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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

1473

OF

LOUISIANA.

VOLUME XXX.

FOR THE YEAR

1878.

PART I.

PERCY ROBERTS,
REPORTER.

NEW ORLEANS:
F. F. HANSELL, PUBLISHER; JAMES A. GRESHAM, MANAGER,
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1879.

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JUSTICES

AND

OFFICERS OF THE COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

THOMAS COURTLAND MANNING, LL.D.

ASSOCIATES,

ROBERT HARDIN MARR,
ALCIBIADE DEBLANC,
WILLIAM B. GILES EGAN,
WILLIAM BRAINERD SPENCER.

ATTORNEY GENERAL,

HORATIO NASH OGDEN, ESQ.

ASSISTANT,

JAMES CONSTANTINE EGAN, ESQ.

REPORTER,

PERCY ROBERTS, ESQ.

CLERKS,

ALFRED ROMAN . . . . . NEW ORLEANS.
BENJ. R. ROGERS . . . . . OPELOUSAS.
TALBOT STILLMAN . . . . MONROE.

In Memoriam.

MONDAY, December 2, 1878.

The Court was duly opened, pursuant to adjournment, present their Honors THOMAS C. MANNING, Chief-Justice, and ROBERT H. MARR, ALCIBIADE DEBLANC, WILLIAM B. SPENCER, Associate Justices.

H. N. Ogden, Attorney General, arose and said:

If it please the court, on Saturday last, at a meeting of the bar of this city, which was called for the purpose of giving expression to the feelings with which the members of the profession had received the news of the death of Judge EGAN, a series of resolutions was adopted, with the request that I should discharge the mournful task of presenting them to the court.

Those resolutions are as follows:

Whereas, the Bar of New Orleans and the State of Louisiana recognize a great loss in the death of the Hon. WILLIAM B. EGAN, Associate Justice of the Supreme Court, his great ability as a judge, his purity of character as a man, and the great zeal displayed by him in the discharge of the duties of his office; therefore, be it

Resolved, That, as a tribute of respect to the memory of the deceased, the Attorney General of the State be requested in behalf of the members of the Bar to present this preamble and these resolutions to the Honorable the Supreme Court, to be spread upon the minutes, and that the court be asked to adjourn.

And be it further resolved, That the secretary of this meeting be directed to send a copy of these resolutions to the family of the deceased.

(Signed) A. GOLDTHWAITE, Secretary.

If the court please, in presenting these resolutions, I desire to say a few words in regard to their subject. I am aware that in this presence it is a work of supererogation to speak in praise of Judge EGAN. This court, during his occupancy of that chair, and the members of the bar, during the long course of his professional practice, have had ample opportunity to study and admire his characteristic traits, and that vacant chair appeals more eloquently than I possibly could to the feelings which animate us all. Not a single lawyer is there here who can not by his memory fill that chair; not one who can not recall the emaciated form sitting there, all kindness, all attention to the speaker before him; and the members of this court, in the habit of daily meeting him in consultation, want no eulogium of him at my hands.

In whatever light we look upon Judge EGAN, we find ample cause for admiration and respect.

It was my privilege to know him well in private as in public life, and in all the relations in which I met him his demeanor was ever that of what is termed a gentleman of the old school, showing the same refinement, the same politeness, the same courtesy to all under all occasions. And, though it may be invading the sanctity of home, I can not forbear to allude to the deep impression made upon me by his conduct toward his venerable father, never failing in the smallest duty, in the least respect for him, and ever striving by all the means in his power to render the father's life happy. Never, in all my experience, have I known a man so careful to have his conduct conform in all things to the maxim, "Do unto others as you would have them do unto you."

As a citizen, Judge EGAN was by understanding and education, not by impulse alone, a patriot. Knowing fully all the obligations of a citizen, he performed them thoroughly, and on every occasion of danger was prominently to the front. His constitution unfitted him for political life, yet he never failed to give his time, his attention, and his talent to the public business. Carefully trained by his father, the venerable Dr. Bartholomew Egan, whose life binds together two distant periods in the history of this country, and whose mind was formed in that ancient school of statesmen who struggled and fought for principles because they were principles, Judge EGAN was fully imbued with and conformed himself to those ideas and views.

As a lawyer, he was devoted to his profession and the interests of his clients, showing there the same earnestness that he exhibited in the other walks of life.

As a judge, he was careful, conscientious, upright, and diligent.

In any and every aspect of this excellent man's character we find nothing but what entitles him to esteem and regard. As a Christian, he was a faithful and devoted member of the Episcopal Church, and his life a daily refutation of the old maxim, *Bonus jurista, malus Christa.*

In fine, I know of no man the memory of whose character should be more carefully preserved; of no man whose record is of more value to his profession and to the community in which he lived.

The keystone to the arch of this admirable character, that which gave it consistency and power, was evidently his profound love of duty. His moral nature moved always in this orbit and in obedience to that great law which, corresponding to the law of gravitation in the physical world, holds society with all its varied interests together.

It is proper, therefore, that the bar should have taken the action which it took, and eminently proper that this court should signify its appreciation of the deceased in the manner suggested by the resolutions.

On behalf of the Court His Honor the Chief Justice said:

Mr. Attorney General and Gentlemen of the Bar.—We received the tidings of our associate's death with great sorrow. This sorrow was none the less because the event was in some sort anticipated. His feeble health during our last term, and its continuance through the summer and autumn gave to us, who were cognizant of his increasing ailments, warning of a probable fatal termination. We respond to the sentiments which have been so felicitously expressed by the Attorney General in presenting the resolutions of the bar touching the loss which the profession, in common with this court, has sustained.

Mr. Justice EGAN was trained for the bar in Virginia, whence he came in early manhood to this State, and immediately entered upon active professional life. Twice called to the district bench, he discharged the duties of that position in such manner as to single him out for further preferment, so that when elevated to the place he occupied beside us, he brought with him the approbation of those who knew his eminent fitness.

There is great expressiveness in the phrase "a conscientious and upright judge," and our deceased brother was well entitled to have it applied to him. He was a pattern of uprightness and purity, careful in investigation, weighing well all that had been said by counsel, whether in oral or printed argument, on the one side or on the other; but always looking straight forward to find out where the right lay, and steadily following that right when his mind was satisfied. He was a man of extraordinary firmness, and when his own convictions were fixed and had been fixed by patient hearing and deliberate thought, he could brave without quailing any obloquy in maintaining them. When he had convinced his judgment on the law of any case his independence and courage assumed the dignity of moral heroism, and from that moment he confronted consequences unflinchingly and with a sort of proud defiance that exulted in the consciousness of his own rectitude. He was, indeed, brave as a lion, and in all respects above reproach.

One of the conspicuous qualities of his mind was caution, as courtesy was a marked characteristic of his manner. He had that suave and gentle politeness which was formal without degenerating into formalism, and which we are accustomed to hear called the manner of the old school, and which, certainly, in some respects deserves imitation. His personal carriage was dignified and graceful, and his public utterances were always in good taste and of good quality.

We unite with our brethren of the bar in tendering to the family of the deceased our sincere condolence, and as a testimonial of respect to his memory, the resolutions and other proceedings of the bar shall be spread upon our minutes, and we shall adjourn without transacting any business.

RULES

OF THE

SUPREME COURT.

REVISED AND ADOPTED MAY 30, 1878.

RULE I.

1. In preparing transcripts of records, in causes appealed to this Court, clerks of lower courts must observe the following requirements:

First—Such transcripts should be written in a fair, legible hand, on good, strong paper (the latter having a double margin on each page thereof), and the various parts should be securely fastened together.

Second—The different portions of a record should be made to appear in the order of their respective filing.

Third—Provided, however, that when the records of one or more other suits are introduced as evidence in a cause, such records should appear in the transcript distinct from, and subsequent in order to, the rest of the record of the principal suit.

Fourth—The transcript should show for which party to the suit each witness is sworn, and by which party each document or record is offered in evidence.

Fifth—No one document should be copied twice in the transcript.

Sixth—An accurate alphabetical index should be attached to and form part of each transcript, affording reference to particular pages of the same (and with proper designations or words of description) for the several pleadings, processes, and orders in the suit; for the depositions and testimony of each witness by name (and not by general reference to testimony); for the note of evidence; and for each document, giving the latter its correct title, or some sufficient designation showing its nature and character, (and not merely by the letters, marks, or figures indorsed thereon).

Seventh—Provided, that when records of other suits are included in the transcripts, as indicated above in the third requirement, a like index to each of such records should follow the general index.

2. Any neglect or omission to observe this rule strictly, will subject clerks, as aforesaid, to the cost of repairing such neglect or omission.

RULE II.

The party applying for the filing of a transcript of the record in a cause in this Court, must first tender to the clerk his bond, with satisfactory security, in the sum of fifty dollars, for the payment of such fees as may accrue to the clerk, or deposit with the latter, in place of such bond, the sum of twenty dollars.

RULE III.

1. Cases will be docketed in the order of their filing.

2. Pursuant to Acts No. 17, of the laws of 1876, and No. 22, of 1878, the clerk will keep a *Summary Docket*, but will enter causes therein only on the formal application of counsel in writing, stating the facts entitling such causes to a summary trial, and he will so enter them in the order of such application.

3. Whenever it shall be made to appear to the Court that a case has been improperly caused by counsel to be placed upon the *Summary Docket*, the same shall thereupon be transferred to the *Ordinary Docket*, and entered at the foot thereof.

RULE IV.

1. Only counsel engaged in a cause will be allowed to withdraw the record of the same from the clerk's office, and then not until the expiration of the three days allowed by law within which motions to dismiss may be filed.

2. Records shall, in all cases, be receipted for on withdrawal. They should be returned to the office within a reasonable time, and must be so returned on the requisition of the clerk.

3. No record shall be withdrawn from the clerk's office after final decree therein made has become executory, except upon written application to the Court therefor, and the order of the Court made thereon.

4. Whenever the transcript of appeal, which has been filed in the clerk's office of this Court, is lost, mislaid, or has been removed from that office, either party to said appeal may supply its place by another transcript, which shall be considered as filed of the same date as the filing of the lost, mislaid, or removed transcript: and any cause in which such substituted transcript shall be filed, will be heard in its regular place on the calendar, notwithstanding the absence of the transcript first filed in this Court.

RULE V.

Court will be held every day of each alternate week of the session.

RULE VI.

1. On Monday of each court week cases will be called and fixed for the next court week:—three for Monday, and eight for every other day; provided however, if there be causes entitled to a place on the

Summary Docket, fifteen of them shall be called and fixed for Tuesday, and the same number (if there be so many) shall be fixed for each succeeding day, until the Summary causes are exhausted. These cases shall be properly posted by the clerk, by eleven o'clock of the next day, which shall be notice to all parties. (This portion of the rule will not apply in country terms, during the pendency of which cases will be called and tried continuously, in the order in which they are filed).

2. Before the calling of cases, opportunity will be given counsel to have any cause entitled to preference, but not to entry in the Summary Docket, made subject, on motion, to be called and fixed for trial.

3. All cases which have not been submitted to the Court, after having been twice duly called for trial, shall be removed from the docket and placed upon a docket to be called the *Delay Docket*, and shall not be again put upon the Trial Docket, except on motion and leave granted thereon.

RULE VII.

1. Within six days after any cause shall be fixed for trial, the appellant shall file with the clerk a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents (referring particularly to the pages of the record where they may be found), and an accurate reference to the points of law and authorities upon which he relies. Ten copies thereof to be furnished and filed with the clerk; one for the opposite counsel, and the remainder for the use of the Court.

2. Within twelve days after the fixing of a cause, the appellee shall also file ten copies of a similar brief, embodying the requirements set forth in regard to the appellant.

3. No cause shall be heard unless one at least of the parties has complied with the foregoing sections of this rule, and if neither party has so complied, the case shall be continued and go to the foot of the docket. If only one party has complied, he may argue or submit the cause, or may decline to do either, in which last event the case shall be continued and go to the foot of the docket, and it is made the duty of the clerk to inform the Court on this point when a case is called for trial.

4. If appellant has filed a brief *before* the day fixed for hearing the cause, but not within six days after it was fixed for hearing, and the appellee has not filed a brief at the time the cause is called for trial, then the appellant may submit the case, and the appellee may be allowed five days to file his brief, but the case shall not be orally argued. If the appellant shall not have filed any brief before the day fixed for the hearing of the cause, and the appellee has filed his brief before the opening of the Court on that day, the latter may argue or submit the cause, or not as he shall prefer, and appellant shall not in that case be

permitted to argue orally the cause, if the appellee does not, nor shall he have time to file a brief.

5. The clerk shall receive no brief in a cause, after it is submitted, unless accompanied by a certificate in writing from counsel that he has delivered a copy to the opposite counsel, with the date of such delivery, or by a written acknowledgment or waiver of such delivery signed by opposite counsel, who shall have, upon application to the Court, a reasonable time from the date of such delivery or waiver in which to reply; and in such cases ten copies must be filed by each party as prescribed in the first section of the rule.

6. All briefs in a cause must be filed in the clerk's office, and before the opening of Court on the day upon which the cause is fixed for trial.

RULE VIII.

1. The original plaintiff in the lower court shall have the right of opening and closing the argument of the cause in this Court.

2. Not more than one hour will be allowed to the counsel for each side, except where in special cases the Court, on application made before the opening argument is begun, may otherwise order. The time not consumed by one counsel will be allowed to another on the same side.

RULE IX.

1. Applications for rehearing must be by petition filed within the legal delay, and must be accompanied by a printed statement of all the points and authorities on which the party founds his application. Additional time for elaborating the argument on such points and authorities may be granted upon a proper showing, if made before the delay expires.

2. When a petition for rehearing in any cause is filed, the clerk will immediately enter it, with its date, in the docket kept for the purpose, and place the record with the decision and five copies of the petition in the consultation room.

3. When a rehearing is granted the cause will be immediately called and fixed with preference, and briefs will be required, as in the first and second sections of Rule VII.

Oral argument may be granted, in the discretion of the Court, if applied for on motion, and four days notice thereof be given to the opposite counsel.

The clerk will properly designate the cause on the Judges' docket as being upon rehearing, and also the fact when oral argument is to be heard.

4. Only one rehearing in any cause will be granted.

RULE X.

1. Motions for dismissal of appeals shall be filed and fixed for trial by the clerk in his office. They shall be so fixed for Monday of each

court week, at least one week's previous notice being given by posting, as prescribed in the first section of Rule VI.; but if not tried on the day for which they are thus fixed, they shall be continued to Monday of the next court week.

2. Such motions shall set forth distinctly all the grounds relied on, and on their trial shall be argued only in printed briefs, which must conform in character and number to the requirements stated in sections first and second of Rule VII.

RULE XI.

1. All motions made in open Court must be offered before the regular business of the Court is begun or after it is closed.

2. No motion will be entertained unless it is in writing, upon not less than a half-sheet of paper, and with a proper title indorsed upon it.

3. All instructions to the clerk and agreements of counsel, on which the Court is to act, must be in writing and duly filed.

RULE XII.

1. The Court will entertain no application for a writ of prohibition, unless previous notice of intention to make such application shall have been given to the opposite party.

2. Hereafter all writs of *mandamus* and prohibition, and rules to show cause, shall be fixed and submitted on printed briefs, and without oral argument.

RULE XIII.

Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases. When the appellant dies, pending the appeal, if his proper representatives be known, and reside within the State, and have not made themselves parties to the case, the appellee may on affidavit apply for an order to summon them to appear within twenty-five days; and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

If the proper representatives of the appellant be not known, or do not reside within the State, the appellee may, on affidavit, obtain an order, that unless they appear and become parties within three months from publication, the appeal will be dismissed. The appellee must cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the Court sits, and upon proof of such publication and in default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined, as in other cases.

If the appellee dies pending the appeal, and his proper representatives be known and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days, and in default of such appearance, after due return of service, the appellant may proceed to have the cause heard and determined, as in other cases.

If the appellee's proper representatives be not known, or do not reside in the State, the appellant may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appellant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the Court sits, and upon proof of such publication, and in default of appearance, the appellant may proceed to have the cause heard and determined, as in other cases.

In country cases the time of personal summonses may be reduced, on special application, according to circumstances.

RULE XIV.

No person applying for admission as an attorney and counselor-at-law shall be examined as such, until his name as a candidate for admission shall have been, by the clerk, published during three judicial days, at the foot of the trial list, posted at the court-room door. Application to be made through the clerk.

The Court will hereafter require of candidates for admission to the bar:

First—Evidence of citizenship of the State of Louisiana.

Second—Evidence of good moral character, by certificates, in conformity to the statutes of March 29, 1823, and March 20, 1842, and of two years study according to act of May 7, 1877.

The Court will not be satisfied with the qualification of a candidate in point of legal learning, unless it shall appear by examination that he is well read in the following course of studies at least: Story on the Constitution; Vattel's Law of Nations, or Wheaton's Elements of International Law; the Louisiana Civil Code; the Code of Practice; the Statutes of the State of a General Nature; the Institutes of Justinian; Domat's Civil Law; Pothier's Treatise on Obligations; Blackstone's Commentaries, Fourth Book; Kent's Commentaries; Smith on Mercantile Law; Story or Parsons on Notes; Chitty or Bayley on Bills; Greenleaf, Starkie, or Phillips on Evidence; Russell on Crimes; and the Jurisprudence of Louisiana, as settled by the decisions of the Supreme Court.

The examination shall be conducted in the following manner: At the beginning of the session in New Orleans, the Court will appoint from

among the members of the bar, a committee of *seven*, who are earnestly requested to lend their aid to the Court. Upon the candidate producing a certificate from the committee that he has been examined by them upon the above works, and that he is, in their opinion, qualified for admission to the bar, the Court will admit him to a public examination, and if, after such public examination, they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counselor-at-law, and not otherwise.

The committee will meet twice in each month, during the sessions of the Supreme Court, to wit: on the Friday preceding each court week.

The Court will examine on Tuesday of each court week.

Each candidate to be examined separately before the committee and the Court.

The foregoing rules will be relaxed in the country districts when necessary for the proper dispatch of business, or when their rigid enforcement, in the short time the Court sits in those districts would work injury, or a protracted delay.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

JANUARY, 1878.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,
HON. A. DEBLANC,
HON. W. B. EGAN,
HON. W. B. SPENCER,
Associate Justices.

No. 6564.

*FRANK WATSON VS. MRS. E. F. BONDURANT.

Where a person has a domicile in a State, and the evidence shows that he resides there with the intention of remaining, he is, in contemplation of the laws providing for the removal of causes from State to Federal courts, a citizen of that State.

Citizenship in a State is not lost by a temporary absence; but a prolonged residence in another State, accompanied by other acts, or by declarations showing an intention to acquire a domicile in the latter State, will forfeit citizenship in the former State, and preclude its being set up in a suit.

To qualify in this State as natural tutrix, or as testamentary executrix, *without giving bond*, is strong proof of an intention to permanently reside here, and is utterly incompatible with the claim of citizenship in another State.

A merely auxiliary proceeding, by which a third person comes in by way of injunction to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the act of Congress of March 3, 1875, from the State to the Federal court.

*This decision and the decision in the case of Schwartz vs. the Crescent City R. R. Co. should have been published in the 29th Annual, but were accidentally omitted.

No mortgage has any effect as to third persons unless recorded: and save in the single case of the minor's mortgage on the property of the tutor, *every* mortgage ceases to have effect, except as to the parties to it, unless re-inscribed in ten years from the date of its original inscription. Neither the existence of the pact *de non alienando* in a mortgage, nor the pendency of a suit to enforce the mortgage obviates the necessity of its inscription, or its re-inscription.

To confirm a judgment by default, involving the assessment of damages, a jury is necessary.

APPEAL from the Thirteenth Judicial District Court. *Hough*, J.

Merrick, Race & Foster for plaintiff and appellee. *S. R. & C. L. Walker*, for defendant and appellant.

The opinion of the court was delivered by

MARR, J. Walter E. Bondurant died at his domicile at Natchez, Mississippi, in June, 1874, leaving a will by which he devised his entire estate to his wife, Mrs. Ella F. Bondurant, whom he appointed sole executrix.

The will was admitted to probate in the proper court, at Natchez, on the sixteenth June; but it does not appear whether there was any property or estate in Mississippi to be administered; nor that the executrix qualified there.

On the nineteenth June Mrs. Bondurant presented a petition to the parish judge of Tensas parish, Louisiana, with a copy of the will and the proceedings of the chancery court at Natchez admitting it to probate, in which it is stated that she was then residing in New Orleans; that she was pregnant; and that deceased had left, in Tensas parish, a succession, consisting of movables and immovables, and debts. She prayed that a curator be appointed for her unborn child; and that she be permitted to qualify as testamentary executrix. Her father was appointed and qualified as curator; and she qualified as executrix under the will.

In June, 1875, Mrs. Bondurant caused to be revived, in her name, as testamentary executrix and as natural tutrix of her posthumous son, a judgment which her husband had obtained in the district court of Tensas for a large amount against John, Albert, and Horace Bondurant; and upon this judgment she caused an alias writ of execution to be issued.

Under this execution the sheriff seized a tract of land in Tensas, in the possession of Frank Watson, who claimed it as owner. Watson enjoined; and the citation and writ of injunction were served at the domicile of Mrs. Bondurant, in New Orleans, on the thirtieth June, 1875.

In October Mrs. Bondurant filed a petition, under the act of Congress approved March 3, 1875, for the removal of this injunction suit into the Circuit Court of the United States, alleging that she was a citizen of the State of Mississippi. Her affidavit to this petition was sworn to before a justice in New Orleans on the thirteenth September.

Watson opposed the removal on the grounds: that the succession of Bondurant, which was opened in Tensas parish, was the defendant; that when Mrs. Bondurant applied for the executorship she declared herself to be a resident of the State of Louisiana; and that she was an officer of the probate court of Tensas, and subject to its jurisdiction; that when the citation and injunction in this case were served on her she was a resident of the State, and the service was made at her domicile; and that the pretended removal to and citizenship in Mississippi were a mere subterfuge and fraudulent evasion of the law, and adopted for the purpose of removing this cause into the United States Court.

On the trial of the preliminary question of removal, it was proven that Walter E. Bondurant lived and died at Natchez; that Mrs. Bondurant, before her marriage, lived with her father in New Orleans; that she returned to her father's, the domicile of her origin, after the death of her husband, and remained until the birth of her child, the precise date of which is not shown. The mortuary proceedings in the succession of her husband were also offered in evidence; and it was proven that she made affidavits, which were filed in the cause, before justices of the peace in New Orleans in July and September.

The district judge declined to order the removal. A motion was made for a new trial, in support of which one of the counsel of Mrs. Bondurant filed his affidavit, in which it is stated that he had discovered since the trial that he could prove by a member of the bar, who had testified on the trial, that Mrs. Bondurant had consulted him as to whether her residence in the State of Louisiana would forfeit her citizenship in the State of Mississippi; that on his advising her it would not, she remained in Louisiana, intending to retain her citizenship in the State of Mississippi; and that this consultation was had with reference to this very case of Watson vs. Bondurant.

The new trial was not granted; and Mrs. Bondurant filed a protest against any further proceedings in the cause. A judgment by default was taken against her, which was confirmed on proof, and the injunction perpetuated as prayed for; and she has brought the case here by appeal.

There is no question as to the sufficiency of the value in dispute; and the right of removal depends upon two questions only:

1. Was Mrs. Bondurant a citizen of the State of Mississippi;

2. Is this such a suit as may be removed into the Circuit Court of the United States.

First. We understand that a person who has a domicile in a State, who resides in a State, *animo manendi*, if he is not an unnaturalized alien, is a citizen of that State within the meaning of the Constitution of the United States, and of the several acts of Congress conferring juris-

diction on the Federal Courts, and providing for the removal of causes from the State Courts into the Circuit Courts. The Fourteenth Amendment settles this beyond doubt. When the domicile or residence is once fixed in a State, the citizenship thus acquired is not lost by a temporary absence, *animo revertendi;* but it is lost, unquestionably, by prolonged absence, and other acts indicating the intention to acquire a domicile elsewhere, accompanied with actual residence at the new domicile.

Before Mrs. Bondurant's marriage her domicile in law and in fact was at her father's residence, in the city of New Orleans. When she married she acquired, immediately, the domicile of her husband; and she could have none other. The death of her husband relieved her of all the disabilities of marriage. She became *sui juris;* and had the right to reside and to acquire a domicile wherever she chose. We think she indicated her choice unmistakably, and without delay.

The will of Walter E. Bondurant is dated June 10, 1874. It was filed for probate on the fifteenth; admitted to probate on the sixteenth; copy of the will and proceedings were certified on the seventeenth; and on the nineteenth Mrs. Bondurant's petition was presented to the parish court of Tensas, praying for letters as testamentary executrix. In this petition she describes herself as "Widow of Walter E. Bondurant, late of Natchez, State of Mississippi, (petitioner now residing in New Orleans, in this State.)"

It was not by any error or inadvertence on the part of the attorney who drew the petition that this statement was made. By our law the testamentary executor who resides in the State is not required to give security; but whenever the testamentary executor, that is, the executor named in the will, is domiciled out of the State, the judge shall only grant him letters on the execution of his bond, with a good and solvent security, for such a sum and under such conditions as are required by law from dative testamentary executors, that is, executors not named in the will but appointed by the court. Act of 1842, section three, page 300; re-enacted in 1855, No. 280, page 309; and in 1870, Revised Statutes, page 287, section 1460. The dative executor is bound to give security for one fourth over and above the amount of the inventory. R. C. C. art. 1679, Civil Code of 1825, art. 1672; R. C. C. art. 1127, Civil Code of 1825, art. 1120. The inventory of the movable and immovable property amounted to $30,062, not including the large judgment in this case, which was for something over $30,000; so that a bond for about $38,000 would have been required.

In order to retain the executorship, it was necessary for Mrs. Bondurant to remain in Louisiana; because the same law requires the judge to appoint a dative executor whenever the executor named in the will is absent. Revised Statutes, page 286, section 1459. The act of 1847,

Revised Statutes, page 288, section 1471, permits tutors, executors, etc., "who only wish to be absent for a time," to retain their offices by leaving a general and special power of attorney with some person residing in the parish in which the succession is opened, or in an adjoining parish, to represent them in all their acts of administration, which power must be registered in the office of the parish recorder.

In the Succession of McDonogh, 7 An. 473, a number of citizens of Louisiana and four residents of Baltimore were named in the will as executors. The Louisiana executors and those residing in Baltimore qualified without giving security. This court held that the appointment of the non-residents without security could not be maintained; and it was vacated.

In Yerkes vs. Brown the testator named his brother, who resided in Philadelphia, as his executor; and he came to New Orleans, rented an office, and qualified as a resident of Louisiana. Shortly after his appointment he returned to Philadelphia, leaving power of attorney with Hennen, who administered several years in his name. The court held that the law was imperative, requiring the executor who is not a resident of the State to give security; and that it is only when the absence is temporary that the executor can retain his office by delegating his powers to another. 10 An. 94.

Mrs. Bondurant appears in this litigation as natural tutrix of her son; and this office, like that of executor, requires residence in the State, only temporary absence being permitted. R. C. C. art. 314. The tutorship must continue until the majority of the child, or until after he attains his eighteenth year, when he may be emancipated. While she is testamentary executrix she can not reside out of the State of Louisiana; but she may close her administration as executrix, and administer as natural tutrix alone. She would still be obliged to reside in the State; and whatever her wishes and intentions might be for the future, she has accepted offices, duties, and responsibilities wholly incompatible with residence elsewhere; and which make it impossible for her to be in any sense a citizen of the State of Mississippi.

The appointment of guardians for minors belongs to the tribunals of the domicile; and if Mrs. Bondurant had continued after the death of her husband to reside in Mississippi, to have a domicile there, that would have been the domicile of her child; and she would have been bound to apply for guardianship to the proper court of that State. She assumes an office unknown to the law of Mississippi, which is peculiar to the law of Louisiana, that of natural tutrix, which is the repeated assumption on her part of residence, domicile in the State of Louisiana; and this office enables her to administer the estate of her child without

giving security, which is required by law of guardians in the other States generally.

If the mere intention to retain a domicile in a State different from that in which a person actually resides would suffice in any case to preserve citizenship, it certainly can not have that effect when the person accepts offices and trusts at the place of residence which are not granted to citizens of other States except on onerous conditions. Mrs. Bondurant could not have qualified as testamentary executrix without giving security, except by satisfying the judge that she was a resident of the State of Louisiana. We will not do her the injustice to suppose she intended to obtain all the privileges and advantages of an actual residence in Louisiana by an untrue statement in a solemn judicial proceeding. A mere visit to her father, with the intention to return to Natchez in a short time, would not have authorized her to claim a residence in Louisiana for the purpose of obtaining letters as executrix without giving security. She ceased to be a resident of Mississippi immediately after the death of her husband. She had no means of preserving a domicile or citizenship in Mississippi except by residence; and it is not shown that she has spent a day at Natchez since she described herself in her petition to the parish judge as "now residing in New Orleans." She has concluded herself on this point by her public acts and declarations, by her continued residence in Louisiana, not less than by her acceptance of the executorship and tutorship. If Mrs. Bondurant is a citizen of Mississippi she is not legally the testamentary tutrix of her husband's will, and the parish court of Tensas would be bound to vacate the appointment or to require her to give security; nor would that court have had the power to recognize her as natural tutrix, since the jurisdiction to appoint a guardian is vested in the proper court of the domicile. The consequence would follow that she is not legally qualified to enforce the rights of the succession in these representative capacities.

Our conclusion is, that Mrs. Bondurant can not be a citizen of the State of Mississippi for the purpose of giving jurisdiction to the Circuit Court of the United States, nor within the meaning and intent of the laws and Constitution of the United States, and of the State of Louisiana, while she is exercising offices and trusts in Louisiana which require actual residence in the State.

Second. We entertain no doubt that the act of March 3, 1875, under which the removal was demanded in this case, was intended to provide for and regulate the entire subject of the removal of causes from the State courts into the Circuit Courts. The first section of the act enlarges and extends the original jurisdiction of the Circuit Courts up to the full limits of the judicial power granted by the Constitution of the United States. This jurisdiction is declared to be concurrent with that of the

State courts; and the jurisdiction exclusive of that of the State courts is limited to crimes and offenses cognizable under the authority of the United States, and appeals from the District Court.

The second section of the act relates exclusively to those cases which may be removed from the State courts into the Circuit Courts; and it is in great part a mere repetition of that portion of the first section which relates to the original jurisdiction concurrent with that of the State courts. There is no doubt that any suit of a civil nature, at law or in equity, falling within the original cognizance of the Circuit Courts under this act, may be removed from a State court on the terms and conditions prescribed in this act. Without intending so to decide now, because we do not find it necessary, we incline to the opinion that no suit can be removed under this act from a State court into the Circuit Court which could not have been brought in the Circuit Court by original process.

This case differs from that of Goodrich vs. Hunton, just decided, in this respect, that in that case the litigation was between the same persons who were parties to the original suit, while in this case Watson was a stranger to the original suit. It differs also from Turnbull's case, 16 Wallace, in that in this case there was a petition filed, and citation and a writ of injunction were issued and regularly served on the defendant. But it is precisely like Turnbull's case in these essentials:

1. That under execution on a judgment in a suit to which Watson was not a party his property was seized and was about to be sold;

2. That he sought relief in the only court in the State which had jurisdiction under the law of the State;

3. That he proceeded in the form prescribed by the law of the State.

It will be observed that in the Bank vs. Turnbull the removal was under the act of March 2, 1867, which gives the right of removal to the citizen of a State other than that in which the suit is brought, whether he be plaintiff or defendant in "A SUIT," *any suit*, involving the requisite amount, in a State court, in which there is a controversy between him and a citizen of the State in which the suit is brought; and the attention of the court was directed to the fact that the proceeding under review was not a *suit*, but was in the nature of a motion. The court declined to consider that question, because, "conceding it to be a suit, and not essentially a motion, we think it was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation." There is no escape from the conclusion, if the decision of the court was correct in this case, that where a third person, not a party to a judgment, intervenes to protect his property, seized under execution on that judgment in the court from which the process issued, that court alone has jurisdiction of the controversy; and that this proceeding, "*conceding it to be a suit*," is not removable into the Circuit Court *ratione materiæ*.

This decision was under the act of 1867, but the language of that act in describing what may be removed—"A SUIT"—has a much broader meaning and extent than the words used in the second section of the act of 1875, in describing what may be removed—"*any suit of* A CIVIL NATURE AT LAW OR IN EQUITY." If there can be A SUIT in a State court in which there is a controversy between a citizen of that State and a citizen of another State, *not of a civil nature*, or an anomalous nondescript, not *at law or in equity*, it would seem, *ex vi termini*, that it must come within the act of 1867, and be removable under that act, all the other requisites concurring; and it is equally clear that such a SUIT would not fall within the restricted terms of the act of 1875, and would not be removable under that act.

If, therefore, the proceeding on the part of Turnbull & Co., by whatever name it may be called, was not removable under the act of 1867, as the court expressly decided it was not, it is because a SUIT means an original suit, not an auxiliary, dependent, supplementary proceeding, by which a third person interposes to prevent the sale of his property, seized under execution, in satisfaction of a judgment in the original suit to which he was a stranger. If such a proceeding was not a *suit* within the meaning of the act of 1867, and therefore was not removable, there is no logic by which it can be shown that the proceeding on the part of Watson in this case is *any suit of a civil nature, at law or in equity*, within the terms of the act of 1875, and that it is, therefore, removable under that act.

There is another reason in this case, which did not exist in Turnbull's case, and which we think conclusive. The whole object of this proceeding is to prevent the sale of Watson's property, seized under execution, and to do this a writ of injunction, *pendente lite*, to be made perpetual by final decree, was indispensable. Without the power to stay by injunction proceedings in a court of the State, no tribunal could take cognizance of this proceeding. Under the act of Congress of March, 1793, Revised Statutes, section 720, the Circuit Court could not take jurisdiction in such a case by removal from a State court, as was expressly decided in Diggs & Keith vs. Wolcott, 4 Cranch., nor by original process, as was expressly decided in Haines vs. Carpenter, 1 Otto; and as we have just had occasion to say in Goodrich vs. Hunton, this prohibitory law places such a proceeding as this beyond the power and jurisdiction of the Circuit Courts.

The reasoning and authorities cited in Goodrich vs. Hunton are equally applicable to this case, and are referred to and adopted here without being repeated. We conclude that the District Court properly refused to grant the order of removal, because of the citizenship of the parties,

and because this proceeding is not such a suit as may be removed from a State court into the Circuit Court.

ON THE MERITS.

The Pleasant View plantation, situated in Tensas parish, consisting of 1400 acres of land and a large number of slaves, were inherited by John Bondurant, Horace Bondurant, Albert Bondurant, and their nephew, Walter E. Bondurant, a minor. To effect a partition, the entire property was sold at public sale, by the sheriff, for three fourths cash, the other fourth, the minor's share, payable on his attaining his majority, in 1862, with interest at seven per cent, payable annually. The property was purchased by the major heirs, and the minor's share was $37,118 50. To secure this a mortgage was reserved in the sheriff's deed, of date fourth December, 1852, in which the clause was inserted by which the purchasers obligated themselves "not to alienate, deteriorate, or incumber said property to the prejudice of said mortgage;" and this deed was recorded on the sixth December, 1852; and was re-inscribed on the eighth September, 1865.

By subsequent partition a tract of 165 acres, part of the 1400 acres constituting the Pleasant View plantation, fell to John Bondurant; and on the thirtieth November, 1854, by public notarial act, duly recorded, he sold this tract to A. C. Watson for $5775, or thirty-five dollars an acre. Frank Watson derives title through A. C. Watson; and it was proven that John Bondurant, from the time he acquired up to the date of his sale to Watson had public, peaceable, notorious possession; and after that time the Watsons had possession in like manner.

The interest was paid up to December 4, 1862; and in March, 1854, a payment of $5018 16 was made, which was credited on the capital sum. In November, 1867, Walter E. Bondurant recovered judgment for the debt with interest; and at sheriff's sale, under execution, he purchased the Pleasant View plantation for $4478, less than half the interest due. Watson was in possession of the small tract purchased of John Bondurant, and Walter E. Bondurant, then a citizen of Mississippi, brought suit against him in the United States Circuit Court in New Orleans to oust him. The case went to the Supreme Court of the United States; and it was decided that Bondurant had not acquired this tract at the sheriff's sale, because the sheriff had not seized it as the law required. See the case, 21 Wallace. This is the property seized under the alias writ, and the subject matter of this litigation.

Plaintiff, Watson, maintains that the mortgage in favor of Walter E. Bondurant had lost its effect as to him by the failure to have it re-inscribed before the expiration of the ten years, as required by article 3333 C. C., article 3369 of the Revised Civil Code.

Defendant contends that re-inscription was not necessary in this case, because Watson is charged with notice by the pact *de non alienando*, and that the mortgage in favor of a minor need not be re-inscribed.

We had occasion lately to examine the question of inscription and re-inscription, so far as third persons are concerned, in the case of John I. Adams & Co. vs. Thomas Daunis, No. 6532, decided on the second inst., and we do not propose now to repeat what we said in that case. We remark, however, that subsequent investigation has only served to confirm the views we then expressed:

First—That under the positive law of Louisiana, as contained in the Code and the Statutes, nothing supplies the place of registry, or dispenses with it, so far as those are concerned who are not parties to the mortgage;

Second—That when ten years have elapsed from the date of the inscription, without re-inscription before that time, the mortgage is without effect as to all persons whomsoever who are not parties to the mortgage.

We understand the effect of the pact *de non alienando* to be this: Where a mortgage contains this stipulation, the sale by the mortgagor does not prevent the mortgagee from proceeding by executory process, and he need give no notice to the purchaser. The proceeding by executory process is a proceeding *in rem;* and if the title under which the mortgagor claims is such that he may thus proceed *in rem*, he need not notice any subsequent alienation of the mortgaged property by his mortgagor; just as in proceeding in admiralty against a ship, no subsequent change of master or of owner need be noticed by the libelant, who proceeds against the thing itself which is liable to him.

A little reflection will show that the pact *de non alienando* contains nothing that the law does not imply in every mortgage. The mortgagor by the act of mortgage binds himself personally, and binds his property for the debt; and he necessarily obligates himself morally, and in law, not to deprive the mortgagee of the benefit of the security by alienating or deteriorating or incumbering the property to his prejudice. If the mortgagee records his mortgage, it is not in the power of the mortgagor to alienate or to incumber the property by any subsequent title which will impair or affect the mortgage.

If the mortgagee, instead of proceeding *via executiva in rem* against the property, elects to sue his debtor *in personam* and to attempt to enforce his judgment by execution *via ordinaria*, the pact *de non alienando* will not enable him to seize the mortgaged property in the hands of a third possessor claiming the ownership. He must exhaust his remedy against property subject to seizure under the writ of fieri facias; and, failing to obtain satisfaction by this means, he can reach the mort-

gaged property only by an action, the regular hypothecary action of our law, against the third possessor; and his mortgage, if properly inscribed, is as available in this form of proceeding without the pact *de non alienando* as it would be with that stipulation. Code of Practice, articles 61–68; Page vs. Générés, 6 An. 550; Desobry vs. Carmena, 9 An. 180.

After the lapse of ten years, without re-inscription before that time, subsequent mortgages are not affected by the first inscription; and neither notice, nor even the pendency of a suit on the mortgage, dispenses with re-inscription. See Sheppard vs. Cotton Press, 2 An. 110; Succession of Lowery, 22 An. 205; Hyatt vs. Gallier, 6 An. 321; Young vs. City Bank, 9 An. 193; Succession of F. Coner, 12 An. 216; Con. Ass. vs. Wilson, 10 An.; Kohn vs. McHatton, 20 An. 223; Britton & Kountz vs. Norment, 20 An. 508; Britton & Kountz vs. Janney, 21 An. 204; Blair & Co. vs. Taylor, 25 An. 148.

The mere reading of article 3333 C. C., article 3369 of the Revised Civil Code, shows that the minors' mortgage which need not be re-inscribed is that to which the property of their tutors is subject by law, as security for the administration of their estates; and there is nothing in the law to take the mortgage in this case out of the rule which imperatively requires re-inscription.

The position of the parties was this: dating from the fourth December, 1852, a mortgage, properly inscribed, secured to the minor, Walter E. Bondurant, his one fourth of the estate inherited by him, or rather the price of this one fourth. This mortgage, in virtue of the inscription, bound the property for and during ten years, without regard to any subsequent changes in title or possession. On the sixth of December, 1862, this inscription perempted and lost its effect, even against the contracting parties; and it would have been the duty of the recorder to have canceled and erased it on the application in writing of any party in interest. Act of 1843, Revised Statutes of 1870, sections 450, 3141, amending C. C., art. 3333 Rev. C. C., art. 3369. From the thirtieth November, 1854, Watson was the owner, and was in possession of the property in question. The mortgage which had affected the property no longer incumbered it in his hands, because ten years had elapsed without re-inscription. The mere failure to cancel the perempted inscription did not revive it. The article of the Code says the inscription must be renewed in the same manner in which it was made. It was dead so far as the first inscription was concerned. The law, however, permits re-inscription; and this mortgage was re-inscribed on the eighth September, 1865, nearly three years after the first inscription had lost its effect even against the contracting parties. The re-inscription gave it effect as a mortgage of the date of that inscription; but at that time the property no longer

belonged to the debtors, the mortgagors; and it had no effect whatever against that property.

The plaintiff in injunction, Watson, demanded two thousand dollars in damages for the unlawful seizure of his property. The judge allowed two hundred and fifty dollars, without calling a jury. This was error. The Code of Practice, article 313, requires the judge where a judgment by default is to be confirmed and damages are to be assessed to have a jury summoned and to give judgment in conformity with their verdict.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be amended so as to disallow the damages awarded to the plaintiff; and to that extent that the said judgment be avoided and reversed; and in all other respects that the said judgment be and it is hereby affirmed; the plaintiff and appellee to pay the costs of this appeal; defendant and appellant paying costs of the court below.

CONCURRING OPINION.

DEBLANC, J. Daniel M. Bondurant left, as his heirs-at-law, three sons, Albert, John, and Horace, and a grandson, Walter E. Bondurant.

On the fourth of December, 1852, the whole of the property belonging to the succession was sold at auction, and bought by his three sons for $148,474. Two days after, on the sixth of said month, the deed from the sheriff to them was recorded, and it was not re-inscribed until the eighth of September, 1865. Since that date, more than eleven years have elapsed, and the re-inscription has not been renewed.

Of the price of said property, one fourth was due by the purchasers to Walter E. Bondurant, and was to be paid to him at his majority, on the fifth of March, 1862, with interest. That claim was secured by mortgage, containing the stipulation which has been and still is confounded for "the pact *de non alienando*."

In 1854, on the thirtieth of November, Augustus C. Watson purchased from John Bondurant the land acquired by the latter and his brothers from their father's estate, and subject to the mortgage of the minor Walter. On the fifth of August, 1872, said Watson sold to his sons, Augustus and Frank, the land thus acquired by him from John Bondurant, and, on the sixth of December, 1875, by purchase of his brother's share, Frank Watson became the sole owner of the whole.

Walter E. Bondurant brought suit against his uncles, to enforce his mortgage, and, on the fourteenth of November, 1867, obtained a judgment against them, with a recognition of said mortgage. Under an alias writ of fi. fa., issued from said judgment, the land bought by Frank Watson from his father and brother, was seized on the fifteenth of June,

1875. On the twenty-eighth of said month, he enjoined the execution, on the grounds:

First—That the mortgage in favor of Walter E. Bondurant has perempted for want of re-inscription;

Second—That he is a third possessor; that he was not made party to the suit in which the said Watson obtained the judgment he is seeking to execute against him, and that, as third possessor, he was entitled to and was not given the notice prescribed by law.

In answer to plaintiff's injunction defendant alleges;

First—That, in the contemplation of the law and by the effect of the pact *de non alienando*, the whole of the land mortgaged remained in the hands of the original debtors;

Second—That, except in certain specified cases, peremption does not run against minors.

In the act of sale from the sheriff to Albert, John, and Horace Bondurant, there is the clause which, for over forty years, has been construed and enforced as the pact *de non alienando*. Does that clause prohibit the sale of the mortgaged property? It does not. John Bondurant had the right to sell; he sold. Frank Watson had the right to buy; he bought. The several acts of sale passed from 1854 to 1875 were duly recorded and became as many notices to the world. 8 R. R. 165, Ducros vs. Foster.

In disregard of those recorded titles, under an execution issued on a judgment against John, Albert, and Horace Bondurant, a tract of land which had ceased to be their property, which was no longer in their possession, was seized to satisfy said execution, and that land was so seized with the full knowledge that it was then the property and in possession of Frank Watson. Is not that seizure a manifest violation of the spirit and letter of our law?

At the date of the seizure, Frank Watson was, and he is now a third possessor: as such, he should have been called upon to pay the mortgage claim, if any such existed, or surrender the hypothecated property. This done, and he failing to discharge the debt, the property should have been seized under proceedings instituted against him, the owner and possessor, and he should have been notified, as the law requires, of the seizure and intended sale of his property. To this rule, in law, there is no exception. There are not, in Louisiana, two classes of third possessors of mortgaged property, one against whom the creditor must proceed regularly, and another whose title may be divested without even the necessity of a single notice.

It is contended that, when the creditor proceeds under an act which contains the pact *de non alienando*, he can seize, not only from the owner and possessor, but from the first vendee and original mort-

gagor and sell, as belonging to the latter, the property which the vendor and mortgagee, knows to have been sold by his debtor, and to belong to another. Is it not time to correct an unjust practice, an abuse, and to discountenance an arbitrary exception to the sound and equitable rule of our Codes?

In Louisiana, when it was a Spanish colony and under the Spanish law, the clause *de non alienando* absolutely prevented the transfer of hypothecated property, and any transfer made in contravention of that clause was a nullity. It impeded what our legislation favors, the transmission of property. In the first of its decisions on this question the Supreme Court said that "the mode of proceeding under an order of seizure and sale was, in a great measure directed, by the Spanish law, under which any transfer made in violation of the clause *de non alienando* was, *ipso jure*, void as to the creditor." 2 N. S. 34 and 35.

That law can no longer be invoked, not even under the pretense that it is not repugnant and contrary to our Code, and, nevertheless, from time to time the colonial rule supersedes the State law. C. C. of 1825, art. 3521.

In lieu of the prohibition to alienate, we have the 3397th article of our Code, which provides: "that the debtor can not sell or mortgage *to the prejudice* of a previous mortgagee."

Is a vendor's right in any way increased by the insertion, in an act of sale, of a clause in and by which the purchaser, adopting the very expression of our Code, binds himself not to sell the mortgaged property to the detriment of the vendor's interest?

If that useless insertion constitutes a pact *de non alienando*, there can be, in our State, no third possessor of mortgaged property, and the hypothecary action need never be resorted to; for, whether written or omitted, the condition not to sell to the prejudice of the creditor, is one fixed by a law which is a part of every contract of mortgage, and, in any and every case, with or without the insertion of that clause, the creditor, under the construction contended for, may proceed against his immediate vendor, in spite of the subsequent transfer or transfers of the hypothecated property, and thus deprive the owner and possessor of those rights of defense which are not denied to even the trespasser.

The article of the Code which provides that the debtor shall not sell to the prejudice of the creditor, recognizes the debtor's right to sell, for it also provides that, if he does sell, the creditor may follow the mortgaged property, in whatever hands it may have passed, and compel the third possessor to pay the debt or relinquish the property. As to the mode of proceeding against third possessors, the Civil Code makes no

difference, and merely refers to the Code of Practice. C. C., arts. 3397 and 3398.

This court has decided that the third possessor of property mortgaged, with the pact *de non alienando*, occupies no better position than the mortgageor. This we admit; but why, in whose interest, under what law is he entitled to less than the mortgageor? To exercise his rights, to enforce his claims, the creditor must cause the property to be seized and sold. It is more difficult to seize it when it is in the hands of the third possessor, than when it is not, and from one who has parted with title and possession?

Though the third possessor occupies no better position than the mortgageor, he has at least the privilege of paying the debt and retaining the property. Under the actual jurisprudence, not the Codes, in order to enjoy that acknowledged right, he must guess that the mortgage claim is not satisfied, who holds that claim, which may have been thrown in the channels of circulation, and how, when, where, and by whom his property is to be sold.

If such a course be sanctioned, what shall become of the constitutional prohibition to deprive any one of property, without process of law? With the legal value given to the pretended pact, there is not left a vestige of that process. Without any demand, written or verbal, without notice of the parody of a seizure, still more, under a decree rendered against A, a writ issued from that decree, commanding and which could command but the seizure of A's property, the property of B is seized, advertised for sale, and sold.

Sooner or later, we will have to choose between our own law and the sprout of a law which has passed with the Spanish dominion.

I concur in only the conclusion of Mr. Justice Marr.

No. 3323.

CHRISTIAN SCHWARTZ VS. THE CRESCENT-CITY RAILROAD COMPANY.

Where the evidence shows that the plaintiff, who was injured by a collision with a railroad car, contributed by his own fault to bring about the collision, he can not recover damages from the railroad company on account of the injury, even though the employees of the company were partly in fault.

APPEAL from the Seventh District Court, parish of Orleans. *Collens*, J.

Cotton & Levy for the plaintiff.

John M. Bonner and *Percy Roberts* for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. On the ninth of September 1869, plaintiff brought suit

against defendant for $10,000. He claims that amount for damages actually sustained by him, through the gross neglect and carelessness of one of defendant's employees. His demand is based on the alleged fact that, on the fifth of January, 1869, without any fault on his part, he was run over by car No. 22 belonging to defendant, and permanently disabled.

The railroad company filed an exception to plaintiff's petition and a general denial. The exception is that the allegations of the demand are vague, inconsistent and contradictory. It was overruled, not urged or noticed on the trial in this court, not referred to in appellant's brief, and—as and with the parties—we leave unnoticed the abandoned exception and enter the field of the merits.

Christian Schwartz is over sixty years of age, and, before he was disabled, kept a tinshop. He has a grown daughter. They now rely, for their support, on the daughter's labor, and charity. Were the proportions of the victim's misfortune to be alone regarded in fixing the liability of defendant, the proportion of that liability could hardly be exaggerated; for, whether through a criminal and unpardonable neglect, or an unforeseen and unavoidable accident, an industrious artisan has, in a moment, seen his indefatigable hand converted into a stiff and paralyzed hand which he now extends on the street, to provide, for himself, his destitute child and destitute home, the strict necessities of the humblest life.

We will not attempt to disguise or reduce the sad result of this sad disaster; we will not criticise the sympathies which it may have awakened even on the jury's bench, but, in the faithful discharge of our stern duty, we have but two guides, the evidence and the law. The sympathies, the prejudices, the passions which move and sway the public mind, should not be allowed to steal admittance in a court of justice.

The infliction of the alleged injury is fully established. We have, now, to ascertain the cause of that injury. If imputable to defendant, the verdict shall not be disturbed—if imputable to plaintiff, we shall cancel the verdict and dismiss his demand.

Two of the witnesses, Frank Waites and Henry Miller, testified that plaintiff crossed from the banquette on the lake side of Tchoupitoulas street, took a position near the railroad track, as if intending to get on the approaching car. The car was then moving at the usual rate, the driver's right hand was on the brake, and, from his attitude and his looks, he seemed to be under the same impression as those witnesses. When the mule was nearly on Schwartz, he rushed across the track and was either knocked down by the mule or slipped and fell, his hand was caught between the chain of the brake and the bottom of the platform; his body was and remained at fully two feet from the wheels.

Dr. Brickam, a witness for plaintiff, was asked; "Could the chain, by pressing the hand against any other substance, inflict such a wound as that described by plaintiff?" He answered: "I think it possible; yes, quite possible." The doctor's answer, though not absolutely confirming, adds at least a probability to the declaration of those witnesses; and, though the weight of a loaded or unloaded car was not proven, is it not evident that if the whole of such a weight had pressed the hand between the iron wheel and the iron rail, the pressed portion—flesh and bones—would have been severed from the rest and would have remained on the track?

The testimony of Waites and Miller was assailed and ridiculed; they were suspected of having been hired for the occasion and bribed to rehearse a prepared lesson. It must have been the jurors' conviction, as, otherwise, their verdict could not be accounted for or justified. As to us, we do not find in their evidence those bold contradictions, that hesitating incoherence, which, generally, brands the fabrication of the perjurer, or the lesson he is paid to repeat. Be this as it may, they are suspected and we dismiss them.

Miss Schwartz, the daughter of plaintiff, said: The accident happened on a very clear and very pleasant day; on that day her father was not as deaf as usually. Not only his hands were crushed, but he also had a deep wound on the left side of his back. When he was brought home after the accident, his body and arm were covered with mud.

Plaintiff fell—this is proven, the head to the river, the feet to the swamp. If, in that position, he was run over, how account for the wound mentioned by his daughter? The wheel, in that position, could strike him but on the right, unless he fell on his back; and the wound was on the left side.

Sworn in his own behalf, Schwartz said: "On the fifth of January, 1868, I was run over by the Tchoupitoulas car, between Josephine and Jackson. I came out of my house, and—when crossing the street—I slipped, fell, and the car ran over me. The mule passed me; I did not come in collision with it. Before the car got close to me, I hallooed 'Stop! Help me!' When I fell, the car was about eight or nine feet from me." "The car, or the mule?" inquired his counsel. He answered; "the car." * * * I believe that, at that moment, I was out of my senses." "Did you observe, before falling, what the driver was doing, or did you see the car before you fell?" "I did not see the car, and do not know what the driver was doing." He was again asked: "Had you seen the car before you fell?" "I had; but it was off, on the other side of Jackson street. When I hallooed, a lady who is now dead came out and tried to assist me. She hallooed at the driver, and *he stopped as*

soon as he possibly could." His counsel repeated the already propounded question: "How far off was the car, when you fell?" "From eight to nine feet." The judge then addressed him: "Was it the car or the mule," he asked, "which was about eight or nine feet?" "That was the car:" he afterward said it was the mule, and, as well as he could judge, the mule and the car. Further on, he stated he was about five feet from the mule, and, lastly, about seven.

Who, in the conflicting fragments of that confused evidence, can discover whether it was before or after he fell, that plaintiff saw the car? To one question, he answered: "I did not see the car before falling"—to the other: "When he saw the car, it was off, on the other side of Jackson street." Where he was at that time, whether at his door, on the banquette, near to or on the track, we are at a loss to ascertain. How and how far from the car did he fall? He said and repeated at eight or nine feet from the car, then eight or nine feet from the car and the mule, and afterward seven or five feet from the mule.

We do not believe, much less do we charge, that he willingly swore to a falsehood, but grave contradictions cloud and darken nearly every line of his declaration.

He fell across the track, and—nevertheless—the mule passed him without coming in collision with him. How could that happen, unless—as stated by Waites, the mule shied and left the track? How did it happen that though, as alleged in his pleadings, he was crossing the street from the river side, he fell with his head toward the river? A fall, without a collision, would have had a different, an opposite result: his head would have been toward the swamp, his feet toward the river; that position, otherwise inevitable, must and could have been so reversed but by a collision, a shock.

Was his entire body, or were only his arms and hands across the track, after the fall? The record does not indicate, and we have to retrace our steps, enter the past, place ourselves where the witnesses stood, see what they have seen and hear what they have heard. Schwartz leaves his house, follows the banquette up to the point where, every morning, he is in the habit of crossing, turns at that point, gets in the street, and is about to step over the track; he hears and sees the car, stops, hesitates, measures the distance from the car and that which he has to cross, believes that he has time to cross, rushes ahead, is struck by the mule, falls nearly senseless, his hand is caught in the chain brake and drops from it as soon as the brake is slackened.

For the convenience and with the consent of their inhabitants, the streets of our American cities are now lined with rails and traversed, in every direction, by those constantly-moving cars which, for the most reasonable fare, convey—in a few moments—from their residence to their

place of business, and from that often distant place back to the residence, the merchant, the clerk, the minister, the attorney, the judge, the proprietor, the servant, the rich and the poor. In return for that priceless convenience, each of these inhabitants has, impliedly at least—renounced, of his right to stand and walk on those streets, that fractional, that insignificant share which is indispensable to accelerate the general circulation. The car is not to be stopped at every minute to let the footman pass—the footman must stop, sacrifice a second, when necessary, to let the car pass. The driver is authorized to presume that no rational being shall remain on the track, while the car is advancing, and he who crosses the track, when the car is at a distance within which it can not be checked, takes upon himself the risks of any accident which may be the consequence of his act..

What is that distance? It then varied, according to circumstances, from three to thirty-two feet. This is the evidence introduced on the trial, and that evidence leaves us on a shoreless sea of doubt and uncertainty. It clearly shows that the possibility and the power to stop within the given distance, depends upon the quality of the brake, the strength of the driver, that of the mule, the pull which immediately precedes the checking, the load carried, the weight of the car, the condition of the weather, of the track, and the unobserved and untold causes which accelerate or obstruct the speed of a vehicle and the evolutions of its wheels. Two experiments made successively, with the same car, the same driver, the same mule did not produce the same result, and—from the evidence before us—we are inclined to believe that, at that time, with different cars, brakes, mules and drivers, one hundred experiments made on the same day would have produced one hundred different results. On one fact, the witnesses agree: when the weather and the track are dry, the cars can be more easily checked. On the fifth of January, 1869, what was the condition of the weather and the track? On this fact, the witnesses disagree: according to some, the day was pleasant and bright, according to others, damp and foggy. Two extracts from the New Orleans Picayune, of the fifth of January, 1869, fully establish that it had rained the day before, and that, on the fifth, in the language of the report published by that paper, "the morning dawned damp and foggy." Miss Schwartz testified that when her father was brought home after the accident, he was covered with mud. It is difficult not to believe that, on that day, no car could have been checked within less than twelve feet of an object, by one prepared to check at a point selected by him, and whose hand and body would have been in advance, placed in the most advantageous position to promptly check. If so, how could it have been expected that one taken by surprise, as was the driver of car No. 22, would have done more than one who experi-

ments with the deliberate intention of ascertaining the shortest distance within which a car can be checked? When Schwartz fell, he was about eight or nine feet from the car, and—nevertheless—the wheel did not reach his body: he "would not have been hurt," said Waites, "had he not thrown up his hand." This declaration shows that, when the driver realized that he had been deceived by plaintiff's attitude, or when the latter was knocked down or fell on the track, the driver, as stated by plaintiff himself, stopped *as quick as he possibly could.*

If Schwartz's body was at two feet and a half from the wheel of the car, all he had to do to avoid it was to fold his arm and to draw his hand toward his body; but the motion, by which he entangled it in the chain, would have been that of almost any one in his position; the first idea of one threatened with a collision is to raise the hand and place it between the exposed body and the object by which it is threatened.

Plaintiff's counsel contends that, if such brakes as were used by other companies had been attached to defendant's car, or a conductor placed on the same, the driver would have been able to stop it in time to avoid the injury. We believe otherwise; under the circumstances already related, neither a more efficient brake, if any better then existed, nor the presence of a conductor in the car, could have prevented the accident—for, above the differences and contradictions which mark every page of this record, there stands a presumption which we can not disregard: Schwartz was standing near the track, and, by his attitude, led the driver to imagine that he intended to get on the car, and, when the mule was almost on him, he rushed across the track and was injured. By whose fault?

Sworn and examined as a witness, plaintiff has failed to justify his complaint; he has failed to show that his injury was inflicted through the carelessness and negligence of the driver; he has failed to show that he acted, on that occasion, with that degree of caution required from those who enter a court to denounce the negligence of others. The whole of the evidence, not excepting his own, leads to the conclusion that plaintiff has contributed to the disaster, and—under the law and jurisprudence of our State—he could not recover, even if the driver had been partly in fault.

23 An. 264, 462, 729; 3 An. 48; 9 An. 441; 18 L. R. 339; 6 An. 496; 11 An. 292; 1 An. 374; 3 An. 411; Redfield on Railways, 119, 117.

Whatever may be, as to the question of facts, the respect due by this court to the verdict of a jury, we can not so extend and exaggerate that respect as to sustain a verdict unsupported by even the declaration of the party in whose favor it was returned.

Under the evidence and the law, defendant is not liable to plaintiff; but, under the circumstances which surround this sad accident, this real

misfortune, plaintiff is now—not a beggar—but the creditor of society or of the State, for whatever is necessary to one of his age and condition.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be and it is hereby annulled, avoided and reversed, the verdict of the jury set aside and plaintiff's demand rejected at his costs in both courts.

No. 6418.

ALBERT G. BRICE vs. JOHN A. WATKINS ET AL.

Where a party, acting through an agent, loans money on the security of the borrower's mortgage, and the agent, who keeps the note in his possession, pays over from time to time to his principal the accruing interest and parts of the principal of the note received from the maker, finally pays over to the principal the balance due on the note, without stating that he is paying his own money, and without obtaining the consent of his principal to buy, or even intimating that he desired to buy the note, he will not acquire any title to the note; and the note itself, and the accompanying mortgage, will be deemed extinguished.

Subrogation to a creditor's rights and liens only takes place in favor of a third person who pays the debt, (when such third person has no interest in paying it,) by an express agreement to that effect, entered into at the time of payment.

APPEAL from the Second Judicial District Court. *Pardee*, J.

E. T. Merrick and *A. G. Brice* for plaintiff and appellee.

J. Caldwell Pierce for defendants.

The opinion of the court was delivered by

EGAN, J. Devine, who was engaged in the real estate business and in loaning money for other persons on mortgage and other security, made a loan of money belonging to Boothby, and for his account, to Bowers, and took as security a mortgage upon certain real estate. Devine retained the note, and as the agent of Boothby received and paid over to his principal various amounts of interest, and from time to time extended the mortgage note, with the knowledge and consent of his principal. Part of the principal was also paid by Bowers and accounted for by Devine to his principal, Boothby. Finally the remaining amount due on the note was received by Boothby, the principal, from Devine, the agent. The district judge thought it probable from the evidence that this payment also was made with the means of Bowers, the mortgagor and maker of the note. If so, it would of itself be conclusive of the issues of this case; but whether so or not, that fact does not change the conclusions which we have reached. Subsequent to the reception by Boothby of the full amount of the note, the present plaintiff, Brice, purchased from Bowers a part of the property covered by the mortgage.

The usual mortgage certificate was required and given, and did not disclose the existence of this mortgage at the time, although in point of fact it had not been canceled on the books of the mortgage office. The present defendant, Watkins, subsequently sued out executory process against the property purchased by Brice, claiming to be the owner and holder of the mortgage note of Bowers, whereupon Brice enjoined upon various grounds, only one of which we consider it necessary to notice; that is, that the mortgage note had been paid and extinguished and that the mortgage no longer existed or was of force against the property. The evidence discloses that after the several partial payments on the note made through Devine to Boothby or to him as the agent of Boothby, and paid over by him to his principal, the latter received from or through Devine the remaining amount due upon the note. Devine claims that this payment was with his own money and that he thereby acquired the ownership of the note and continued to hold it against the maker, Bowers, until the latter part of 1872, when he transferred it to his father-in-law, Watkins, the present defendant. Both Boothby and Devine testified on the trial.

The former says that he received the money as a payment of the note; that the investment was a good one; that the interest was paid on it regularly; that he had no other use for the money; that he did not need or want it; and that *he did not sell or transfer the note to Devine.*

The latter alone says he bought the note from Boothby on the eighth of June, 1872, when he paid him the balance due upon it, $750. He does not detail what conversation occurred between him and his principal at the time. He does not say that he told Boothby that he wished to buy the note for his own account and with his own funds and that Boothby consented, or that the latter even knew that such was his intention. He only swears that he bought the note from Boothby, who needed money and to whom he advanced it. Boothby denies the truth of either statement. He is wholly impartial and without interest or suspicion of interest in the present controversy. His credibility is not impeached by any witness or fact in the record. On the contrary, his statements are sustained by the other facts and circumstances and by the probabilities of the case. He was in the habit of loaning money at interest on good security, and Devine, who was engaged in that business, had effected other transactions for him of similar character. He not only swears that he did not need or desire the money, which was only for investment, and that the Bowers mortgage was (as is evident from the record) a good investment; but that after receiving the money from Devine he kept it several days unused, and finally loaned it to a gentleman *who had not repaid it.* The note was long overdue, the security good, the interest promptly paid, and the creditor received from

his own agent, as he had received other previous payments, the whole amount remaining due upon the note, without one dollar or cent of discount, even according to the testimony of Devine himself, who does not even pretend to have made a dollar by the transaction. There was no motive for the sale of the note, and the evidence fails to disclose any for its purchase. The probabilities and the reasonableness of the case all sustain the direct repeated and emphatic statement of Boothby, that he did not sell or transfer the note to Devine; but only received the money, as he thought he was bound to do, as a payment and extinguishment of the note. And such we think it was, whether it was made with the money of Devine or of Bowers, the debtor. That such payment may be lawfully made by a stranger under our law is settled both by the Code and repeated decisions of the courts. R. C. C. 2134. Such payment extinguishes the debt, and, of course, its accessory obligation, the mortgage, as fully as if made by the debtor himself. Subrogation to the rights, actions, privileges, and *mortgages* of the creditor against his debtor can take place only by an express convention or agreement *at the time of the payment* or when the debtor borrows the money to make the payment, which fact must appear by an act declaring it and a receipt for the money, executed by the debtor before a notary and two witnesses, or, lastly, where the person making the payment is shown to have *an interest in* discharging the debt when it takes place of right by mere operation of law. C. C. 2159, 2160, 2161. No convention is here shown with either creditor or debtor, nor is there evidence of such interest or of any interest at all in Devine which would operate legal subrogation in his favor. See, also, Sewall vs. Howard, 15 An. 400, and Oliver vs. Bragg, same, 402. He was, however, not a third person in this matter. He was the agent of the creditor, who transacted the business, effected the loan, took and held the note and mortgage and received payments upon them for account of his principal. He could not acquire the note, the property of his principal, without the consent of the latter, and after a full disclosure of the facts. We agree with the district judge that no such consent and no such disclosure were given or made in this instance. There was wanting the essential ingredient to make a valid *sale* or purchase of the note; there was no "*aggregatio mentium.*" The agent could not consent with himself for his principal; the latter did not consent for himself; and it is manifest from the evidence that Boothby's consent would not have been given to a transfer of a perfectly good paying investment of funds for which he had no other use to any one, and especially not to his own agent; and had the latter disclosed to him that such was his intention in making the payment that he would not have received it. See Story on Agency, sec. 210, 211; Story's Equity, vol. 1, sec. 315 and 316; 13 An. 20; 6 La.

415; C. C. 1798. The case of Gusman vs. McCann, 23 An. 87, relied upon by the defendant's counsel, has no application to that at bar, and is not in accord with the later case of Hoyle vs. Bemiss, 25 An. 438, decided by the same court. In the 23 An. case there was no question of agency or of acquisition by the agent of the property of his principal. The note was acquired by a stranger, who invested his own money, *and before its maturity;* and it appears from the statement of the case that the matter was fully talked over and understood between the parties, and even in that case the court was divided; and it is very questionable whether under the facts stated it was a *purchase* of the note at all, and whether it was not rather a loan to the debtor of the amount paid for the note, and which consequently could not operate subrogation without the execution of the receipt and declaratory act required by law. Our opinion would not have been changed had the evidence referred to in the defendant's bills of exception been received by the court below; but we do not think the court erred in refusing to receive it under the circumstances stated in the bill; neither does the view which we have taken of the case make the ruling of the court *a qua* in rejecting the schedule and other proceedings in the bankruptcy of Devine necessary to its determination. We think, however, that the evidence did bear upon issues made in the case, and that it was calculated to throw light upon it, and that it was competent and should have been received under the allegations of plaintiff's petition.

We do not consider it necessary to pass upon the credibility of witnesses or conflict of testimony, further than has been already done in this opinion. Even taking Devine's own statements of the facts and circumstances under which he claims to have acquired the note and mortgage in question, we think the payment of the money by him to Boothby operated a discharge of the obligation evidenced by the note and mortgage which do not now exist, either against the debtor or the property mortgaged. If any obligation on the part of Bowers grew out of the alleged use by Devine of his own money in the payment of the debt of the former, it was of a different character, and carried with it neither note nor mortgage. Even this, however, the district judge thought questionable. He heard the testimony and saw the witnesses, and we are not prepared to disturb his conclusions, deliberately made and intelligently presented in the record.

It is therefore ordered, adjugded, and decreed that the judgment of the court below be and it is affirmed, with costs of both courts.

No. 6667.

BUSSY & CO. vs. NELSON.

The death of a defendant to a suit pending in a court of ordinary jurisdiction, does not divest that court of jurisdiction, and work the transfer of the case to the probate court. The suit remains where it was instituted, but only to be proceeded with when the legal representative of the deceased defendant is made a party.

The probate court of a parish has no authority to appoint a curator *ad hoc* to represent the heirs of a deceased defendant to a suit pending in a court of ordinary jurisdiction, when the succession of the deceased has not been opened; only the court before which the suit is pending has the legal right to appoint such a curator.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Thomas M. Gill, for plaintiff and appellee.

Clarke, Bayne & Renshaw, for defendant.

Valle J. Rozier, curator *ad hoc*, appellant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs sued the defendants as a commercial firm, composed of S. C. Nelson and William Tolle, the residence of the individual members and the domicile of the firm being in Indiana. Process of attachment was issued, and two flatboats loads of staves were seized here, which were subsequently released upon Nelson's application, by the execution of a satisfactory bond. The bond was given by Nelson alone and in his individual capacity, with a resident surety. He also answered the demand of plaintiffs, specially denying the existence of a commercial partnership, and contested the correctness of the account sued on and denied any indebtedness.

This suit is in the Fourth District court of New Orleans, and at that stage of it, Nelson died in Indiana.

The plaintiffs then filed a petition in the Second District court, reciting the above facts, and stating that they knew of no property or succession of Nelson in this State, and prayed the court to appoint a suitable person to represent S. C. Nelson deceased and his heirs, if any he has, and to appear and defend the suit. Whereupon the Second Court made the appointment in these words; Let J. V. Rozier Esq., be appointed to represent Samuel C. Nelson deceased and his heirs, if any he has, and to defend them in this suit.

Mr. Rozier is an attorney at law, practicing in the courts of this City and in this Court, who on being notified of his appointment, filed in the Fourth Court an exception to the suit of plaintiffs, in which he denied that the Second Court had authority or jurisdiction for making the appointment of himself to represent the deceased and his heirs, and also alleged that the Fourth Court was without

jurisdiction to proceed further against the deceased. This exception having been overruled, the case proceeded. The default against Towle was confirmed, and judgment entered for one thousand and thirty eight dollars against him, which is the sum claimed less two hundred and forty dollars, and the attachment was maintained. A similar judgment was rendered after trial against Nelson, "represented herein by V. J. Rozier, Esq., curator *ad hoc*."

The question for solution is, had the Second Court the power to appoint a person to represent the deceased or his heirs in the suit pending in the Fourth Court, or should the latter court have made the appointment.

We pass by that part of the exception which contests the jurisdiction of the Fourth Court over the suit after Nelson's death with the remark that we have recently held, that a suit pending in one of the courts of ordinary jurisdiction in New Orleans does not abate by the death of one of the parties, nor does the death of a defendant in such suit compel its transfer to the Second Court, but that it remains within the jurisdiction of the court where it was instituted, and only awaits the representative of the succession of the deceased to be made a party in order to proceed in its trial. Angustin vs. Avila, 29 Annual 837.

The plaintiff did not apply to the Second Court to open the succession of the deceased Nelson. On the contrary, their petition in express terms disclaimed such intention. They averred that there was no property of the deceased in this State—no succession to open. It was not therefore the appointment of a curator to a vacant succession that was desired, nor of a curator or other representative of any succession. The prayer was for the appointment of a person to represent the deceased, and his heirs, who should appear and defend the suit—evidently meaning their suit in the Fourth Court, the institution and progress of which they detailed in the petition to the Second Court as the reason why they asked the appointment. It was a curator *ad hoc* that they desired.

The case of McManus vs. West, 18 La. 41 is the authority relied upon by plaintiffs' counsel for making the application to the Second Court, wherein it is said, the suggestion of plaintiff's death does not justify the appointment of a curator to his heirs by the court of ordinary jurisdiction. If they were within the State, no curator could be appointed to them, and if absent, the Court of probates possesses the exclusive power to make the appointment. At the first glance, this would seem to favor, if not to authorize, the course pursued in the case before us, but a more attentive examination will shew the contrary.

That suit, like this, commenced by attachment. West, the absent defendant, was represented by a curator *ad hoc*. The garnishees answered they had nothing belonging to West except certain cotton which they were directed to hold for Odom, and he then intervened and claimed it. Just then the plaintiff died, and the counsel of the intervenor suggested his death and at his instance a curator *ad hoc* was appointed to represent the heirs of the plaintiff. The court said the appointment was improperly made, and annulled the judgment which had been rendered, and obviously for this reason.

The Codes nowhere provide for the appointment of a curator *ad hoc* to a plaintiff. A plaintiff comes into court of his own volition. If he dies, a representative of his succession is appointed who takes his place as *actor* in the suit, or his heir represents him. Defendants do not come into court voluntarily. The law must provide the means by which they can be brought in, and when the process of the court can not reach them personally, the law devises ways and means by which a standing in court is artificially created for them, and they or their property are rendered amenable to the jurisdiction of the court. If a person, says the Code of Practice, against whom one intends to institute a suit is absent and not represented in the State, a curator *ad hoc* must be named to defend him. art. 116.

The present plaintiffs insist that the case of McManus is authority for the appointment in this suit, because there was an intervenor in that case, and as to him, the plaintiff was a defendant, and when the court said that the court of probates could alone appoint the curator to the absent heirs, the dictum had reference to a defendant's heirs.

It might be answered, that the same court which decided the McManus case had also said that an attorney, appointed to represent absent heirs by a court of probates, could not represent them in any other tribunal. He can act only in the court for which he is appointed. Harrod vs. Norris, 10 Martin, 16. But it is obvious that in both cases, the court is treating of the manner in which successions are to be represented. So also it is to successions that the Code of Practice has reference, when it provides that Courts of Probate have the exclusive power to appoint curators to vacant estates and absent heirs. art. 924.

In the case before us there was confessedly no succession. A non-resident defendant, whose property had been attached, and who had appeared and answered, died during the pendency of the suit—died at his foreign domicile, where his succession was opened. The plaintiffs acted on the assumption, that the Second Court could alone appoint a curator to represent the heirs of the decedent, although

there was no succession to open, or if any, without seeking or demanding the appointment of a curator to a vacant estate, or to the absent heirs of such estate. The appointee on the other hand insists that the succession of the deceased defendant should have been opened in the Second Court; and a curator of that succession *eo nomine* should have been appointed, who could then have represented the succession in the suit in the Fourth Court. Both are in error.

Under the state of facts as alleged, the Fourth Court, which had jurisdiction of the suit at its inception, did not lose it by the death of one of the defendants, and alone had the authority to appoint a curator to represent the heirs of that defendant in that suit, there being no succession opened or to be opened in this State, and no means being provided to bring the foreign representative of the foreign succession before our courts.

The judgment was therefore rendered contradictorily with one not authorized to represent the parties, and must be annulled.

It is ordered, adjudged, and decreed that the judgment of the ower Court is annulled, avoided, and reversed, and the case is remanded to be proceeded with according to law, the appellees paying costs.

No. 6486.

GEST & ATKINSON VS. N. O., ST. LOUIS, AND CHICAGO RAILROAD COMPANY.

Where by a judgment of a circuit court of the United States the assets of a corporation have been taken possession of, and placed in the hands of a receiver, no writ of attachment, or any other process can legally issue from any other court to disturb the receiver's possession of such assets, or take effect on any right, or debt, that may have accrued in favor of the corporation after the receiver had qualified, and taken charge.

Under the law of Louisiana mortgaged property may be sequestered.

Extracts from the judgment of another court are not admissible in evidence, in order to show the force and effect of the judgment. A certified copy of the entire judgment, together with all the pleadings that led up to it, must be put in evidence.

APPEAL from the Superior District Court, parish of Orleans. *Lynch*, J.

McGloin & Nixon for plaintiff and appellant.

L. E. Simonds for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs obtained final judgment against the defendant railroad on twenty-fifth of May, 1876.

They thereupon issued execution, and propounded interrogatories to Glover & Odendahl, E. Marquez & Co., and Leonard & Maxwell, as

garnishees, seizing in their hands any moneys due to the defendant railroad.

On twenty-ninth of August, 1876, J. B. Alexander, alleging that in a certain suit pending in the United States Circuit Court for Louisiana, entitled "Illinois Central Railroad Company et al. vs. New Orleans, St. Louis, and Chicago Railroad Company," he had been, by order and decree of said court, of date eleventh March, 1876, appointed receiver of the said defendant railroad, and as such put into possession of all its property, franchises, and revenues. That the said writs of garnishment, in so far as they operated a seizure of the revenues and earnings of said road, accruing subsequent to said date, to wit: eleventh March, 1876, disturbed his said possession and enjoyment, and were in violation of and in conflict with the said orders and decrees of the Circuit Court. Wherefore he prayed that plaintiffs be ruled to show cause why the said writ of garnishment and the interrogatories propounded thereunder, so far as they conflict, interfere with, or disturb his possession, use, and administration of said property, so in his custody, should not be annulled, vacated, and quashed, and that the civil sheriff be ordered to notify the parties garnisheed that the said garnishment will only apply to indebtedness originating prior to eleventh March, 1876, and not to freights or other sums due and earned by said railroad since said eleventh March, 1876.

This rule was tried and made absolute, and the plaintiffs, Gest & Atkinson, appeal.

If the facts stated in the rule are proved by legal and competent evidence there is no doubt in our minds of the correctness of the judgment.

The United States Circuit Court in a suit pending before it, had in effect caused the New Orleans, St. Louis, and Chicago Railroad to be judicially sequestered, and had appointed a receiver therefor. Having thereby acquired custody and jurisdiction of the property, and consequently of its revenues and earnings thereafter, it is elementary that no other court could, by its process, take the property out of the custody, or divest the jurisdiction, of the Circuit Court. The revenues and earnings of the road subsequent to eleventh of March, 1876, the date of sequestration, were in the custody of the Circuit Court, and could not be seized by *fieri facias* garnishment or otherwise by any other court.

It is unnecessary to discuss the legality of the appointment of the receiver.

We must presume that that court has proceeded according to law. We simply remark, *en passant*, that there is ample authority under our law for the sequestration of mortgaged property. O. C. C. 2948, 2950; C. P. article 275, paragraph six. We would not consider it a very grave

departure from our law if the "judicial guardian" of whom it speaks were called a *receiver* or a "keeper."

We think, however, that the evidence offered by the receiver in support of his allegations was insufficient and illegally admitted. The plaintiffs' objections, as stated in the bills of exception, were good and should have been sustained. Mere extracts from the judgments of the Circuit Court appointing the receiver and granting him writs of assistance to maintain his control and possession of the property, were not admissible. 19 L. 526; 3 An. 594. We do not think this case comes within the scope of those where extracts from inventories and process verbals of sales have been admitted.

In order that this court may know the extent of the receiver's rights and powers, under the judgments in question, it ought to have the opportunity of examining the pleadings upon which said judgments were rendered.

A decree read under the light of the pleadings may be and often is a very different thing from what it would appear to be if considered disconnectedly. Rejecting these extracts, the receiver has failed to make out his case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now ordered that the rule taken herein by J. B. Alexander be dismissed at his costs in both courts, as in case of nonsuit.

No. 5409.

GEORGE L. GETTWERTH VS. MRS. E. HEDDEN.

Where the owner of a vacant lot in the city of New Orleans, who desires to erect a building of certain dimensions on the lot, finds that the wall of his neighbor's house, which is built up to the boundary line of the lot, is so thin that the weight of his prospective building, although erected within the bounds of his own lot, would destroy his neighbor's house, he has the legal right to take down the neighboring wall, and replace it by one strong enough to support the building he shall erect. Such reasonable care must be observed by him however, as will render the inconvenience and loss to his neighbor as small as practicable; and his care must be proportioned to the risk of loss and inconvenience to his neighbor that his undertaking may occasion; and he is liable for whatever actual damage his neglect to take such care may entail.

A party can not be held liable for the value of property, stolen on account of its being exposed to theft by an act of his which he had the legal right to do.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

Braughn & Buck for plaintiff and appellee.

Singleton & Browne for defendant.

The opinion of the court was delivered by

MARR, J. This is an action for damages, which involves no disputed question of law. The testimony is voluminous, and somewhat conflicting, and, without analyzing it in detail, we shall state, in general terms, the material facts which we consider proven.

Gettworth leased from McCarty, for a term of four years, ending September 13, 1876, a house and premises which he fitted up for a confectionery and restaurant, with counters, shelves, soda fount, oyster stand, bar and rooms for private supper and dinner parties. His family occupied the upper part, the second story.

Mrs. Hedden owned the adjoining lot, on which she desired to erect a three-story brick building. The house occupied by Gettworth was built entirely on McCarty's property; and the wall extended up to the line of Mrs. Hedden's property. At her request the City Surveyor examined this wall, and in a report, in which he gives its dimensions, he states that it would not support a three-story building, and that, if Mrs. Hedden should build entirely on her property the weight of her house would destroy McCarty's. It was necessary, therefore, to demolish this wall and to rebuild it with the requisite thickness.

On the 14th Nov., 1872, the builder, Evans, employed by Mrs. Hedden to superintend the work, gave notice to Gettworth that he would be ready, in a few days, to commence taking down the wall, and requested him to move his goods away from it.

Precisely at what time the work was commenced the record does not show; but about the middle of December the premises were in such a condition that Gettworth's wife and children could not lodge there, and slept elsewhere for about seven weeks. The counters and shelves were taken out: the interior of the house was exposed to the weather: the work was retarded, sometimes by the heavy rains, sometimes for lack of materials, sometimes by reason of the absence of Evans, who was sick, sometimes because it was so cold that the mortar was frozen, and the workmen could not lay the brick. It was a cold winter, with frequent and heavy rains; and the business of Gettworth was greatly interfered with for want of the use of a fireplace, and consequent inability to make his customers comfortable while taking meals and refreshments.

The testimony is not satisfactory as to the precise time during which these annoyances and inconveniences continued; but we gather from the testimony of the painter employed by Gettworth after the wall had been built and papered, that the counters and shelves were replaced in March, 1873.

Gettworth brought this suit on the seventh of March, 1873, to recover $2212 25 for damages, claimed under these heads:

First—$1000 for actual loss of business, at $10 per day, from December first to March tenth.

Second—$1000 for further damages, "actual, punitive, and exemplary," for loss of customers, decrease and depreciation of business, and the annoyance, trouble, suffering, and exposure to which plaintiff and his family were subjected.

Third—$212 25, value of a lot of liquors and other articles stolen from the premises on the twelfth of December, 1872, the thieves having gained admittance and egress through the openings and exposures left by defendant.

The judge of the District Court, an upright, conscientious magistrate, now no more, who evidently considered the case very carefully, rejected the damages claimed under the second and third heads; and awarded to plaintiff $550: and from this judgment Mrs. Hedden appealed. Gettworth died pending the appeal; and his administratrix, made a party in this court, asks us to amend the judgment so as to allow the full amount sued for.

So far as the claim for "punitive and exemplary damages" is concerned, but little need be said. Mrs. Hedden exercised an unquestioned legal right in demolishing this wall, and replacing it with one capable of sustaining the structure which she erected. The exercise of this right is of constant occurrence in all cities; and it is so universally known that the owner of the property subject to it and his lessee must be considered as having notice of its existence, and that it might be exercised at the pleasure and convenience of the adjoining proprietor. If the lessee should be subjected to inconvenience he might claim of the lessor a proportionate reduction of the rent. Dorville vs. Amat, 6 An. 566; or if the premises should become untenantable, the lessee might dissolve the lease. Coleman vs. Haight, 14 An. 564.

No improper motive, no intentional wrong can be attributed to Mrs. Hedden or her superintendent; and while it is possible, in most cases, to avoid serious injury to the neighbor, whose wall is thus taken down, it is not possible, in any case, to prevent great annoyance and inconvenience, personally, to the family occupying the house, and interruption of the business conducted in it, by making it less inviting and accessible to customers.

The proprietor who exercises this right is bound to take every precaution that prudence and a due regard for the rights and comfort of the neighbor require; and if he fails to do this,

he is responsible for such actual loss and damage as the neighbor has suffered which might have been avoided.

As to the alleged loss by stealing, Gettworth knew, a month before this happened, that the wall would be demolished at an early day; and that the premises would, necessarily, be very much exposed. The articles alleged to have been stolen were in a building which the witnesses call a shed. Gettworth was on the premises and knew the full extent of the exposure; and it was not prudent, it was in legal contemplation fault, contributory fault, on his part, to leave such portable property exposed to thieves and plunderers. He should have moved it to some other better secured part of the premises; or to a place of safety elsewhere, if no part of the premises was safe. What thieves could carry away in one night, without waking the owner, who slept on the premises, without attracting the attention of the police, he could have placed beyond their reach without great expense or labor.

We think it was not prudent to have such work undertaken in the winter. It could have been done in the summer and early autumn much more expeditiously, and with far less risk of personal inconvenience to the occupants of the house. The discomfort of exposure in warm dry weather is trifling compared to that which results necessarily from like exposure in the cold, wet weather of winter. The interruption of business in summer, when the population is greatly diminished, is of small consequence compared to similar interruption from December to March, inclusive. No law certainly, restricts the proprietor as to the season at which he shall exercise his legal rights with respect to his neighbor's wall; but when he chooses to exercise them at a time, and under circumstances which greatly increase the risk of injury to the neighbor, he is bound to use extraordinary precautions, in accordance with the increase of the danger.

The testimony satisfies us that this work might have been done in such a manner as to have caused Gettworth no serious injury. It was the work of a few days, when the bricklayers could get at it, to run up the wall to the height of Gettworth's house. As soon after this as was practicable the house should have been restored, as nearly as possible, to its original condition. If this was ever done it was not earlier than March, because the shelves and counters were replaced in that month, and there was still some other work to be done at that time.

It was possible for Evans, the superintendent, to have had all his materials ready, and on the spot, so that no delay would

have occurred for want of them; and to have secured the interior of Gettworth's house from exposure to the weather, by well-constructed partitions, to supply the place of the wall to be demolished until the new one could be completed. By means of such temporary partitions families are enabled to occupy houses which would be otherwise untenantable while one of the walls is being demolished; and the business conducted in them suffers but little more interruption than would result, ordinarily, from the erection of an independent building alongside.

We think there was such fault on the part of Evans, whether from error of judgment, or want of skill and experience, or from some accidental circumstances not anticipated and not provided against, as imposes liability on defendant for the actual loss and damage suffered by Gettworth, which might otherwise have been avoided.

It is difficult to estimate actual damage in a case like this. Gettworth had a good business; and it was in great part broken up for from two and a half to three months. He estimates his loss at $10 a day. Whether the judge of the District Court arrived at the $550 allowed by him, by fixing the time at fifty-five days, at $10, or at a longer time and lower rate we do not know; but there is no testimony in the record which requires or authorizes us to disregard his estimate, or to fix the damages at a less amount.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to substitute the name of Mrs. Diana Sachsen, Administratrix, for that of George L. Gettworth, plaintiff, and, as thus amended, that said judgment be affirmed with costs.

No. 6707.

LORD CECIL ET AL. VS. THE BOARD OF LIQUIDATION.

Bonds of the State which are described by the Supplemental Funding Act of 1875 as "questioned and doubtful," can not be legally funded by the Board of Liquidation until they have been scrutinized, and declared valid by this court.,

Although such bonds be negotiable in form, and have passed into the hands of innocent third persons, who have purchased them in open market, before their maturity, and for a valuable consideration, they nevertheless will not be a valid debt of the State, unless their holders prove that they were issued in accordance with law. The rule of the commercial law in favor of the holders of ordinary negotiable paper, is not applicable to such bonds.

Lord Cecil et al. vs. the Board of Liquidation.

The bonds of the State issued in favor of the "Bœuf and Crocodile Navigation Company," were not issued in conformity to law, as obviously appeared from the Act authorizing their issue, printed on the reverse sides of the bonds; and therefore are not binding obligations of the State.

The act of the Legislature passed in 1877, which gives to the Third District Court of the parish of Orleans, in certain enumerated cases, concurrent jurisdiction with the Fourth, Fifth, and Sixth District Courts of said parish, is not in violation of any provision of the State constitution.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

Clarke, Bayne & Renshaw for plaintiffs.

B. F. Jonas for intervenors.

H. N. Ogden, Attorney General, for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. Lord Eustace Cecil, George Montague Sandford, George Woodhouse Currie, and Sir Philip Rose, as trustees of the Foreign and Colonial Government Trust in England, purchased thirty-eight bonds, of one thousand dollars each, of the State of Louisiana, which had been issued under an act of the General Assembly of this State approved January 3 1870. Upon presenting these bonds to the Board of Liquidation to be funded, they were refused because the bonds were issued in aid of the Bœuf and Crocodile Navigation Company, and all the bonds of that issue had been declared of doubtful validity by the supplemental Funding Act. This act prohibits the Board of Liquidation from funding any bonds mentioned in this *liste des proscrits* until they have been declared by this court to be legal and valid obligations of this State, and that they were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valid consideration. Acts 1875 p. 110. Thereupon the plaintiffs instituted this suit for the purpose of obtaining from this court a decree affirming the legality and validity of the bonds in question.

L. B. Bimse of New York intervened, claiming ownership of fifteen other bonds of same denomination and issue, alleging a like presentation of his bonds for funding and a like refusal, and praying a like decree. An intervention of this kind seems to be sanctioned by the act, and no objection is made to it.

The defendant answered by a general denial, and a special averment that the bonds held by plaintiffs had none of the characteristics required by the supplemental Funding Act. The answer to the intervention is the same in substance. There was judgment in favor of the plaintiffs and intervenor, and the defendant appeals.

It will be observed that the object of this and similar suits is not to obtain a judgment against the State for the amount of the bonds. The decree we are to render is assimilated to a special verdict of a jury,

who have been charged to ascertain or find certain facts, i. e. do the bonds possess the requisites, enumerated in the act of 1875, which it is essential they should have in order to justify the Board of Liquidation in funding them.

The General Assembly passed an act granting the aid of the State to the Bœuf and Crocodile Navigation Company, by which the Governor was authorized to issue the bonds of the State to the amount of eighty thousand dollars in favor of that company. It empowered the president and secretary of the company to sell or pledge the bonds thus issued in such quantities as they may deem necessary to raise money for the completion of the work of making the Bœuf and Crocodile navigable. Whether the two things designated by these two words were canals, or bayous, or streamlets, or larger bodies of water nowhere appears in the act, which provides further that all the rights and privileges of the company are pledged, hypothecated, and mortgaged to the State to secure the payment of the bonds issued in its aid, and the interest that may accrue thereon. Acts 1870 p. 21.

The bonds have at their head the words, "State bond in favor of the Bœuf and Crocodile Navigation Company," and run thus, "the State of Louisiana is indebted to Henry C. Warmoth or bearer in the sum of one thousand dollars" etc., and bear even date with the act above quoted, and are signed "H. C. Warmoth, Governor of the State of Louisiana," and are countersigned by the Secretary of State. It is admitted that the signer of the bonds is also the payee.

The testimony of all the plaintiffs was taken, from which it appears they bought thirty-eight of these bonds in London on the 8th of April 1870, three months after their date, and paid for them £6461 1s. 10d. a sum exceeding that at which they can now fund them in Louisiana consols. The intervenor's testimony is that he paid nine hundred and twenty dollars flat for each of his fifteen bonds, in open market at New York, on the 1st of April of same year. These holders now charge that being purchasers in good faith, before maturity, and for a valuable consideration, in open market, they are protected by the undisputed rule of commercial law which shelters them from all latent equities between the maker and the payee—that they had not to look further than or behind the broad seal of the State, which assured them of the genuineness and legality and validity of the securities thus purchased.

If this rule of commercial law is applicable without reserve to the bonds of this State, what significance are we to attach to the act of 1875? The Funding Act provided that all obligations of the State might be exchanged for consolidated bonds at the rate of sixty cents on the dollar, and constituted a board to liquidate these obligations, and gave to the holder of any valid bond or warrant, in case of its rejection by

the board, the right to apply to any proper court for relief. Acts 1874, p. 39. In the following year, the supplemental Funding Act enumerated bonds, amounting to over fourteen millions of dollars, which it declared 'questioned and doubtful as to their legality and validity,' and expressly and in terms prohibited the board from funding any of the bonds on that list until this court had decreed that they were valid obligations, and that they had been issued in conformity to law, and for a valid consideration.

If the holders of these 'questioned' bonds, who are purchasers before maturity for a valuable consideration, are entitled to have their bonds funded because they thus purchased them, why should the General Assembly impose upon them the vain and useless formality of obtaining a decree from this court upon any quality of the bonds? Of what avail is an inquiry touching the validity of a bond, or its issuance in conformity to law, if the fact that it is invalid and that it was not issued in conformity to law, will not affect the rights of the holder? Clearly this rule of commercial law does not apply here. The State can be sued in her own courts only by her permission, and in the manner and for the purposes indicated by her. The supplemental funding act required parties who resort to an action against her, through the board of liquidation, to establish the good consideration, and valid issue in conformity to law, of the bonds offered for funding, and restricted this court to an ascertainment of the possession of these requisites by those bonds. It is that law therefore that must be our guide, and not the general commercial law, in actions like the present. We have a substantial inquiry to make. The holders of these 'questioned' bonds must shew affirmatively that they have all of the requisites recited in the act of 1875 as necessary to obtain a decree of this court. One of these is that they must be issued in conformity to law. Were these bonds thus issued?

The act from which they derive their existence reads, "that the Governor is hereby authorized to issue in favor of the Bœuf and Crocodile Navigation Company, domiciled in the parish of St. Landry, State of Louisiana, the bonds of the State to the amount of eighty thousand dollars." The bonds were not thus issued. They are payable to H. C. Warmoth or bearer. The act provides that the president and secretary of the company shall have power to sell or pledge the bonds, but neither of these officers is made the payee for the company, but they are signed by the Governor in his official capacity and are payable to him in his individual capacity.

It would be difficult to imagine a case where the parties would be more entitled to equitable relief than this. Their good faith is unquestioned. The English holders purchased for a trust fund. They

invested in these bonds, relying upon the good faith of the State, whose seal attested their genuineness, and we are asked, not unreasonably, to assist in upholding that faith and credit. But we are not the law-making department of the State. The policy or impolicy, the good or bad faith, of an enactment such as the Funding bill of 1874 is now beyond our inquiry. Too many and too grave complications would now ensue from the opening of that question. But the act of 1875 emanated from the same source, and that Act imposes upon us the duty and the necessity of ascertaining whether any of the bonds enumerated in it are wanting in any of the qualities, essential to entitle them to be funded. We think the bonds of the plaintiffs and intervenors are wanting in one of them. They were not issued in conformity to law. And the lack of this quality was patent.

The Act which authorized the issuance of the bonds is printed in full on the reverse of each bond. Each purchaser, when the bond was offered to him, could read for himself the conditions and form prescribed by the act. If a more minute examination was made, he would fail to discover from the terms of the Act what it was that the Legislature of Louisiana was intending to improve. The term 'navigation' would certainly imply that water was the element to be operated on, but there is no indication beyond that. The Act bore on its frontlet unmistakably the warning, *caveat emptor*.

The judgment from which this appeal was taken was rendered by the Third District Court of this city. It is now contended on behalf of the defendant that the matter in controversy was without the jurisdiction of that court. It derives that jurisdiction from an act of the present year. Acts 1877, p. 218. The Attorney General attacks the constitutionality of that Act.

The Constitution confers upon the General Assembly the power to establish as many District courts in the parish of Orleans as the public interest may require. Until otherwise provided, seven are constituted, and to the third is given exclusive jurisdiction of appeals from justices of the peace. These seven courts shall also have such further jurisdiction, not inconsistent herewith, as shall be conferred by law. article 83. It is not inconsistent to enlarge the jurisdiction of one of these courts. The third Court must have exclusive jurisdiction of appeals from justices of the peace, but this exclusive jurisdiction of a particular class of cases does not preclude it from having concurrent jurisdiction with other courts of another class. The division or assignment of jurisdiction made in the constitution must remain until otherwise provided, and the use of this phrase implies that another assignment may be made. The legislature has given to the third Court original concurrent jurisdic-

tion with the fourth, fifth, and sixth, in certain cases, and this is one of them.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and it is now decreed that the bonds held by the plaintiffs and intervenor are not valid obligations of the State of Louisiana, and that they were not issued in conformity to law. It is further ordered that these parties pay the costs of both courts.

Rehearing refused.

CONCURRING OPINION.

MARR, J. There are certain considerations affecting the validity of the bonds in question in this case to which I attach much importance; and which I desire to state more distinctly than my brethren have done in the several opinions prepared by them.

The law relating to commercial paper, bills of exchange, and promissory notes, by which the innocent holder, for value, before maturity, is protected against equities and defenses which might have been available between the original contracting parties, is not applicable to the holders of State bonds or municipal bonds. Every one who purchases such bonds knows that they purport to have been issued in virtue of delegated authority; and that their validity, as obligations of the State or of the municipal corporation, depends upon the nature and extent of the power granted by law.

In Wilson vs. City of Shreveport, 29 An. 678, we had occasion to consider this subject with reference to bonds issued by the municipal authorities of Shreveport; and the views we expressed in that case are equally applicable to bonds issued by the State:

"Those who contract with municipal corporations know that these bodies act validly only within the powers conferred upon them by the special laws by which they are created; and the creditor of a corporation is bound to see that the contract or obligation of which he claims the benefit is within the power which the corporation may lawfully exercise. The fact that the obligation is in the shape of a negotiable instrument, or that it was acquired in good faith for a valuable consideration, before maturity, in no manner enlarges the power of the corporation, or gives any additional force or validity to its unauthorized acts."

It is a great mistake to suppose that the State governments have unlimited power to tax the property of the inhabitants.

In an argument of great force, Mr. Justice Miller, delivering the opinion of the Supreme Court of the United States, in the Loan Asso-

ciation vs. Topeka, 20 Wallace, 658, demonstrates that all our governments, State and national, in all their departments and branches, are of limited and defined powers. At page 664, he uses this strong language with respect to taxation in aid of private enterprises:

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises, and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

The suit was on bonds issued by the city of Topeka, in aid of a manufacturing company, in virtue of an act of the legislature of Kansas. The difference between that case and this is, that the bonds were issued by a municipal corporation; and that they were a donation to the company. But if a municipal corporation, under the authority of an act of the legislature could not validly exercise this power, it is simply because the legislature itself had not such power, and, therefore, could confer no such power upon the municipal corporation. And, if it is not lawful to make such a donation in aid of private enterprises, it is equally unlawful to lend the bonds of the State, in aid of such enterprises, to be paid by taxation, as principal and interest become exigible. This is certainly a donation of the use of the money, and of the interest on the sums so advanced. It is compelling the citizens to contribute annually, not for the use of the State, but for the use and benefit of the favored individuals, whose private fortunes are thus built up at the expense of the taxpayers.

Justice Miller lays down the proposition, and demonstrates it, that there can be no lawful tax which is not laid for a public purpose.

Interest had been paid on these bonds; but no importance was attached to that fact, since the payment of the interest was equally unauthorized as was the issuing of the bonds.

Looking into the history of this Bœuf and Crocodile Navigation Company, it will be seen that, in February, 1867, certain individuals in the parish of St. Landry, by notarial act, organized themselves as a corporation, for the purpose of improving the navigation of these bayous; and shortly after the legislature passed an act recognizing this company, and granting it the right to navigate these bayous; to charge certain freight; and to collect tolls at the rate of $2 50 a ton on steamboats, and $1 50 a ton on other water craft, employed by others in navigating these waters, thus creating a monopoly in favor of this company. Among other extraordinary privileges granted to this company was the exemption of its property and franchises from taxation for ten years; so that the other citizens of the State were not only to be taxed to complete this work,

but were to have their annual burdens increased for ten years, up to the taxable value of the property of this favored company thus exempted. See the act of 1867, No. 171, p. 315, approved twenty-eighth March.

There is another, and a fatal objection to these bonds, which, of itself alone, made them void *ab initio*. The constitution of Louisiana, article 111, provides that—

"Whenever the General Assembly shall contract a debt exceeding in amount the sum of one hundred thousand dollars, unless in case of war to repel invasion or suppress insurrection, it shall, in the law creating the debt, provide adequate ways and means for the payment of the current interest and of the principal, when the same shall become due; and the said law shall be irrepealable until principal and interest be fully paid; or, unless the repealing law contain some adequate provision for the payment of the principal and interest of the debt."

The State has no means of paying its debts except by taxation; and the power of the legislature to raise, by taxation, whatever amount may be necessary for the legitimate debts of the State, can not be questioned. The plain meaning of this article 111 is that when the means of the State are anticipated by the contracting of a debt exceeding one hundred thousand dollars, some other ways and means, beyond the ordinary taxes for ordinary purposes, adequate for the payment of the principal and interest, shall be specially provided, appropriated, and set apart for that specific purpose; and, in order to preserve the good faith and credit of the State inviolate, the provision thus made contemporaneously with the contracting of the debt, is placed beyond the legislative power of repeal. It would be a waste of words to enlarge upon the wisdom of this constitutional restriction; but it is not out of place to say, that if it had been faithfully observed, the credit of the State could not have been abused to any great extent; the markets of the world would not have been flooded with its bonds; and strangers, trusting to the honor and integrity of the State, and the assurance of its broad seal, would not have invested their means in these deceptive, unauthorized, illegal, worthless securities.

Turning now to the act approved January 3, 1870, pages 21, 22, we find that it authorized the issue of bonds of the State to the amount of eighty thousand dollars, payable twenty years after date, bearing interest at eight per cent, each bond to be for $1000, with forty bonds for forty dollars each attached, representing the interest to be paid semi-annually. That is, the principal of the debt thus contracted was $80,000, and the interest $128,000, making the whole debt thus contracted $208,000. The article of the constitution makes no distinction between the principal and the interest; indeed, it expressly characterizes both as constituting the debt, of which each is merely a separate

part. The expression used in the article, "the principal and interest of the debt," is conclusive; and it is not possible to call the principal sum a debt without characterizing also as a debt the interest on that sum stipulated in the same contract. The debt therefore thus created did exceed $100,000; and it falls within the terms of this article of the constitution.

The act creating this debt does not provide adequate ways and means for the payment either of the current interest or of the principal. It does, indeed, declare, section 3, that all the rights and privileges of the Bœuf and Crocodile Navigation Company are pledged, hypothecated, and specially mortgaged to the State; but the object of this is to secure the refunding, by the company, to the State, at the expiration of the twenty years, "all the sums of money paid by the State upon said bonds," as provided in section 4.

Obviously, therefore, the State undertook to advance and pay, in principal and interest, $208,000 to the holders of these bonds; and in the act creating this debt no provision whatever is made for the means of paying either the principal or the interest.

Of what value is the declaration, in this act, that the rights and privileges of this company are pledged, hypothecated and specially mortgaged to the State? Of what value were these rights and privileges? What will be their value at the expiration of the twenty years?

But if this security had been sufficient to indemnify the State, what provision is made in the act of adequate ways and means to enable the State to pay one single dollar of this debt to the holders of the bonds? Absolutely none. The legislature simply ignored article 111 of the constitution, and violated its positive injunction. There can be but one consequence; it is inevitable. The act was *ultra vires*, and is void; and the bonds, having been issued without authority of law, in violation of the organic law, are absolutely void, and impose no obligation, legal or moral, on the State.

I concur in the decree just pronounced.

CONCURRING OPINION.

DEBLANC, J. Under act No. 46 of the Legislature of the State of Louisiana, approved on the 3d of January 1870, the Governor of said State was authorized to issue—*in favor of the Bœuf and Crocodile Navigation Company*, domiciled in the parish of St. Landry, the bonds referred to in said act.

To whom were said bonds to be delivered? By whom alone could they have been either sold or pledged? They could have been properly

delivered but to the company in whose favor they were to be issued, and that company could have legally disposed of them but for one object: to raise money for the completion of the work necessary to secure the navigation of the Bœuf and Crocodile.

How and by whom was that money to be raised? In such quantities as would be deemed necessary, and by the President and Secretary of the company.

Instead of issuing those bonds in favor of the company, what was done? They were made payable to Henry Clay Warmoth, then Governor of the State, or bearer. In that form, they passed to the applicants, who claim that—under act No. 11 of the extra session of 1875, they have the right to compel the Board of liquidation to exchange them for consolidated bonds. In that form, they are not the bonds authorized by the statute of 1870—and, as remarked by the Chief Justice, that fact could have been ascertained by reading the law published on the back of every instrument they hold.

Did the company receive those bonds, and did they pass—by transfer or otherwise—from the company to any one? That may be, but those facts are not shown. The actual bearers took them before maturity, and—in their opinion—by whom and howsoever their transfer was effected—were it by one who acted with or without a mandate from the company—the delivery of the bonds, and the payment made by them to those by whom they were delivered, preclude the State from contesting their validity.

Were these questions presented by either the demand or the defence, we would certainly hesitate to adopt the second conclusion—but they are not presented. We are called upon—under a special act—to declare, not whether the bonds were taken on good faith and before maturity—not whether in an authorized suit brought to recover from the State the amount of those obligations, the State would be cast—but whether, under the provisions of the act relied upon by plaintiffs, the obligations so transferred to them shall be exchanged for consolidated bonds?

Had these bonds been made payable to the company, and, in that form, had passed to third parties, they might have carried, on their face, the presumption that they had been delivered to, received and disposed of by those who alone had the right to sell, pledge and transfer them. Stripped of that presumption, they do not bear in themselves the evidence that they were issued, delivered and disposed of in accordance with the law. If they were, to non-bond the State towards the holders, to bond the company towards the State, those facts must be legally established.

I concur in the opinion read by the Chief Justice.

CONCURRING OPINION.

EGAN, J. I attach more importance than seems to have been accorded to it to the fact that the bonds which are sought to be funded present the very novel peculiarity of having been executed by H. C. Warmoth, *Governor*, in favor of H. C. Warmoth, *individually*, or bearer. In my opinion, this can not be treated as surplusage in so large and important a transaction and one involving the faithful discharge of a public trust. It may be that no wrong was done or intended by this. It is, however, one of those acts which come under the head of constructive fraud, and one violative of the general rule which prevails not only in America but in England, and in all enlightened countries and of which the plaintiffs could not have been ignorant when they purchased these bonds—that "a trustee is bound not to do any thing which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it;" that an agent can not dispose of the property of the principal to himself, nor execute in his own favor obligations in the name of his principal. In like manner that all agreements or obligations which are founded upon violations of public trust and confidence or of the rules adopted by courts in furtherance of the administration of public justice are held void, and that, too, whether fraud or a violation of trust public or private actually exists in the particular case or not. That eminent jurist and writer, the late Judge Story, announces these principles with great clearness and cogency in his Equity Jurisprudence, and so do all the standard works. Such is the settled jurisprudence of this State, the obligations of which especially rest upon us as administrators of its laws. It is, however, needless to cite authority in support of maxims so well founded and of so universal recognition; and nowhere to a greater extent than in Great Britain and New York, where the plaintiffs and intervenor acquired the bonds in question. This case bears no similitude to the execution by an individual to his own order or to himself or bearer of a note or negotiable instrument designed to be put upon the market. H. C. Warmoth, Governor, and H. C. Warmoth, the individual, are not one and the same entity. H. C. Warmoth could not, as Governor, make or sign any valid or binding obligation of the State payable to himself individually.

It will be understood that the subject we are discussing has nothing to do with the particular motives for the particular act of which no evidence is before us; we are simply dealing with the law which governs all such acts, *whether well or ill intentioned*, and the public policy which makes such law necessary. As has been very properly remarked by the Chief Justice, we are now acting under and solely in obedience to a statute

which requires us to find or adjudge the existence of certain facts which are made by the statute a pre-requisite to the funding of obligations of the class now under review. Among these facts are the important ones whether they were issued in accordance with law and are valid obligations of the State. With this finding it has been well stated the rules of law which give currency and credit to ordinary negotiable instruments for ordinary purposes have nothing to do. If it did, however, who will say that even according to the strictest rules of commercial law the holder or purchaser is not to be affected by what it bears upon its face? and even were the law and public policy which dictates it less imperative is there not enough in the unusual manner in which these instruments are drawn to put any purchaser upon inquiry at least and to give as to them double force to the principle of "*caveat emptor?*" But this is not all. The act which is printed upon the back of the bonds not only provides that the bonds shall be issued to the Bœuf and Crocodile Navigation Company, by its very terms, and that only so much of them as may be necessary to carry on the work shall be put in circulation by the president and secretary, (of which fact these bonds bear no evidence whatever,) but it goes farther, and provides that all the rights, franchises, and property of the company *shall be mortgaged* to the State to secure the payment of the bonds issued under it, and the re-imbursement of any amounts which the State may have to pay by reason of the issue. Now the act itself makes no provision for the making or retaining of this mortgage *in any special or unusual manner;* and it must therefore be interpreted to mean that this must be done in the usual way by the execution of an instrument *at least in writing,* if not by public act, see La. Civil Code, art. 3305, as no valid mortgage can under our law be otherwise executed or retained. And not only is this true, but it was beyond the power of the Legislature had it even attempted it in express terms (as it did not) to provide for the retention of a mortgage *to affect third persons* and to give to the State and to its paper the security contemplated by the act, without not only the writing but the recording in the proper office or offices of registry and in the proper manner of the act or instrument of mortgage. Art. 123 of the State Constitution provides that "no mortgage or privilege shall hereafter affect third parties unless *recorded* in the parish where the property to be affected is situated." La. Civil Code, arts. 3342, 3345, 3347. 3348 make similar provision.

Again, conventional mortgages can only be agreed to by those who have the power of alienating the property which they subject to them. C. C. of La. art. 3300. Again, to render a conventional mortgage valid it is necessary that the act establishing it shall state precisely the nature and situation of each of the immovables upon which the mortgage is granted. La. Civil Code, art. 3306. Do not all these provisions of the

constitution and laws of the State, of which the Legislature was and must have been cognizant, furnish additional evidence that the Legislature contemplated the issuance of these bonds *to the Company itself*, which alone, through its authorized officers, could grant a mortgage upon its property, and as we have seen it must be first granted before it could be recorded, and must be recorded to affect third persons or to furnish any security to the State such as the act expressly stipulated. The legislative act was the letter of attorney of its officers in the premises. They had no power or authority to act or bind the State otherwise than as provided in the act. If, therefore, the Governor chose to issue these bonds to himself or to any other person or corporation than the Bœuf and Crocodile Navigation Co. he acted in so doing without authority and thereby created no valid obligation of the State. It is also true that the act does not contemplate that the State authorities shall put these bonds upon the market. That power and duty are specially confined to the President and Secretary of the Company as the work may require. Every purchaser who deals in State securities is at least required to know the law which provides for their issuance.

For these additional reasons I concur in the decree.

CONCURRING OPINION.

SPENCER, J. The State by the funding act declared its willingness to fund its outstanding obligations at sixty cents on the dollar, and organized the Board of Liquidation to carry into effect its provisions.

By act No. 11 of 1875, known as the Supplemental Funding Act, it declared that there were certain series of its obligations (among which are named those held by plaintiffs and intervenor), which were of doubtful legality, and it forbade said board to fund them, until the decree of this court had been obtained, declaring that they were legal and valid debts of the State, contracted in pursuance of its constitution, for a valid consideration and issued in strict conformity to law.

A State can be sued only by its own consent, and it may therefore impose such limitations and restrictions on the right of suit as it pleases. Hence this court, in determining its powers and duties in cases against the State, must look to the act authorizing the same, in order to determine the scope and limitation of its power and jurisdiction. Outside of the act authorizing the suit, and beyond the limitations therein fixed, it is absolutely without authority to hear and determine; and must therefore confine its investigations within the limits and to the objects specified.

Act No. 11 charges us to investigate, first, the constitutionality of

the act under which the bonds held by plaintiffs were issued—second, whether, if the said act be constitutional, said bonds were issued in strict conformity to its provision—third, whether there was a good and valid consideration to the State for the bonds.

We are required to investigate each and all of these questions, and to report by decree the results of that investigation. It is manifest, therefore, that the accepted rules of the commercial law are not the sole, or indeed the controlling, guides for our investigations. *That law forbids* all inquiry *into the consideration* of negotiable paper, when in the hands of *bona fide* holders for value and before maturity, as in this case. Whereas, act No. 11, which is the charter by virtue of which we have any authority in this case, declares that *we shall go into that* inquiry and *specifically* charges us with it! Which law shall we obey? Which law shall govern us? Certainly the act No. 11—for if *that* is not to govern us—if its injunctions are to be ignored, we are without authority to hear this cause at all. Any decision we would render would be *coram non judice.*

I do not think that the act No. 11 in any way changes the laws of evidence. The facts in controversy before us may be proved by any lawful evidence, direct or presumptive, oral or written.

It is also clear that this court is not by said act vested with power to render judgment against the State for any sum of money—but we are directed, as it were, to render *a special verdict*—to find the existence or non-existence of certain facts and conditions relative to said bonds; and according as we shall find them to exist or not exist, the State directs that the board shall act. Our jurisdiction is extended and limited to these inquiries. We can not go beyond them, nor stop short of them, without disregarding the law under which we are authorized to act. If we find any one of the conditions specified by the law to be wanting in these bonds, it will be our duty so to declare, and it will then be the duty of the board not to fund them.

I therefore address myself to the inquiries submitted to us by the statute, to wit:

First—Is the law under which the bonds were issued violative of the constitution of this State or of the United States?

Second—Were the bonds issued in strict conformity to the law authorizing their issue?

Third—Did the State receive a good and valid consideration therefor?

As the first of these questions was not raised in argument or pressed I pass it.

The second point has been especially contested, and in my opinion is the one upon which the plaintiffs' rights must stand or fall.

The act of the legislature granting aid to the Bœuf and Crocodile Navigation Company, directs in substance, by its first section, that $80,000 of bonds of the State shall be issued "*in favor of*" the said company. By its second section the president and secretary of said company are authorized to sell or pledge the said bonds so issued. By its third section it stipulates and reserves a mortgage in favor of the State upon all the property, rights and franchises of the said company to secure the payment of said bonds, and the reimbursement of any amounts the State may have to pay on account thereof.

The bonds held by plaintiffs, and said to have been issued under said act, are made payable "to H. C. Warmoth or bearer." There is a caption to the bonds as follows: "Bonds of the State of Louisiana." "Issued in favor of the Bœuf and Crocodile Navigation Company." Plaintiffs contend that this is a substantial compliance with the directions of the statute, and that the bonds being made payable "to H. C. Warmoth or bearer" is immaterial, since they bear upon their face the statement that they were issued in favor of the company. Unless good reasons can be assigned to the contrary I should be disposed to accept this view. But I think such reasons exist. The State was, in effect, loaning or rather proposing to loan its bonds to the company upon certain terms and conditions; which were that the company should pay the bonds when due, and re-imburse the State any sums it might pay on account thereof—these obligations of the company to be secured by a mortgage on its property and franchises. The company was only to sell or use so much of the bonds as were necessary for the contemplated improvements, and such bonds as were sold or pledged were to be so sold or pledged by its president and secretary. This offer to loan by the State was clearly incohate and incomplete until accepted by the company, of which acceptance we have no proof in this record. The company could only be bound to pay said bonds, and to re-imburse the State if it paid them, and by the stipulated mortgage, in the event, and to the extent, the corporation accepted, received and used the bonds. It therefore became a matter of importance that these bonds should not be given out, except upon such terms and under such circumstances as would insure the liability of the company for their payment or re-imbursement, and make effective the mortgage of the State. It seems to me therefore that an important purpose was contemplated and to be attained, in requiring the bonds to be issued *in favor of the* company, and in specifying the officers of the company who should negotiate them. It was a means of fixing the liability of the company. If the bonds had been made payable to the company, they could not have been sold or pledged, except by the indorsement of the company by its president and secretary. I take it that the words "in favor of" used

in this statute must be taken in their usual and ordinary signification, which is synonymous with "payable to." When we speak of a note being given "in favor of" a person, we mean and are understood to say that it *is payable to him.* I think that the act contemplated and required that these bonds should be made payable to the company, and that there was a good reason and purpose in so requiring. As the bonds were in fact issued, *i. e.*, payable to Warmoth or bearer, the company could, (and if solvent,) no doubt would dispute successfully its liability to the State, by denying that it ever received or disposed of them. I therefore think there was a fatal variance between the bonds as issued and the statute authorizing their issue, and that therefore they were not issued "in strict conformity to the law." I prefer to rest my concurrence upon this ground.

I concur in the decree of the court in this case.

No. 6778.

STATE VS. GEORGE WASHINGTON ET AL.

The judge presiding at a criminal trial can not, either in his charge to the jury, or at any time during the trial, declare the existence of any fact bearing on the case at issue, or deny the existence of any such fact, when it is asserted to the jury by the counsel of the accused in the course of his argument.

APPEAL from the Superior Criminal Court, parish of Orleans, *Whitaker*, J.

H. N. Ogden, Attorney General, for the State.

L. Marrero for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. Defendants were indicted for and convicted of rape, a crime—the legal price of which should ever be the life of the perpetrator. The jurors by whom they were tried, returned against them the qualified verdict of "guilty, without capital punishment." If guilty, they were fortunate indeed that a too merciful qualification was attached to the verdict.

During the trial in the lower court, their counsel—in addressing the jury—asserted that one of the State witnesses had testified that the prosecutrix had no other mark of violence on her person but the laceration of her private parts. The judge presiding denied the assertion thus made by the counsel, and prevented him from commenting on the disputed fact. To that interruption, the prisoner excepted, and—on that ground—moved for a new trial.

That interruption was unauthorized and irregular—and, as it

came from one who is justly presumed to stand indifferent and disinterested between the prisoner and the State, from one in whom an impartial jury is justly inclined to believe and trust, it may have influenced their minds and verdict. Were he mistaken, the denial by the judge of a fact asserted by an attorney, would often impair, and might even destroy the legitimate effect of proper evidence, dispel reasonable doubts, reconcile conflicting opinions, change already formed convictions, and substitute—to that of the jurors—the judge's recollection of the facts disclosed on the trial.

What does the law command? "In his charge to the jury, the judge shall not state or repeat the testimony of any witness—nor shall he give any opinion as to what facts have been proven or disproved." Revised Statutes, Sec. 1963. This he did, during the trial and before his charge, and this he could not legally have done at any stage of the trial. In his ardent zeal to protect society against the repetition of the most execrated, the most infamous crime, he has vitiated the verdict returned against the prisoners, and—to our regret—the sentence based on that verdict must fall.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from and the verdict of the jury, be and they are hereby annulled, avoided and reversed, and that this case be remanded to the lower court for a new trial.

No. 5402.

J. H. MONTAGUE ET AL. VS. WEIL & BRO.

Any former member of a dissolved commercial firm may be brought into court by a firm creditor and condemned for a social debt, contracted while he was a member, on a citation addressed to the *firm*, but served personally on him; when the citation is accompanied by a certified copy of the petition, in which the creditor prays for a judgment against *each* former member of the firm *in solido*.

The reduction of an agreement to writing, signed by the parties, is not necessary to its perfection as a contract, unless it clearly appears that the parties intended that it should not be complete as a contract, until so written and signed.

Whoever by word, or act, purposely persuades another that a certain state of things exists, which induces him to act so as to alter his previous position, is estopped from denying the existence of that state of things.

APPEAL from the Sixth District Court, Parish of Orleans. *Saucier*, J.

Finney & Miller for plaintiff and appellee.

J. C. Egan for defendants.

The opinion of the court on the original hearing was delivered by MANNING C. J. and on rehearing by SPENCER J.

The defendants in August 1873 leased a store from plaintiffs for one year, commencing from first of November following at seventy-five dollars per month, payable at the end of each month. They were occupying the store under a former lease at the time the new lease, or agreement to lease, was made, and the rental of the old lease, which expired on thirty-first October was one hundred dollars per month. The agreement was that the store should be whitewashed, and a written lease and rent-notes were to be signed. The first of these stipulations was performed by plaintiffs, and they also had prepared the necessary writings for the signature of the defendants, which were presented to them. Objection was made by them because of an opening in the upper part of a wall, and this was closed to comply with their wishes, and the lease and notes again presented to them for signature. They expressed their willingness to sign them, but deferred doing it from time to time, giving unsatisfactory excuses for this omission or delay in signing, but never refusing, on the contrary always promising to execute the lease and sign the notes.

On the 10th. of October, the plaintiffs' agent addressed a letter to the defendants, reciting at length the agreement, and his subsequent efforts to obtain the defendants' signature to the lease and notes, recalling to their recollection their promises to sign, their delays, and informing them of his purpose to enforce the contract. They promised many times, and to several persons to comply with their agreement. The occupant of the adjoining store was requested by the plaintiffs' agent to take the matter in hand, and he says that Samuel Weil, one of the firm, constantly declared his intention to sign the papers, and talked with him about the lease fifty times. It is indubitably established that the defendants made the agreement to lease, and afterwards repeatedly expressed their willingness and intention to perfect it by executing the lease and notes. But they never did execute them.

They continued however in the occupancy of the house, and during the first week of December paid the rent for November under the new lease. After this payment of the November rent, the plaintiffs' agent inquired of Samuel Weil again if he had executed the lease, and the latter promised to do it the next day.

On the 15th. of December the plaintiffs' agent received a written notice that Samuel Weil, successor to Weil & Bro. would not keep the storehouse longer than first proximo, and this was signed S. Weil per M. G. Weil. On the 26th. of that month plaintiffs brought this suit to recover the rent agreed on in this new lease, and provisionally seized the contents of the store. The sum sued for is $825 with interest on the monthly instalments from their maturities.

There is no dispute that the occurrences have been correctly detailed. Upon one matter alone is there any difference, and that is whether notice of the dissolution of the firm was ever given to plaintiffs. But the defendants deny any liability, because the lease was not complete until they had signed it. There was an agreement to lease upon specified terms, and the lease was to be signed, but this agreement was never consummated. The lease never was signed. It is also urged in defence that the firm of Weil & Bro. was dissolved on 25th. October 1873, six days before the lease was to begin, and notice of its dissolution was published in a newspaper on the 31st., and therefore the firm could not be held responsible on the lease, and that it has paid all the rent due up to the time of its dissolution. It was also urged by way of exception that the firm could not be sued after its dissolution by service on one of its members, and that no judgment could be rendered against the member who was cited, because the citation was addressed to the firm.

The defence is not good, and first as to the exception. Since the case of Kearney vs. Fenner 14 Annual 870. it has not been disputed that service of citation upon one partner of a commercial firm was sufficient, and that a judgment against the firm was properly rendered upon such citation. It is also true that a commercial partnership exists for the purpose of its liquidation, after it has been dissolved, and the former partners may be sued in the Court of the firm domicil on the liabilities of the firm, and in a late case this doctrine was extended so as to permit them to be brought in by attachment, if they were non-residents. Lobdell vs. Bushnell, 24 Annual, 295.

A commercial firm is not permitted to escape its obligations by a dissolution, nor will such dissolution oppose any obstacle to its creditors enforcing their obligations in the court where they were enforceable during the existence of the firm. Troplong remarks this as an anomaly ;— L'état d'une Société de commerce pendant sa liquidation présente de singulières anomalies. Cette Société est dissoute, mais dans l'usage du commerce elle est censée subsister encore pour se liquider. Elle a pris fin pour commerce pour agir et entreprendre ; il semble qu'elle se prolongue en quelque sorte, pour regler le passé et mettre ordre à ces affaires. C'est cette idée qu' exprime la formule usitée dans les circulaires des négocians. La Société ne subsiste plus que pour sa liquidation. Traité de la Société, 2. to No. 1004.

In a very early case, Des Boulets vs. Gravier, 1. N. S. 420. this Court approvingly quotes from Pothier the general rule touching the necessity of reducing the agreement to writing and thus states it ;— it must appear to be the intention of the parties to make the perfection of the agreement depend on the writing, for if it was merely contem-

plated to secure a more authentic mode of proof, then neither party can pretend the contract was not complete. Zacharie formulates the doctrine thus ;—La clause par laquelle les parties conviennent de consigner leur convention dans un acte sous seing privé, ou de la faire constater par acte notarié n'en fait pas dependre l'existence de laccomplissement de ces formalitiés, à moins qu'il ne résulte clairement des termes mêmes de cette clause ou des inconstances, que telle a été l'intention des parties. Une clause de cette nature doit, en général, être considerée, comme ayant uniquement pour objet d'assurer la preuve de la convention à laquelle elle se rapporte. 2 to 466 note.

The intention of the parties here nowhere appears to be to make the existence of the lease depend upon its formal confection, and the signing. On the contrary the payment of the November rent under that lease is evidence that they regarded it as complete, for if the store was held under the old lease, a hundred dollars should have been paid instead of seventy-five. The defendants, both by words and conduct, induced the plaintiffs to believe that they regarded the new lease as binding and complete, and it is a sound principle of law, as well as of morals, that where one by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. Marsh vs. Smith, 5 Rob. 523.

The answer of the defendants to this is, that the firm of Weil & Brother did not pay the November rent, nor continue occupying the house, but only Samuel Weil, one of the former members of that firm, and that notice of the dissolution of the firm was brought home to plaintiffs by publication in a newspaper, as well as by personal notice. The agent of the plaintiffs says he did not receive personal notice of the dissolution, and never heard of it until late in the year, and we believe him. It was said in oral argument by the defendants' counsel that the plaintiffs were affected with notice by the newspaper publication, and that the rule is that to those who had had dealings with a firm, a newspaper publication of dissolution was all that was required, and a special notice was required only by others. The rule is just the reverse. Special notice of the dissolution should be given to those who have had dealings with the firm.

Certainly the plaintiffs were not told that the firm had ceased to occupy the house during November and up to the middle of December, when the defendant were often applied to to sign the lease, and these different applications afforded convenient and appropriate opportunities for such information to be given. Nor does the payment of the rent for November by Samuel Weil alter the relative positions of

the parties. He was one of the firm, and its active member, and represented it.

After the institution of the suit, the rent for December was paid, and is so considered in the judgment, and in March the plaintiffs rented the house to other parties for the benefit of the defendants and for the remainder of the term of their lease. This rental has also been paid, and plaintiffs concede that credit should be allowed for these sums.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is affirmed, subject to the credit of fifty dollars on the first of April 1874, and same sum on the first of each succeeding month up to and including the first of November of that year, and that the plaintiffs have and recover their costs of the defendants.

ON REHEARING.

The opinion of the court was delivered by

SPENCER, J. The facts of this case are in the main fully stated in our former opinion and need not here be repeated.

One point urged by the defendant, however, did not receive any special mention therein. To wit: That in executing the writ of provisional seizure it is alleged that the sheriff did not simply seize the effects in the store belonging to defendants, but actually took possession of the leased building and its keys, and excluded the defendant from the premises. It is claimed that this was an act for which plaintiffs are responsible, and amounted to a dissolution of the lease. There can be no doubt that if such an act were done by the lessor that it would, at the option of lessee, dissolve the lease. But it is not pretended that the sheriff had any mission, either by law or in fact, from the plaintiffs to do this act. The sheriff's return shows only a seizure of the effects in the house. One of the defendants' clerks swears that the sheriff took possession of the house, keys, and every thing in the house.

There is no proof that plaintiffs even knew of this fact, if fact it be. They were not informed thereof by the sheriff's return on the writ, or by any act or word on the part of defendants.

This silence on the part of defendant, especially when taken in connection with the formal notice of the fifteenth of December, of his intention to abandon the leased premises on the first of January, proximo, makes this objection come with very bad grace from him. The seizure was made on the twenty-sixth of December, only four days *before* the time *he had fixed* for his abandonment, and we regard him as estopped from setting up that the lease was dissolved by a pretended

exclusion from a house which he had formally given notice he intended to quit.

The only serious question involved is that raised as to the sufficiency of the citation. It was addressed "to Weil & Bro.," and served in person on Samuel Weil, against whom alone judgment was rendered. The question is, therefore, whether, *after* the dissolution of the firm *in fact*, but *before any special notice* thereof to plaintiffs who were entitled to such notice, a citation addressed *to the firm*, and served on a member in person, will have the effect of a legal citation to the member so served?

The question is not free from difficulty. We have lately had occasion, in the case of Ranlett vs. Collier White Lead Company, to examine and review the authorities upon the subject of the proper mode and place of citing the members of a dissolved commercial partnership, in a suit for a debt of the partnership. We then held that each partner must be separately served with citation, and could not be cited to appear in such suit out of the place of his domicile.

But it is urged by plaintiffs that this rule does not apply until the creditor of the partnership has had legal notice of the dissolution, and that until such notice, the firm, *quoad* such creditor, continues to exist. The contrary was held by this Court in Brashear vs. Dwight, 2 An. 404, when it was said: "It is satisfactorily proved that before the institution of this suit the partnership of Bemiss, Brashear & Co. had been dissolved, and the dissolution published in the newspaper of the village where it had been carried on. It is contended that the plaintiffs in the suit were in the habit of trading with the firm, and that notice of the dissolution should have been brought home to them otherwise than by publications in the newspapers.

The ground would be well taken if the object of the plaintiff had been to make the defendant liable in a direct action against him *for dealings had with the firm after its alleged dissolution*, but it does not affect *the manner of bringing the partners of a dissolved partnership into Court.*"

We think, therefore, that the question before us is not affected by the fact that the creditor has or has not had notice of the dissolution; and eliminating this there remains the simple question, whether a citation addressed to the dissolved partnership, and served on one of the partners, is a good citation of that partner?

It must be borne in mind that this was served on Samuel Weil in person, with the citation "to Weil & Bro.," a certified copy of plaintiff's petition, in which it was specifically alleged and set forth that the firm of Weil & Bro. was composed of Samuel Weil and M. Weil, and in which there was a prayer for judgment against the firm and against

each member thereof *in solido.* The object and purpose of citation is notice. Under the facts of this case it is not possible that Samuel Weil could have been misled as to the identity of himself as a party defendant in such cause. The citation to Weil & Bro., accompanied by the copy of petition, and served on Samuel Weil personally, sufficiently designated him, and was a substantial compliance with art. 179 of the Code of Practice, which provides that the citation "must mention the name of the defendant to whom it is addressed."

We think this case comes within the purview of the doctrine held by the courts of France, under their code of procedure which is very similar to ours. The rule is thus stated in Copier vs. Despus, Cassation, twenty-third of November, 1836: "Les erreurs ou omission dans un exploit n'entrement pas nullité toutes les fois que cet exploit, ou les pièces qui l'accompagnent, renferment des énonciations qui peuvent reparer ces erreurs ou omissions."

On the other points involved in this case we adhere to the views expressed in our former opinion, and see no reason to change the conclusions therein reached. We think this case differs from that of Avandano vs. Arthur, just decided, in this, that Arthur at all times refused to sign, while in this defendants at all times promised to sign the lease; over and over recognizing its existence. So the parties clearly did not contemplate the writing as the completion of their agreement, but only as its evidence.

It is, therefore, ordered that the decree heretofore rendered by this court remain undisturbed.

No. 5397.

DAVID L. RANLETT VS. THE COLLIER WHITE LEAD COMPANY.

When a judgment debtor brings suit in a State court to annual a judgment of that court against him, and in favor of a non-resident creditor, the latter is not, under the act of Congress passed in 1789, entitled to an order to remove the case to a Circuit Court of the United State.

APPEAL from the Fourth District Court, parish of Orleans, *Lynch*, J.

Singleton and Browne for plaintiff and appellant.

J. Ad. Rozier for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues to annul a judgment, obtained in one of the District Courts of this city by the defendant, against the

commercial firm of Dix & Ranlett, of which plaintiff was a member. The defendant, before pleading, filed a petition praying the removal of the cause to the Circuit Court of the United States on the ground that the Company had its domicil in the State of Missouri while the plaintiff was a resident of Louisiana.

A similar application was made in Goodrich & Hunton, which was also an action to annul a judgment, and with which was joined a prayer for an injunction against further proceedings upon the original judgment until the suit for its nullity could be heard. In that case, our decision was based upon that part of the application which demanded the removal because the party was restrained from executing his judgment, and the removal was refused. 29 Annual, 372.

The present suit is divested of that feature, and is an action of nullity pure and simple. The petition for removal was filed in 1874, and is claimed under the act of Congress of 1789.

The action to annul a judgment is a pendant to the original suit, and a consequence of it. In that, the Collier Company sought the jurisdiction of the State Court, and obtained its judgment therein. It was plaintiff, and waiving its right to proceed in the courts of the United States, commenced its action in the courts of the State where its debtors reside. When those debtors, or either of them, attack the judgment rendered against them in the tribunal that rendered it, and seek to annul it, the original plaintiff has not the right to decline the jurisdiction selected by himself, and compel his debtor to go with him into another forum to test the validity of the judgment obtained by him. The lower Court thus ruled, and we approve it.

The defendant then excepted to the petition of plaintiff, that it discloses no cause of action. The pleadings do not inform us wherein the petition is defective. There is no allegation of the want of any specific ingredient in the complaint of plaintiff, necessary to make it complete, and we are left to conjecture and ascertain what it may be. We discover none.

Whether the alleged grounds of nullity are sufficient to warrant the judgment which the plaintiff asks, and whether the co-defendant, Dix, in the original suit should have been a party to this, are matters for subsequent inquiry. At present, and with the pleadings before us, we have only to reverse the judgment of the lower court which sustained the exception to the petition because it disclosed no cause of action, and dismissed the suit, in doing which the judge was equally reticent with the pleader as to the defects that vitiated the petition.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is reversed, and the cause is remanded thereto to be proceeded with according to law, the defendant paying costs of appeal.

ON APPLICATION FOR REHEARING.

MARR, J. Appellant was a member of the commercial firm of Dix & Ranlett, which had its domicile at New Orleans. This partnership was dissolved in 1859 or 1860; and in 1861 appellant removed to the parish of Jefferson where he resided continuously nntil 1865 or 1866. In January, 1864, suit was brought against him, as a member of the late firm of Dix & Ranlett, by the Collier White Lead and Oil Company, in one of the District Courts of the parish of Orleans; aud judgment was taken against him by default, which was confirmed in June, 1864. He demands, in this suit, the nullity of that judgment, for want of jurisdiction.

The appellee, in whose favor the judgment thus attacked was rendered, excepted on the ground that the petition disclosed no cause of action. The allegations of fact, on which appellant's action is based were not traversed: they are admitted to be true, and must be taken to be true for the purposes of this exception.

By the general law of Louisiana suit must be brought in the parish in which defendant has his domicile, if he reside in the State. C. P. arts. 129, 162. There are exceptions to this rule, one of which is that "in matters relative to partnership, as long as the partnership continues, in all suits concerning it, the parties must be cited to appear before the tribunal of the place where it is established." C. P. art. 165, no. 2.

On the allegations of the petition the presumption would be that the court which rendered the judgment complained of was without jurisdiction, unless some fact appears which prevents that presumption, and takes the case out of the general rule. No reasons are assigned for the judgment maintaining the exception; but the argument of counsel for appellee in this Court, rests upon the hypothesis that the partnership continued in 1864 for the purpose of liquidation, although it was dissolved in 1859 or 1860; and that the partners were subject to the jurisdiction of the Court of the place of the social domicile, without regard to their residence or domicile. As there was neither allegation nor proof of any prolongation of the partnership, for any purpose whatever, the judge must have assumed that it continued within the intent and meaning of the C. P. art. 165, no. 2, as a presumption *juris et de jure.*

We think that the decision in Lobdell vs. Bushnell, 24 An. relied upon by counsel for appellee, has been misunderstood and misapplied The case was thus:

Lobdell and Colwell, residing in the parish of West Baton Rouge, Bushnell, who lived in one of the Northern States, and Woodward, who resided in the State of Mississippi, were partners; and the domicile of the partnership was at New Orleans. About two years after the dissolution, Lobdell brought suit, in one of the courts of New Orleans,

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for a settlement of the partnership. Bushnell was found at New Orleans, and was cited personally; a curator *ad hoc* was appointed for Woodward and was cited in his stead; and Colwell was cited in his parish. Colwell excepted to the jurisdiction; and his exception was maintained on appeal. A rehearing was granted; and the first decision was set aside, and the exception was over-ruled. The Court said:

"The partnership, although dissolved, still continued for the purposes of liquidation, and a partition of the gains. And we think the partners may be sued at the domicile of the partnership for such purposes." 24 An. 696, 697.

There was, in reality, no occasion for the enunciation of this proposition. Bushnell did not reside in the State; and he was properly cited where he was found: C. P. art. 165, no. 5: and the Court thereby acquired jurisdiction as to him. The partners were not bound *in solido;* they were joint obligors, liable jointly to the complaining partner for his share of the gains; and all of them were necessary parties to the suit, as the Court well observed. *Ex necessitate* the court which acquired jurisdiction with respect to one of them was vested with jurisdiction as to all of them; and it could not have proceeded to judgment without having them all made parties. R. C. C. 2085; Faurie vs. Millaudon, 3 N. S. 478.*

In support of that part of the opinion just quoted the Court cited 3 N. S. It should have been 6 N. S., 188: 6 La., 685: and 13 La 484.

In the first of these cases, Dufau vs. Massicot's heirs, Dufau, Massicot, and Wiltz were partners; and Dufau brought suit against Massicot's heirs to recover Massicot's share of the debts of the partnership paid by Dufau. Wiltz was not a party to this suit. The Court decided that the share of the debts of the partnership due by one of the partners could not be judicially established without having all the partners before the Court: that is, a partnership can not be liquidated in a suit in which all the partners are not parties.

In the second case, Lincoln vs. Ball's executors, some of the partners brought suit against the executors of a deceased partner, for liquidation. Another of the partners was dead; and his representatives were not made parties. The Court decided that in a suit for the liquidation and settlement of partnership transactions and accounts all the partners must be parties, either as plaintiffs or defendants.

In the third case, Cutler vs. Cochran, suit was brought, after the dissolution, by one of the partners for the use of himself and the other partners, on a note payable to the partnership. The Court decided that all the partners must join in the suit.

* By act of 1870, No. 103, published in Acts of 1871, p. 18, joint obligors may now be sued separately, and judgment obtained against each for his share.

It was in this case that Judge Martin said: "On the dissolution of a commercial partnership, by mutual consent, the partnership continues for the purpose of liquidation; but as, during its existence, all the partners must join in a suit against its debtors, although either of the partners might receive payment of the debt, so, after the dissolution, an individual partner, notwithstanding he may still receive payment, can not institute suit without joining his co-partners."

This suffices to show the restricted sense in which Judge Martin understood that a partnership continues after dissolution. The several partners become, by the dissolution, in the absence of a different agreement and provision, and where it has not become necessary to provoke the appointment of a receiver by judicial authority, equal administrators of all the property and effects of the partnership, and liquidators of its affairs. Their interest in all the property assets of the partnership still continues, and their liability to the creditors of the partnership remains unchanged, notwithstanding the dissolution. This seems to be all that is meant by what Lindley, in his work on Partnership, side page 332, characterizes as a loose statement, "that a partnership which is dissolved is, nevertheless, deemed to continue so far as may be necessary for winding up its affairs." See Story on Partnership, § 325: Collyer, § 118: Kent's Com. 3. side pages 56, 64: Crawshay vs. Collins, 15 Ves. 227: Lyon vs. Haynes, 5 Manning & Granger, 541; Troplong, Société, 2, p. 467, no. 1000.

Our attention has not been called to the decision of a court of the State of Louisiana, to the effect that, after the dissolution of a partnership, the several partners who reside in parishes different from that in which the partnership was established, may be sued for debts of the partnership in the parish of the social domicile. Certainly no such thing was decided in Lobdell vs. Bushnell, nor was any such question presented to the Court in that case.

When a partnership is dissolved that juridical being, that ideality no longer exists; and it can not be said to continue in the individuals who composed it, or in the liquidators chosen by them, or in the receivers judicially appointed, in any other or different sense than a deceased natural person could be said to live in his heirs, or executors, or administrators. On the dissolution, the several partners become subject to the general laws, which were suspended with respect to them so long as the partnership continued, in all suits concerning the partnership. All the partners in a commercial partnership are liable *in solido* for the debts of the partnership; and when the partnership is dissolved, that liability may be enforced against them singly and individually. See David vs. Eloi, 4 La. 107. Lambeth vs. Vauter, 6 Rob. 127.

In Hobson vs. Whittemore, 13 La. 422, it was held that, during the

existence of the partnership, all the partners, defendants, must be cited before the court of the social domicile; and that the plea of domicile in another parish by one of them was of no avail.

In Black vs. Savory, 17 La. 86, it was decided that after a dissolution, two of the partners, who lived in a parish different from that of the social domicile, might be sued in the parish of their domicile, for a debt of the partnership.

In whatever sense, therefore, it can be said that a partnership continues for the purpose of liquidation notwithstanding the dissolution, it is not true in the sense that they must be, or that they can be cited to appear before the tribunal of the social domicile, at the suit of creditors of the partnership, when they reside in other parishes. Obligors *in solido* are amenable, each, to the jurisdiction of the tribunal of their respective domiciles; and as each may be sued alone for the entire demand, neither reason nor authority requires that they should be pursued in the tribunals of other parishes.

We should not have deemed it necessary to go into this discussion but for the stress which has been laid upon the decision in Lobdell vs. Bushnell; and the manifest misinterpretation which has been put upon it.

The rehearing is refused.

No. 6669.

THE STATE VS. PAT. MALLOY.

A criminal information may in two separate counts, charge two separate, but kindred offenses, growing out of the same transaction. Such an information is not obnoxious to the objection of duplicity.

An information charging the crime of burglary, or grand larceny, describes the place where the offense was committed with sufficient certainty when it gives the parish, the name of the owner of the house, and the house in which the offense is alleged to have been committed.

Where an information under the count of grand larceny, charges the theft of various things of small value, a verdict of the jury that the accused is guilty of "petit" larceny is sufficiently responsive to the indictment, and does not amount to an acquittal on the count of grand larceny.

When the crime *charged* in the indictment is one of which the Superior Criminal Court has jurisdiction, the finding of the jury for any smaller crime will not divest that court of jurisdiction.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, for the State.

Cullom & Castellanos for the defendant.

The opinion of the court was delivered by

SPENCER, J. Defendant was prosecuted in the Superior Criminal

Court on an information charging that he did in the parish of Orleans, etc., on the twenty-sixth of June, 1876, first, break and enter, in the night time and with intent to steal, the shop of one Joseph Cimarelle. Second, that having so broken and entered, etc., he did, at the time and place aforesaid, steal, take and carry away one gold watch of the value of $150, one pair of shoes of the value of $5, and certain other chattels, named and described. In other words the information contained two counts, one for burglary and one for grand larceny, growing out of the same transaction. The defendant filed a motion to quash the information, first, for duplicity, in that it contains two counts for two offenses, distinct, substantive, and of different natures and character. Second, for uncertainty in that it does not describe the place alleged to have been burglariously entered, with that minuteness which would enable him to plead *autre fois acquit* or *convict.* This motion was overruled, and the trial resulted in the following verdict:

"We, the jury, find the accused of the *first* charge not guilty. The second charge not guilty. We find said accused guilty of petit larceny."

Thereupon the accused filed a motion in arrest of judgment—assigning as grounds therefor, those of the motion to quash already mentioned, and these in addition, to wit: First: That the verdict of petit larceny is not responsive to the information. Second: That under the verdict the Superior Criminal Court was without jurisdiction. Third: That under the verdict of *not guilty* of the charges in the two courts, the prisoner is entitled to his discharge. This motion was overruled and the defendant sentenced to two years at hard labor. He appeals. His counsel has not favored us with an argument or any reference to authorities.

The motion to quash was, we think, properly overruled. There is no duplicity in the information. It charges in separate counts two kindred offenses growing out of one and the same transaction. See 8 A. 109, 114. We think the objection that there is no certainty in the charge is not well taken, even as to the charge of burglary, of which he was acquitted, much less as to that of grand larceny, under which he was convicted.

A verdict of guilty of petit larceny is responsive to an indictment charging the theft of various articles, as in this case. By the verdict he was found not guilty of grand, but guilty of petit larceny. This was no more an acquittal under that count, than a verdict of "not guilty of murder," but "guilty of manslaughter" would be an acquittal under an indictment for murder. The other objection, that the verdict of guilty of petit larceny divested the Superior Criminal Court of jurisdiction, can hardly be considered as serious. The jurisdiction of courts in criminal matters is governed by the offense *charged* or penalty imposed,

just as that of civil tribunals is governed by the amount in dispute. If on account of the absence of some ingredient of the offence charged, the offense is reduced to a less penal one of a kindred nature, the court may sentence for the lesser offense, although an indictment for that offense could not have been originally entertained by it; just as a civil court may on trial of a demand for a greater, give judgment for a lesser amount than its jurisdiction originally embraces.

The sentence and judgment appealed from are affirmed.

No. 6753.

BERTRAND SALOY VS. AMOS S. COLLINS.

A judgment of the lower court which dissolves an injunction, and which passes definitively on all the essential points at issue between the parties, is a final judgment from which an appeal will lie to this court.

But a judgment is incomplete until signed by the judge who rendered it, and hence, until thus signed, this court can not take cognizance of an appeal from it.

APPEAL from the Second District Court, parish of Orleans. *Pardee*, J.

Charles E. Schmidt for plaintiff and appellee.

Cullom & Castellanos for defendant.

The opinion of the court was delivered by

MARR, J. Under a writ of seizure and sale the sheriff of the parish of Orleans advertised and was about to sell the mortgaged property, when Collins, the mortgagor, obtained an injunction, on the ground that, either the judge who granted the order was without jurisdiction or the civil sheriff of the parish of Orleans was without power or authority to execute the writ.

Saloy, the seizing creditor, moved the court to set aside and dissolve the injunction, with damages and costs, on the grounds:

First—That the injunction bond was irregular, and insufficient.

Second—That the surety on the bond was not good and solvent.

Third—That the petition for injunction, on its face, discloses no cause of action, and no right to the relief prayed for.

The judge gave his reasons at length, and signed them, for his judgment; and on the same day, rendered judgment dissolving the injunction, with twenty per cent damages, and costs; and Collins appealed.

The judgment which we find in the record is copied from the minutes. It is not signed, nor is there any evidence or indication in the record that it was actually signed.

The sole purpose of the injunction suit was to arrest the proceedings under the writ of seizure and sale, on the grounds stated in the

petition. The judgment dissolving the injunction, with damages and costs, decided all the points in controversy between the parties; and it was, therefore, a final judgment; C. P. article 539; which the law required the judge to sign. C. P. art. 546.

This court has jurisdiction of appeals from final judgments, C. P., art. 565, and of such interlocutory judgments as may cause irreparable injury. Art. 566. But an interlocutory judgment, which need not be signed, is merely a decision on preliminary matters, which still leaves the merits to be disposed of by the definitive judgment. C. P. art. 538.

No appeal lies from a definitive judgment until it is signed. The appeal, therefore, in this case was premature, and this court is without jurisdiction to entertain it, or to make any further inquiry touching it.

The appeal therefore is dismissed with costs.

No. 6461.

POLICE JURY OF THE PARISH OF PLAQUEMINES VS. JAMES FOULHOUZE ET AL.

The right to an office will not be considered on any rule taken in this court.

If it appears from a scrutiny of all the provisions of an act of donation *inter vivos* that it was the real intention of the donor, and of the donees, that the land conveyed by the act should be dedicated to public use, such land will be held as thus dedicated.

Property dedicated to public use is not liable to seizure and sale.

Property held by a municipal corporation in trust for public uses can not be alienated by the corporation, nor subjected to seizure and sale by any of its creditors.

Where a certain tract of land has been dedicated to public use—the whole of it remains thus dedicated, although only a part has been actually put to public use. Nor is this dedication at all impaired because a part of the land has been temporarily leased to private individuals.

APPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee*, J.

R. T. Beauregard, District Attorney *pro tem.*, and *Henry Chiapella* for plaintiff and appellee.

E. Howard McCaleb for defendants.

The opinion of the court was delivered on the rule by

MANNING, C. J., and on the merits by SPENCER, J.

Mr. R. T. Beauregard applied to this Court to be recognized as District Attorney *pro tempore* of Plaquemines Parish, and exhibited a commission therefor. The order was made, though there was no occasion for either the application or the order. Shortly thereafter he filed a motion in this cause, and thereupon T. A. Flanagan took a rule upon him to shew cause why this order of recognition should not be rescinded,

this relator alleging that he is the legal District Attorney *pro tem.* of that parish.

This has the appearance of an attempt to determine the contestation for an office under the guise of this rule to rescind an order. We shall take no action in the case until it has been determined, judicially or otherwise, who is the person to represent the parish in this suit.

We shall dismiss the rule, and rescind the order of recognition, thus restoring all parties to the *status quo* and

It is accordingly so ordered.

ON THE MERITS:

SPENCER, J. Defendants being judgment creditors of the parish of Plaquemines issued execution, seized and advertised for sale "a certain tract of land * * having and measuring one arpent front by thirty-six arpents in depth, bounded in front by certain lands belonging to the parish of Plaquemines on which are situated the Court House and jail of said parish, etc." * * * The said land being the thirty-six rear arpents of a certain tract, acquired by defendant, the parish of Plaquemines, from Jacques Larose by Act of Donation *inter vivos* passed before Ed. Barnett, notary, etc., on the twentieth of June, 1846." The land thus seized, together with that referred to as containing the Court House and jail, constituted a tract which, as stated, was donated by Larose, "*to the inhabitants of the parish of Plaquemines.*" The Act of Donation contains the following clauses: the donor declares "that he does by these presents make donation *inter vivos*, gratuitous and irrevocable, unto the inhabitants of the parish of Plaquemines in this State, their heirs and successors, herein represented by Messrs. Andre Casse, Geo. N. Johnson and Geo. N. Buford, duly authorized, etc., by the police jury of said parish, accepting the same for said inhabitants, and acknowledging possession thereof, a certain arpent of land, etc." —describing the land aforesaid—"To have and to hold the said arpent of land and appurtenances, unto the said inhabitants, etc., to their proper use and behoof forever."

"The present donation is made on the express condition that said inhabitants shall build and erect the Court House of the aforesaid parish on the piece of ground herein above described."

The Court House and jail were erected on that part of said tract fronting on the Mississippi river. It seems that the police jury in 1875 leased the rear portion of said tract—the thirty-six arpents now seized—to one Cantrelle, who cultivated it in rice.

The police jury send out this injunction against the sale of said land under execution as aforesaid, on the ground that the same had been dedicated to public use and was "*hors de commerce.*"

The Court *a qua* so held, and the defendants appeal.

There can be no doubt that Larose, by said donation, intended to set apart the land in question to a public use. He declares that the donation is made "on the express condition" that the donees should build the Court House thereon. The appellants in their argument admit that this was *the motive* which induced the donation, but say it was not a *condition of the donation.* It matters not whether this stipulation was or was not a *condition* in the technical sense of that term. It is the duty of this court to ascertain *the intent,* "the motive" actuating the parties, and to give effect thereto if not unlawful. The right of Larose to dedicate this piece of property to public uses is not disputed. If such was the motive and intent which actuated him to make the donation—and if the donation was accepted for the purpose intended by the donor, it would seem past all controversy that the act of donation was intended to, and did, dedicate the property given to the use of the public.

Property dedicated to public use can not be the subject of private ownership. It is out of commerce, and not liable to seizure. R. C. C. 449, 454, 455, and 458. Police Jury of Baton Rouge vs. Michel 4 A. 84, 7 A. 595, 18 A. 560, 2 A. 527, 21 A. 244, 29 A. 38, 630—Dillon on Municipal Corporations, Sec. 531.

It is, perhaps, not unworthy of note that this donation is made "to *the inhabitants*" of the parish of Plaquemines, and not to the parish in its corporate capacity. If the corporation can in any sense be deemed the owner or holder of the property donated, it owns or holds it, by the very terms of the act, "for the proper use and behoof forever" of the inhabitants.

"A municipal corporation has *no implied or incidental authority to alien or dispose of* for its own benefit property dedicated to, or held by it, in trust for the public use, nor can it extinguish the public uses in such property, nor is such *property subject to the payment of the debts of the municipality.*" Dillon on Municipal Corporations, Sec. 512.

"Municipal corporations possess the incidental or implied right to alienate or dispose of their property, real or personal, of a private nature, unless restrained by charter or statute: they can not, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, nor of the public squares, streets or commons. The distinction is between property which a corporation may own, the same as a natnral person, and that which it holds in general or special trust." Dillon on Municipal Corporations, Sec. 445.

What the corporation can not itself do directly, can not be done indirectly by judicial process.

We see no significance whatever in the fact that the whole of the donated tract is not in actual public use. It suffices that the public has a right to use. Nor does the fact that the part seized was cultivated in rice in 1875, under lease from the parish, operate to deprive the public of its rights of use. We have just seen that the parish can not directly or indirectly divest the property of its public character. How much of said property is or is not needed for the use of the public, is not, in its nature, a judicial question. It suffices for us to know that the public *has a right* to the use of *the whole*, and, for aught we can know, may have some day *necessity* for its use. Fifty years hence the Court House and jail may be, by encroachments of the river, driven to what is now the rear arpent of the tract. But these are considerations with which this Court has nothing to do. We must ascertain and enforce the rights of parties—which are governed by the law and not by the river.

There is no error in the judgment appealed from and it is affirmed with costs of both courts.

No. 6652.

J. M. SERRA É HIJO VS. HOFFMAN & CO.

In determining what effect the discharge in bankruptcy of a principal debtor will have on the obligation of his surety, this court will be guided by the law of Louisiana and not by the bankrupt law.

Under the law of this State the discharge in bankruptcy of the principal on an appeal bond, will not release the surety on that bond from any obligation he incurred by signing the bond.

The surety who pays the debt of his principal is subrogated, by mere operation of law, to all the rights of the creditor. No act of subrogation by the creditor, in his favor, is required.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Geo. L. Bright for plaintiffs and appellants.

Hudson & Fearn for defendants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff obtained judgment against Hoffman & Co. for $1945 29 in gold, with five per cent interest in gold from twenty-sixth November, 1872, and costs.

Defendants took a suspensive appeal, giving Wolkart as surety on the bond. Pending this appeal, Hoffman & Co. were adjudged bankrupts and discharged as such.

The appeal was tried and the judgment below affirmed against Hoffman & Co. who, however, afterward pleaded their discharge from the judgment.

The plaintiff thereupon in due form proceeded against the surety for the amount of the judgment against Hoffman & Co. The surety pleaded that he was released by reason of the discharge in bankruptcy of his principals; and the court below so held. Plaintiff appeals, and the question is presented to this court.

Counsel on both sides have discussed this question, as one depending on the bankrupt law, and have cited us to numerous authorities from the reports of other States, *pro* and *con*. As might be expected there is considerable conflict among them, and for the simple reason, no doubt, that these courts were governed by different systems of law.

The bankrupt law undertakes to regulate and govern *the rights and obligations of the bankrupt only*. It provides the manner and effect as to himself of *his discharge*, but in no way undertakes to determine the effect of his discharge upon the obligations of others—out of superabundance of caution, however, the 5118th section of the United States Revised Statutes declares: "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt either as partner, joint contractor, indorser, surety, or otherwise."

In determining the effects of a discharge of the principal, upon the obligations of his surety, we have therefore nothing to do with the bankrupt act. It is the law of Louisiana alone which governs, and to which we must look for a solution. Hence we attach but little weight to the decisions of foreign tribunals upon their own laws, differing perhaps radically from ours. It may well be that the effect of a discharge of the principal would be to release the surety, by the law of Massachusetts, and not to release him by laws of New York.

Under the law of Louisiana, therefore, does the discharge in bankruptcy of the principal release the surety?

Article 3014, O. C. C., says: "The obligation of the surety toward the creditor is *to pay him* in case the debtor should not himself satisfy the debt," etc.

To satisfy a debt in the sense of the law is to pay it—to perform or do the thing one is obligated to do or perform.

Does a discharge in bankruptcy operate a payment of the debt—a performance of the obligation? In a late case, "Ludeling vs. Fulton," 29 An. 720, this court said: "A surrender in bankruptcy does not operate or have the effect of a payment. Payment extinguishes absolutely the obligation, both morally and legally. Bankruptcy is simply a bar to the enforcement of it." We adhere to that doctrine, and consider it

elementary. When we turn to our Code under the chapter treating of "the extinction of suretyship," we find no such *cause* as that of the *bankruptcy* of the principal. On the contrary, we find by article 3029 that the surety "can not oppose" to the creditor "exceptions which are personal to the debtor." We find, also, by article 3026, that so far from the "bankruptcy or insolvency" of the principal releasing the surety, the latter is given the privilege of proceeding against the principal or his estate for indemnity, before paying or even being sued for the debt.

To hold that the bankruptcy or insolvency of the principal releases the surety, would be to expunge the title of suretyship from our Code. It would be to render that important contract a mockery, a delusion, and a snare. The very purpose, and the only purpose, of suretyship is to save the creditor from the effects of the insolvency, bankruptcy, or inability to pay of the principal.

As we have seen, the obligation of the surety is to pay the debt if *the principal does not pay it.* The defendant's argument makes the surety liable, if the principal *does not pay, or does not go into bankruptcy.* This *last condition is not found* in the law of Louisiana. The distinction between the "insolvency" and "bankruptcy" of the principal, as to its effects on the obligations of the surety, is equally without foundation in our law. It matters not whether *the non-payment* by the principal proceeds from insolvency, bankruptcy, dishonesty, minority, or coverture. It is *the fact of non-payment, non-performance,* by the principal which renders the surety liable. Nor is there any force in the objection that after the bankruptcy the creditor can not subrogate the surety. It requires no act of subrogation by the creditor. *The law* subrogates the surety to such rights as *the law gives* the creditor—to such rights as the creditor has—no more, no less. If the insolvency, bankruptcy, or dishonesty of the debtor has rendered those rights valueless, it is the surety's misfortune—not the creditor's fault. The creditor does not warrant that the debtor will pay the surety. The judgment appealed from is erroneous.

It is ordered and decreed that it be reversed; and it is now ordered and decreed that the plaintiff, Serra é Hijo, have and recover of the surety, Justin Wolkart, the amount of the judgment of said Serra é Hijo against Hoffman & Co., to wit: nineteen hundred and forty-five dollars and twenty-nine cents, in gold, with five per cent interest in gold thereon from twenty-sixth November, 1872, till paid, and all costs of that suit, as well as the costs of this suit.

No. 6681.

STATE EX REL. FRED. DUFFEL, DISTRICT ATTORNEY PRO TEM., ET AL. VS. MORRIS MARKS.

The real issue between the parties to a suit, which has been formally passed on by the lower Court, will not be considered on a motion to dismiss the appeal. It must be referred for decision to the trial of the case on the merits.

The filing of the transcript of appeal in the Supreme Court, (in a case wherein a contest for office is involved,) *nine* days after the judgment in the case was signed by the lower Court, is within the legal delay.

No acquiescence in the judgment of the lower Court made by one of the appellants, or his attorney, can prejudice the right of appeal of another appellant, who was not a party to the act of acquiescence.

Any interested person may bring up the record of an appeal from the lower Court, and deposit it in the hands of the clerk of the Supreme Court.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Maker*, J.

T. C. Egan, Assistant Attorney General, *Frederick Duffel*, District Attorney *pro tem.*, et al. for plaintiffs and appellants.

J. D. Augustin, *Gus. A. Breaux*, et al. for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

DEBLANC, J. In his official capacity as District Attorney *pro tempore*, Frederick Duffel filed, in the District Court for the parish of Ascension, on the relation of Othello J. Flagg, a petition in which he alleges—in substance—that Morris Marks who claims to have been elected and commissioned as Judge of the Fourth District of the State, did not—when elected—possess the qualifications required by the Constitution of Louisiana to hold said office, and that said Flagg, who—previous to and at the date of defendant's election, was discharging the duties of that position, is alone authorized to act in that capacity, until a qualified successor shall legally be inducted into that office.

The relation concludes with the prayer that Morris Marks be restrained and prohibited from assuming and usurping the functions and prerogatives of the office of Judge of the Fourth District of this State. On the ninth of December 1876, the injunction thus applied for was granted by the parish judge of Ascension, and soon after—on motion of the district attorney—"said injunction and all the proceedings had or orders therein issued were discontinued, reserving what—in said entry—is termed the main action. Defendant then filed his exceptions and answer, and—on application of his counsel—the exceptions and the merits were cumulated.

This done, the case was fixed and tried, the relator's action dismissed, and defendant recognized as the Judge of the Fourth District. From the decree dismissing that action, the State—through the district attorney, and Flagg—through his counsel—have appealed to this Court. In his petition to that effect, the district attorney avers that the State is injured and aggrieved by the judgment referred to, and here we transcribe his own words, "*excepting that portion rendered in the matter of the relator, O. J. Flagg, which is acquiesced in by said State.*"

Defendant urges a dismissal of this appeal, on the grounds:

First—That the transcript was not filed in this Court within ten days after the rendition of the judgment.

Second—That, on the face of the record, Flagg is without interest to prosecute this appeal.

Third—That the State has acquiesced in the judgment.

Fourth—That he, defendant, has not been properly cited to appear in this Court.

The last ground is not discussed in appellee's brief, and—we infer from his silence—has been abandoned by him. The second ground constitutes the main, the real issue of this litigation; it presents the question passed upon and decided by the lower court: is Morris Marks a judge and the successor of O. J. Flagg? That question belongs to and must be tried with the merits.

The first ground is untenable. The judgment appealed from was signed on the seventeenth of May, and, nine days after, on the twenty-sixth of that month, the transcript was filed in this Court. We are told that it was so filed at the request of Flagg—and that, inasmuch as he is without interest in this litigation, this act goes for naught and can not inure to the benefit of the State. The frivolity of that strange pretension might be surpassed, but by exclusively the iniquity of its sanction.

The transcript herein referred to was brought to the city and delivered to the Clerk of this Court, not by Flagg, but by another party, under the express instructions of the parish attorney of Ascension. This is shown by two affidavits. Were it, however, as contended by defendant's counsel, what difference would it have made, if instead of having been deposited by a State officer, that transcript had been deposited by Flagg?

Had the district attorney openly refused to bring or send the transcript—had it become evident that, though placed in his hands, that transcript would not have been filed at all, or not filed within the delay prescribed by law, can it be doubted that, under the presumed circumstances, any interested party would have been authorized to procure, carry and file the transcript, in order to protect—against either the dereliction or negligence of an officer, a constitutional right, the right of

appeal? If so, in cases similar to this, that privilege could be exercised but with the leave and consent of the State Attorney.

The district attorney, it is urged, has—in the name of the State—acquiesced in the judgment appealed from. In so doing, as in arbitrarily dismissing a fraction of the action, he has transcended his powers, and his unlawful course can in no way prejudice the principal appellant in this case.

It may be that Flagg has ceased to be, and that defendant is now the Judge of the Fourth District. If so we find, so we shall hold. To ascertain that fact, to decide whether justice has or has not been done, it is our plain duty to retain, open and consult a transcript, the filing of which we consider as legal, and not liable to any serious objection.

The motion to dismiss is overruled.

ON THE MERITS.

MANNING, C. J. The transcript in this case is identical with that in No. 6682, and appears to have been filed to guard against an apprehended motion to dismiss the other appeal.

For the reasons set forth at length in that suit, it is ordered and decreed that the same judgment be entered in this case as was rendered in No. 6682.

No. 6650.

JOHN ANDERSON VS. JOHN J. ARNETTE ET AL.

Where two parties appeal from a judgment *in solido*, rendered against them individually, on account of a debt contracted by a commercial firm, then in liquidation, of which they had been the sole members, and their appeal bond is signed in the *firm* name, and also by one of the defendants in his own name, the surety on the appeal bond will be held liable for any judgment on appeal, rendered against the defendant who had signed the bond in his own name. The name of the firm to the bond will be treated as mere surplusage.

If one of the parties to an appeal dies, pending the appeal, a valid judgment may be rendered against his succession by making his administrator a party to the suit, and prosecuting it to a judgment contradictorily with the administrator.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

Grover & Harding for plaintiff and appellee.

Bentick Egan for defendant and surety.

The opinion of the court was delivered by

EGAN, J. Suit was instituted by the present plaintiff against Alexander Wheeless and Daniel Pratt for debt of the commercial firm of

Wheeless & Pratt, then in liquidation, of which firm they were the members. The petition prayed for citation, not to the firm, but to Alexander Wheeless and D. Pratt, and for judgment against them *in solido*, which was accordingly so rendered in the court below, but reversed, on appeal, as to Pratt, and affirmed as to Wheeless. There was no judgment in either court against the firm, and, as we have seen, none was prayed for; nor was any attempt made to cite or sue the firm, but only the individual members by reason of their obligation to pay a debt contracted by the firm, which was expressly alleged by the plaintiff to be then "in liquidation." The appeal bond was signed "Wheeless & Pratt, A. Wheeless, John Kouns, and purports to be given by "Wheeless & Pratt" as principals and John Kouns as surety. It recites the rendition of the judgment in the case No. 7832 of the Seventh District Court of Orleans, the same case, and is the bond by virtue of the giving of which the appeal was prosecuted from the only judgment rendered in it, which, as we have seen, was against *the individual members and not the firm.* The appeal was considered to be that of Alexander Wheeless and Daniel Pratt, and was so passed upon and adjudged. It is now urged by Kouns, the surety, defendant in the rule, that the appeal was taken by the commercial firm, whose surety alone he was, and that the firm was "not cast in the appeal," nor was any judgment rendered against it on appeal, and hence, that the condition upon which he bound himself in the appeal bond has not happened, and the court below erred in holding him liable.

It is well settled that judicial bonds must be interpreted as to their obligations by the record of the cases in which they are given, and that the law will supply what is wanting or will correct clerical errors where there is enough to identify the bond with the case. From the facts stated already, the pleadings, the judgment, the recitals of the bond, and the title and number of the case, all of which are given in the bond, as well as the court and the date of rendition, and signing of the judgment, it is manifest that the bond in question was given in the case, and to effect an appeal from the judgment rendered in the case in which the individual members of the firm and not the firm itself were sued and condemned.

Nothing can be inferred in favor of the surety from the fact that the name of "Wheeless & Pratt" instead of "Daniel Pratt" is signed to the bond. The individual name of "A. Wheeless" is also signed, and that of the surety "John Kouns." It does not need now to cite authorities to show that the appeal would have been effective and the surety bound had the principals not signed the bond at all. Here, however, A. Wheeless, as whose surety Kouns is sought to be condemned in this proceeding did sign it, and the name of the firm at the foot of the bond was surplusage in a case to which it was not a party, and in which no

judgment was or could be rendered against it or in its favor either below or on appeal. Evidently the Supreme Court considered and gave effect to the bond and the appeal as that of the individuals, and not of the partnership, and considered the appeal effective in favor of Daniel Pratt who had not signed the bond at all upon the mere signature of his surety. This the court was warranted in doing under our settled rule of decision. Kouns however was at the same time the surety of both "Daniel Pratt" and "Alexander Wheeless" *or at all events of the latter, who* signed the bond as principal, and who upon the faith of Kouns' suretyship prosecuted his appeal. He did so unsuccessfully. He was "cast in the appeal," and the condition upon which Kouns bound himself *in solido* to be liable in his place has happened. The distinction between the legal entity, the ideal thing, a firm and the individual members composing it, is well recognized by all courts as it has been by us in the discussion of the present case; but as there was no firm and no other than the individual members involved in or party to the case in which the defendant's obligation was given, and as we have held that he was the surety not of the firm but of the individual members, and especially of Alexander Wheeless, who was condemned upon appeal, the cases of Grieff vs. Kirk, 17 An. 25, and of McCloskey, Bigley & Co. vs. Wingfield & Bridges, decided by us in March last on a rule on C. S. Bush, surety, do not apply in the present case. Those decisions are, in effect, that one who is surety for a partnership does not thereby become surety for the individual members.

It is further objected by the counsel for the defendant in the rule that both Wheeless and Pratt were dead before the rendition of judgment upon appeal, which was therefore an absolute nullity. The record discloses the fact that the death of Wheeless was suggested and his administrator made a party to the appeal before the rendition of judgment. It further appears that a *fieri facias* was regularly issued against the principal and returned by the sheriff "*nulla bona*," after an unsuccessful demand upon the administrator of the principal, Wheeless.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be and it is affirmed, with costs of both courts to be paid by the appellant.

ON APPLICATION FOR REHEARING.

MANNING, C. J. The application for rehearing not being accompanied by a printed statement of the points and authorities on which the party founds his application, as required by Rule IX of this court, and time to file the same not having been applied for, the rehearing is refused.

No. 6591.

SUCCESSION OF R. H. BAYLY. OPPOSITION OF WASHINGTON AND LEE UNIVERSITY.

The State courts have jurisdiction to determine whether a debtor is released from certain debts, by his discharge in bankruptcy.

The executor of a succession is liable in a fiduciary capacity for all succession funds received by him, or which come under his control; and he can not change the nature, or relax the stringency of his obligation for such funds, by wrongfully allowing them to be received by, or pass into the possession of a commercial firm, of which he is a member.

The amendment of the Bankrupt Act authorizing *compositions* to be made, was merely designed to provide another *mode* by which discharges in bankruptcy could be effected; but it was not intended to enlarge the scope of discharges, and thus enable the debtor to liberate himself from any class of obligations, which a discharge under the original bankrupt act would not free him from. Hence a composition, under the bankrupt act, will not release the debtor from any fiduciary debt.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Finney & Miller and *Fernandez & Kruttschnitt* for opponent and appellant.

Kennard, Howe & Prentiss for executor and appellee.

The opinion of the court was delivered by

MANNING, C. J. G. M. Bayly is the testamentary executor of the succession of R. H. Bayly, and in that capacity filed an account of his administration April 21. 1876, the homologation of which was opposed by the Washington and Lee University, a legatee of the deceased. The lower court satisfactorily disposed of all the grounds of opposition except one, viz., an item of $18,021 79 which is stated in the account to be the balance due the Bechnel plantation by G. M. Bayly and Pond.

This plantation is owned by Bechnel and the succession of R. H. Bayly in equal parts. The executor is one of the firm of G. M. Bayly & Pond, which firm was the factor of the plantation for several years, and the sum above mentioned is the balance due by that firm on account. The firm went into bankruptcy, this balance being due at the time of filing their petition.

It is contended on the part of the opponent, that the executor must be compelled to account for this balance as cash, and that no proceedings in bankruptcy on behalf of the firm, or its individual members, can discharge this debt because *quoad* the executor, it is fiduciary in its character. The executor, on the other hand, insists that the debt is not due from himself but from a juridical person, distinct from him, i. e., the commercial firm, and therefore he is not liable for it as a fiduciary—that even if liable under the original law, a composition made under

authority of the amendatory Act of Congress of June 22 1874 extends to all debts due by the bankrupt, and discharges him from them—and lastly that only the court having jurisdiction of the proceedings in bankruptcy has jurisdiction to determine whether the discharge is complete or not.

This last objection is waived in the brief of the executor's counsel, and properly, since there can be no doubt that the State court has the jurisdiction necessary to determine that question.

Upon the first point, we think the debt was fiduciary in its character. The executor had not the right to allow the funds of the estate he was administering to remain in the hands of the firm, of which he was a member. Or rather the instant those funds came into the hands of the firm, they were in his hands, not individually but as executor. He could not be expected or compelled to collect a debt of himself, but he is chargeable with the debt as so much money held by him for the estate. Fuselier vs. Rabineau, 11 Annual, 393.

The second objection involves an adjudication of the scope and extent of a composition, duly made under authority of the bankrupt court. The Bankrupt Act enacts that no debt created by the bankrupt, while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy, but the debt may be proved, and the dividend thereon shall be a payment on account of such debt. U. S. Rev. Stats. Sec. 5117. The act of 1874 provides that in all cases of bankruptcy, now pending, or to be hereafter pending by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to such known creditor, of the time, place and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor; and such resolution shall, to be operative, have been passed by a majority in number and three fourths in value of the creditors of the debtor assembled at such meeting, either in person, or by proxy, and shall be confirmed by the signatures thereto of the debtor, and two thirds in number and one half in value of all the creditors of the debtor. * * * * *

The provisions of a composition accepted, by such resolution, in pursuance of this section, shall be binding on all the creditors, whose names and addresses and the amounts of the debts due to whom are shown, in the statement of the debtor, produced at the meeting at which the resolutions shall have been passed, but shall not affect or prejudice the rights of any other creditors. U. S. Stat., 1st Sess., 43d Cong., 182, Sec. 17.

That a composition was made by the bankrupt in due form is not denied, and we are referred to several decisions of the Circuit courts of the United States to shew that all debts of whatever character are dischargeable under the authority of this amendatory law. Bechet's case, 2 Woods, 173. and others in same volume. Woolsey vs. Cade, 15 National bankruptcy Register, 238.

But it is very clear that when the courts in these decisions adjudge that a composition, accepted by the creditors and approved by the Court, discharges the bankrupt debtor from the claims of all creditors, whose names, addresses, and the amount of debts due them, are shewn in the debtor's statement, they can and do only refer to those debts that are dischargeable by the original Act. There are certain classes or kinds of debts that cannot be discharged by proceedings in bankruptcy. For all debts that can be discharged, the bankrupt Act provides the means and forms through which such discharge can be effected. The amendatory act of June 1874 provided only an additional mode by which the bankrupt should be relieved of dischargeable debts, but did not change the fundamental prohibition against a discharge for certain enumerated kinds of debts.

The ruling in Woolsey vs. Cade is, that a debt due from a factor for the proceeds of goods sold is barred by his discharge in bankruptcy, and the reasoning of the judge in that decision confirms our view of the point now under consideration. He is discussing the difference in phraseology between the bankrupt Acts of 1841 and 1867, and adopts the language of Blatchford J. in another case;—"But in the act of 1867, the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of a bankrupt, and while acting in any fiduciary capacity, and not to be limited to any special fiduciary capacity. Therefore, under the act of 1867, no debt created by the defalcation of a bankrupt, while acting in any fiduciary capacity, will be discharged." *In re* Seymour, 1 Nat. Bankrupt Rep. 29. Woolsey's case, *ut supra* 240. Chief Justice Brickell then proceeds to argue and decide that the debt of a factor for the proceeds of goods sold is not included in or under the debts called fiduciary in the bankrupt Act, but the whole tenor and effect of his decision shews that if such debt of a factor had been regarded by him as fiduciary, he would have ruled that it was not dischargeable by the proceedings in bankruptcy. And he uses these forcible expressions pertinent to the matter in hand:—"The trustee of an express trust, such as an executor, administrator, or guardian, or a mere collecting agent, can not, without a dereliction of duty more or less censurable, become indebted to his *cestui que trust* or to his principal. A fiduciary relation between him and the person he represents exists previously to and independent of the particular transaction

from which a debt can originate. Because of his want of fidelity and his dereliction of duty, it may be just to withhold from him the relief intended only for the unfortunate. Trustees and agents, of the character of which we speak, can not mingle with their own the funds they may receive in their representative character. If deposited in a bank, they must be deposited as trust funds. Mingling or depositing them as their own is a destruction of the means of tracing and identifying them, and is a conversion rendering them absolutely liable for them." *ut supra* 243.

The debt, acknowledged to be due by the firm of Bayly & Pond, is due by each of the members of that firm, and G. M. Bayly the executor, by mingling or depositing the funds of the succession as his own or those of the firm, effected a conversion of them which rendered him absolutely liable for them, and the debt, being fiduciary in its character, is no more discharged by the composition made under the act of 1874 than it was under the law of 1867. We can not reduce the amount of the judgment to one-half, as the counsel of the executor ask in their brief, because the executor has not appealed, or prayed an amendment of the judgment.

The judgment of the lower court sustained the opposition, and decreed that the amount due to the estate of R. H. Bayly by the commercial firm of G. M. Bayley & Pond, and by its individual members, is that stated in the item of the account, and that it be accounted for in due course of administration by the executor. The opponent prays an amendment of the decree so as to make it conform to his prayer, and it is proper that it be made. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court be amended, and that the sum of eighteen thousand and twenty-one dollars and seventy-nine cents is the sum due to the succession of R. H. Bayly, by G. M. Bayly the executor, and that he account for that sum as cash. It is further ordered that G. M. Bayly pay the costs of appeal.

No. 6817.

STATE EX REL. JACOB STRAUSS VS. J. G. BROWN, ADMINISTRATOR OF PUBLIC ACCOUNTS.

In virtue of an act of the Legislature passed March 17, 1870, no creditor of the city of New Orleans, whether he be the holder of a liquidated, or an unliquidated claim, can compel by mandamus, any auditing officer of the city to issue, or deliver to him, a warrant for any amount due him; or compel any disbursing officer of the city to pay him any sum which he may claim that the city owes him.

State ex rel. Strauss vs. Brown.

A mere change in the title of an officer who performs certain, described functions in the government of a city, will not make him amenable to the operation of a summary writ, from which, under his former title, he was exempted by special statute.

An act of the Legislature which leaves to creditors the ordinary legal remedies for the enforcement of their rights, and merely restrains them in certain cases from employing the summary process of mandamus, does not violate the constitutional provision that every injured person shall have adequate remedy by due process of law, and without unreasonable delay.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Hornor & Benedict for plaintiffs and appellants.

B. F. Jonas for defendant.

The opinion of the court was delivered by

MARR, J. Relator seeks to compel, by mandamus, the Administrator of Public Accounts, of the city of New Orleans, to issue and deliver to him a warrant for the amount due on certain pay-rolls, of which he claims to be transferee and owner.

The Administrator excepts that by the Act No. 5, of the extra session, approved seventeenth March, 1870, he is not amenable to the process invoked.

Section one of the act, upon which he relies, is as follows:

"That from and after the passage of this act, no court within the State shall have authority or jurisdiction to allow, order, hear, entertain, or enforce any summary process or proceeding, or writ, or order of mandamus, or any order or proceeding in the nature of an order or mandamus, either against the controller, deputy controller, or any auditing officer of the city of New Orleans, the object of which shall be, either directly or indirectly, to obtain or compel said controller or deputy controller, or auditing officer, to issue and deliver any order or warrant for payment of money, or against the treasurer, assistant treasurer, or any officer or officers charged with the disbursement of the moneys of the city of New Orleans, the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the city of New Orleans to any person, persons, corporation, or corporations whatever, but all actions or proceedings for the recovery of any sum of money claimed to be owing by the city of New Orleans shall be in the ordinary form of action, instituted against the city of New Orleans as a corporation, and not against any branch, department, or officer thereof, and shall, in all respects, be conducted in the same manner as other ordinary actions."

The manifest object of this act was to restrict creditors of the city to the ordinary forms in the enforcement of their demands; to protect the property and means of the city from seizure under execution; and

to compel judgment creditors to have their judgments registered, so that they might be provided for, and paid in their regular order out of the annual budget for each year.

Counsel for relator maintain that this act conflicts with the articles of the Code of Practice authorizing the writ of mandamus. The Code of Practice is the general law; the act in question is a special law, which relates to the city of New Orleans and its officers alone. In certain cases, contemplated and provided for in the Code of Practice, suitors may enforce their rights by process of mandamus; but by the terms of the special law of 1870 all the courts of the State are forbidden to allow this writ to compel any auditing officer of the city of New Orleans to issue or deliver any order or warrant for the payment of money, or to compel any disbursing officer of the city to pay any money claimed to be due from the city. These officers of the city government are therefore, by this act, exempted from the summary proceedings to which other officers of other corporations may be subject by the general law, the Code of Practice. The articles of the Code of Practice which allow and provide for this process are not repealed; they are simply not to be applied to the auditing and disbursing officers of the city of New Orleans for the purposes specified in the act.

The Code of Practice is a general statute, which was approved fourteenth March, 1870; the act in question is a special statute, which was approved seventeenth March, 1870; and if they were in conflict, the last expression of legislative will would prevail.

It is objected that in this act No. 5 the auditing officers are designated as the controller and deputy controller, and the disbursing officers as the treasurer and assistant treasurer; and that in the act No. 7, approved sixteenth March, 1870, amending the city charter, these offices were abolished, and their places supplied, respectively, by an auditing officer styled the Administrator of Public Accounts, and a disbursing officer styled the Administrator of Finance, under the new charter.

The act does, indeed, designate the auditing officers as the controller and deputy controller; but it adds immediately, "or auditing officer;" and it designates the disbursing officers as the treasurer and assistant treasurer; but it adds, immediately, "or any officer or officers charged with the disbursement of the moneys of the city of New Orleans." The Legislature had in view the officers performing certain functions, and designated them by the official titles under which those functions were performed at the time the act was passed; but the language used is sufficient, and it was evidently so intended, to apply to the officers of the city government, by whatever titles they might be designated, charged with the functions which, at that time, were performed by the

controller and deputy controller, and the treasurer and assistant treasurer, respectively.

Again, it is urged that this act No. 5 was intended to apply to unliquidated demands, contested claims, and not those admitted to be due and owing. The act makes no such distinction; and its terms include any and all orders or warrants for the payment of money, and any and all moneys to be paid, claimed to be due from the city, whether such claims be unliquidated and contested, or be liquidated and admitted to be due. Mandamus will not lie to compel payment of unliquidated demands or contested claims. The payment of demands against the city, liquidated by judgment in solemn form, can not be enforced otherwise than as provided in the second and third sections of the act; and it would be extraordinary if claims merely admitted to be due, not liquidated by judgment, could be enforced by this summary process, to which even judgment creditors are not permitted to resort. The disbursing officer pays only on orders or warrants. Orders and warrants pre-suppose liquidated demands, admitted to be due; and the restriction of the prohibitions of the first section to unliquidated or contested demands, would make any reasonable interpretation of the entire act impossible, and would defeat its manifest purpose and intent.

Counsel for relator argue that he has no adequate remedy otherwise than by writ of mandamus; and if the act of 1870 be so interpreted as to deny him this remedy, it will be in conflict with article ten of the constitution, which provides that every one injured in property or person, or reputation, shall have adequate remedy by due process of law, and justice shall be administered without denial or unreasonable delay.

The act does not deprive the creditors of the city of adequate remedy; that is, such remedy as creditors in general have against their debtors by suit in the ordinary forms. The creditor who has recovered judgment against an executor or administrator is not permitted to seize and sell, under execution, the property which belonged to the deceased, nor to enforce payment otherwise than in due course of administration. The creditor who has recovered judgment against his debtor can not seize under execution the homestead or certain other property and rights specially exempted by law; and in many cases the debtors have no other property or rights than such as are not subject to the pursuit of creditors. The creditors of the city of New Orleans may sue and obtain judgment; but the city has no property or rights not exempt from seizure under execution, because the statute forbids the issue of execution against the city. The city can pay its debts only out of its revenues, whether derived from taxes or from other sources; and if the city could be interfered with by seizure under execution in the collection and control and disbursement of its revenues, as current exigencies require, the

city government could not be administered—could no longer subsist. The second and third sections of the act provide for the registry of all final judgments against the city, and for their payment out of the annual budget; that is, in due course of administration, by the administrators chosen and appointed by law.

An act designed to deprive the citizen of a remedy, by due process of law, would be in violation of the constitution, and would defeat the grand object of political organization, the protection of the citizen in the enjoyment of his life, his liberty; and his property; but it is no violation of the organic law, nor is it an infringement of the rights of the citizen, to prohibit resort to certain summary proceedings, certain extraordinary remedies, to enforce claims and demands of a specified character, for the enforcement of which by other means and process, special provision is made by law.

The claims asserted by relator accrued in 1876, under the dominion of the act of 1870: so that there is no question as to legislative interference with vested rights and pre-existing contracts or obligations. The act in no manner violates the organic law; nor is it controlled by the articles of the Code of Practice relative to the writ of mandamus. The judgment of the district court maintaining the exception and dismissing the proceeding is in conformity with the expression of the legislative will; and the relator must seek his remedy, and enforce his demands in subordination to that will.

The judgment appealed from is therefore affirmed with costs.

No. 6657.

STATE EX REL. JAMES D. HOUSTON VS. THE CITY OF NEW ORLEANS.

The approval by the Clerk and Judge of the Criminal Court of the parish of Orleans, of the account of the Criminal Sheriff, for fees and expenses of his office, does not amount to a judicial decree in his favor for the amount of the account, nor conclude the city of New Orleans from contesting the account. And if the city should dispute the correctness of his bill, he must, like the holder of any other contested bill, sue and obtain judgment on it, before he can ask for a mandamus to compel its payment.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

C. H. Luzenberg and *L. A. Sheldon* for plaintiff and appellee.

B. F. Jonas for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. James D. Houston, the sheriff of the Criminal Court and keeper of the prison of the parish of Orleans, applied for and

obtained—from the Superior Criminal Court, a writ of mandamus directing I. G. Brown, and J. C. Denis, the first as administrator of accounts, the other as administrator of finance of the city of New Orleans, to pay him—for fees and expenses of his office—the sum of eleven thousand five hundred twenty four dollars and ten cents.

From that decree, those officers and the city have appealed. They contend:

1. That the Superior Criminal Court is one of limited and exclusively criminal jurisdiction, and that it can issue the writ of mandamus only in aid of its own jurisdiction.

2. That the bills presented and sued upon by said sheriff are not correct.

3. That—if correct—the City Council has made no appropriation for their payment, and that—under the city charter—they can not be paid without and before such an appropriation.

4. That, under act No. 5 of the extra session of the legislature of 1870, no court within the State had authority or jurisdiction to order, allow, hear, entertain, or enforce any summary process, or writ of mandamus, to compel the payment of money claimed to be due to any one by the city of New Orleans.

We presume that plaintiff relies on the fact that his bills have been approved by the Clerk and the Judge of the Criminal Court. That approval is necessary; but—when the correctness of the bills is disputed—that approval does not close the door against any real and legitimate defense.

The services of the sheriff are as important as valuable to the City and the State; the compensation fixed by law for his services should not be arbitrarily resisted, or causelessly retarded—: but, when disputed—the sheriff's account is but a claim, and—until acknowledged by the final decree of a competent court—that claim can not be enforced by mandamus.

The city officers should not slightly refuse to pay or provide for the payment of an account which—as that of relator—bears on its face the sanction of a district judge; but—when beside that sanction, they find an error, or detect an illegality, they have the incontrovertible power to protect the city against the illegality or the error.

"Where officers, whose functions are chiefly ministerial, are yet intrusted with the performance of certain special duties requiring the exercise of judgment and discretion, they can not—as to such duties—be controlled by mandamus, and while they may be set in motion and compelled to act, the courts will not decide what their action shall be." High's Ext. Remedies, p. 46, *ante* State Ex. Rel. Louis Fix vs.

As it is evident that—whatever may be his right—the relator has

mistaken his remedy, it is useless to decide whether—if properly resorted to—that remedy could have been legally granted by the court in whose jurisdiction it was sought.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed, and the alternative writ of mandamus granted on the thirtieth of April 1877 discharged at the costs of relator in both courts.

No. 6813.

JOSEPH BILLGERY VS. THOMAS FERGUSON.

A writ of seizure and sale can not legally issue, until three days after notice of the decree of court, granting the writ, has been served on the debtor.

The notice of judgment in executory proceedings, which must be served on the debtor three days previous to the actual seizure of the mortgaged property by the sheriff, *must* be signed, and issued by the *clerk* of the court, and not by the sheriff.

If such notice has been issued by the sheriff, and objection to it is formally made before any sale of the seized property has taken place, the objection will be sustained, and no rights or liens will accrue to the seizing creditor, in virtue of the seizure.

An adjudication of property under a judgment subsequently annulled by a regular decree of court, conveys no title.

Where property, within the parish of Orleans, has been seized by the sheriff under a writ of *fi. fa.*, and remains in his hands unsold until the return day of the writ, he must, in order thereafter to legally hold the property, and thus maintain on it the lien acquired to the creditor by his seizure, make due return of the writ on its return-day, and cause the clerk of the court to make and give to him a duly certified copy of the writ, within twenty-four hours after the return of the original. Otherwise, the sheriff will be without authority thenceforth to maintain the seizure.

An act of sale which contains the stipulation of a real price, no matter how fraudulent the sale may be, can not be disregarded, and assailed collaterally, like a simulated sale.

Counter letters can have no effect against creditors, or *bona fide* purchasers.

A mortgage primarily without any consideration given to secure certain negotiable notes in the hands of any future holder, becomes a valid mortgage in favor of any innocent third person who may acquire one of the notes before its maturity, and for value.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Louque & Fernandez, J. C. Peirce, and *Paul Capdeville* for plaintiff and appellee.

McGloin & Nixon for defendant.

The opinion of the court was delivered by

EGAN, J. On the first of September, 1876, the plaintiff, as the holder of certain mortgage notes of the defendant, sued out a writ of seizure and sale against the mortgaged property. The *writ* issued the same day

the *order* was granted without the issuance or service of the three days notice to the seized debtor required by arts. 735 and 736 of the Code of Practice.

On the second of September, 1876, however, the sheriff, as seems to have been heretofore customary in New Orleans, issued a notice or demand of payment to the defendant, and on the fifteenth of November, 1876, a further notice of the seizure of the mortgaged property, which was served upon the defendant on the next day, the sixteenth. The property remaining unsold, the sheriff collected the rents, and on the fifth of March, 1877, the plaintiff took a rule upon him and upon Mrs. Baranco to show cause why the rents and revenues should not be paid over to him. Mrs. Baranco answered the rule, claiming to be entitled to the revenues in preference to all others, first, by reason of priority of seizure; second, by virtue of the sale made to her "of all the rights, titles, and interests of Raymond in and to the contracts under which said market was built, and in and to said market," on the twenty-eighth of July, 1876, by virtue of and under an execution from the Fifth District Court of Orleans, issued upon a judgment in favor of the New Orleans National Bank vs. Joseph Raymond.

Mrs. Baranco's counsel claims, also, to have set up orally other objections to the plaintiff's rule, which, under the view we have taken of the case, it is unnecessary to consider.

Joseph Raymond was subsequently made a party to the rule and answered, denying that there had been any legal seizure herein, for this, "that this being an executory process, no legal notice of issuance of same has been made." The right of either Mrs. Baranco or Raymond themselves to assert claim to the fund in controversy, by way of third opposition, regularly filed by themselves, under the facts presented in the record may well be questioned. Yet when brought into court at the instance and under the rule of the plaintiff, the former, a judgment creditor of Raymond, and the latter, himself the holder of other mortgage notes of the same series as those upon which the seizure and sale was sued out, may be held to have sufficient interest to contest plaintiff's right to the fund in controversy. The one that she may have opportunity to contest with all the parties before the court, *(as Ferguson is not)*, the reality and good faith of the sale and mortgage from Raymond, a judgment debtor, to Ferguson, upon which these proceedings are based, and the other for the reason before stated, that he appears to be the mortgagee and vendee of the defendant and to have received from him other notes of the same series with those of the plaintiff, and further, according to the terms of what is called a counter letter found in the record *as between himself and Ferguson*, at least to be entitled on certain conditions to retake the property of the market itself.

In the case of Hart & Hebert, in Liquidation vs. Pike Brothers & Co., 29 An. 262, we held, and still adhere to that view of the law, that in matters of seizure and sale, the preliminary three days notice to the debtor, of the granting of the judge's order required by articles 735 and 736 of the Code of Practice, must be issued by the clerk of the court in which the order is obtained, and not by the sheriff, whose only duty is to serve it upon the seized debtor, and that the writ itself "can not legally issue until that notice has been given." No such notice was either issued or served in the present case at any time, either before or since the issuance of the writ and the seizure under it. On the contrary, as we have seen, the writ was issued on the same day the order for its issuance was obtained. The notices emanating from the sheriff which are found in this record are not those required by law, and do not supply in the present case the want of those which are required.

In the case of Jouet vs. Mortimer, 29 An, 206, we declined upon the facts of that case to set aside an accomplished sale where title had passed without objection by the seized debtor for the want of such preliminary notice. Here, however, the state of facts is entirely different—no sale has been made under plaintiff's writ, nor is there any question of title to property acquired under such sale. On the contrary, the plaintiff himself comes into court by way of rule upon the sheriff and other parties named, to show cause why certain rents and revenues collected by the sheriff should not be paid over to him, as seizing creditor, with the distinct allegation that the sheriff "refuses" to pay the same over to him. It is not even a question of recovery back from the plaintiff, after the receipt of funds so derived from the sheriff. In other words, he is asserting affirmatively and originally a right to a fund in the hands of the sheriff by virtue of a writ issued without warrant of law where this right depends solely upon the writ so illegally issued and served at his own instance, and *before* the acquisition of any other or greater right than those resulting from the mere seizure alone. Let us now consider the rights of Mrs. Baranco—those of Joseph Raymond need not be further considered for the reason that he does not even ask to receive the fund from the sheriff but only to defeat the plaintiff's right to it, and besides he neither alleges nor proves any seizure on his own behalf. Of the second ground set up by Mrs. Baranco in her answer to the rule in which she "assumes the character of plaintiff in reconvention," (i. e.) her rights by virtue of the alleged adjudication to her of the property seized on the twenty-eighth of July, 1876, under suit 5938 of the Fifth District Court of Orleans, it is only necessary to say that the alleged adjudication has been annulled and set aside by a judgment of this court, and is not now urged or relied upon. The first ground: that is, her alleged priority of seizure and consequent right to be paid by preference to the plaintiff and "all

others," depends upon a *fi. fa.* issued upon a judgment of the Fifth District Court of Orleans, in the same case in which the adjudication was set aside. It is true that the sheriff's return shows that the same property was seized under this suit on the fourth of September, 1876, while the seizure under the writ of seizure and sale of plaintiff was not made till November 15, 1876. Were this then a contest over rents and revenues collected by the sheriff between these dates, and were both seizures *valid and subsisting*, Mrs. Baranco's superior right would unquestionably have to be acknowledged and adjudged. The contest is not, however, over any rents or revenues prior to the last seizure, which the sheriff expressly tells us were never collected by him, but the present controversy is confined entirely to the fund derived from rents and revenues collected by the sheriff since November 15, 1876, and as he testifies under the plaintiff's writ, and by virtue of instructions from his attorneys. It is not necessary to determine in this case, but yet proper to remark, that it is the duty of the sheriff without any specific instructions to collect the rents and revenues of property under seizure in his hands, and that the mere absence of specific instructions to that effect by one of two seizing creditors, and the fact that they are given by the other, will not authorize the collection for account of one of the seizing creditors only, nor can the rights of the other be affected by or made to depend upon such state of facts. The existence of an injunction for a time, however, and of conflicting claims to the money, to the knowledge of the sheriff, accounts satisfactorily not only for his not at once collecting rents and revenues but for his refusal to pay over those subsequently collected, otherwise than under order of court, without assuming that an efficient officer failed to do his duty under either process. Now, as to Mrs. Baranco's seizure: The *fieri facias* in her case, that of the New Orleans National Bank vs. Jos. Raymond, was dated September 2, 1876, and levied on the fourth of September, 1876, and had expired on the fifteenth of November, 1876, the date at which the plaintiff's seizure under the writ of seizure and sale was made, unless it was kept alive by the demand by the sheriff from the clerk of a copy in accordance with the provisions for the parish of Orleans contained in article 642 of the Code of Practice. By that article, in all cases where a seizure is made under *fieri facias*, except in the parish of Orleans, it is the duty of the sheriff to return the original writ on its return day, and *to make* and retain a duly certified copy of the writ and *to proceed under such certified copy* in the same manner as though the original writ was in his hands; and to make due return thereon; and in the parish of Orleans, the officer at the time of making return of the original writ "*shall cause to be made by the clerk of the court issuing said writ a* duly *certified copy hereof*," which must be delivered by the clerk to the officer making the

return within twenty-four hours from the time of his returning the original; and the officer *shall proceed under such certified copy so furnished him in the same manner as though the original writ was in his hands, and make due return thereon.*" We have been unable to find any such copy or any copy at all of Mrs. Baranco's writ, or of any return upon it in the record. So far as this record discloses the facts, the sheriff had no process, nothing under which "to proceed" on her behalf issued upon her judgment. As, however, Mrs. Baranco's writ and seizure were directed against Joseph Raymond and his property and that of Billgery against Thomas Ferguson and his property, and as we do not think the former can proceed otherwise than by a direct action, we are not called upon to decide what was the legal effect of the expiration and return of the writ without obtaining a copy upon the seizure already made prior to that time. He was, therefore, without either power or authority to proceed for either purpose after that date.

There is, however, another reason why giving to her the largest liberty to attack the sale from Raymond to Ferguson as a mere simulation, it can not be so regarded, certainly in this proceeding. That is, that whatever its purpose, and even though designed to defraud the creditors of Raymond, there appears to have been at least some of the elements of a real sale in it, and those very important ones, as this litigation demonstrates, that is, there was a real price evidenced by the payment of five hundred dollars each, and by the execution of the negotiable notes of the purchaser Ferguson, to a large amount, under some of which the money now in controversy has been realized. An inconsiderable price, or one stipulated to be paid in an unusual manner, may be a badge of fraud, but it is well settled that if there is a real appreciable price at all, however fraudulent the sale may be, it is not simulated. As to the so called counter letter, the plaintiff Billgery who appears in this litigation as the *bona fide* transferee, and holder for value of some of the mortgage notes given by Ferguson to Raymond in the sale as part of its price, was neither party nor privy to it, so far as appears from the evidence. Our own Civil Code provides, art. 2239, that "counter letters can have no effect against creditors or *bona fide* purchasers; although they are valid as to all others. That instrument in the present case is as follows: "I, the undersigned, do hereby certify that the sale made to me by Jos. Raymond, per act before T. Ducros, Notary, on the twenty-eighth day of October, 1874, of his rights, title and interest on the Second Street Market, I bind myself to re-transfer the said property to him when the said Joseph Raymond delivers to Thos. Ferguson the notes, that the said Thos. Ferguson has given to him as payment for the Revenue of Second Street Market.

"Signed, THOS. FERGUSON."

And taken in connection with the proof of the execution and real delivery of the notes to which this controversy itself bears testimony, this paper shows that Raymond himself, whatever his intentions, either in the sale or in the transfer of the notes, could not demand or obtain a re-conveyance of the property without delivering them up to Ferguson.

There was, then, sufficient reality in the execution of the sale and mortgage to prevent its being treated as against Billgery, at least, as a mere simulation, and therefore disregarded by Mrs. Baranco in making her seizure of the property. In Brewer vs. Gay, 24 An. p. 36, it was held, and we think properly, "that although there was primarily no consideration for the mortgage, yet it having been made to secure any future holder of mortgage notes, the moment they changed hands for a valuable consideration the mortgage became valid." This, however, is no new doctrine, but one of every-day practice, and, however unreal the original sale and mortgage as between the parties, the equitable doctrine which is recognized and enunciated in the article of the Code in regard to the effect of counter letters would come in aid of the plaintiff as against both Raymond and Ferguson and we may add all holding or claiming through either of them, while in order to sustain even a direct action in avoidance of the contract it would be necessary to connect Billgery with the fraud or simulation involved in it; and to have Ferguson before the court, also, as he is not. It is hardly necessary to cite the article of the Code, 2645, to show that if Billgery became transferee of the notes of Ferguson, or of any part of them, that such transfer carried with it and included the privileges and mortgages which were attached to them. This mortgage and vendor's privilege was recorded on the thirtieth of October, 1874, (the same day it was executed) both in the office of conveyances and of mortgages, and is admitted to have been so recorded anterior to the judgment of the New Orleans National Bank vs. Raymond, the same set up by Mrs. Baranco as subrogee. If, then, both her seizure and that of Billgery were even subsisting and legal she would have to yield to the superior claim and rank of the plaintiff in the rule on that, her only remaining ground for assertion of superior right. But as we have seen, under the facts of the case, that Mrs. Baranco could not directly seize and sell under her judgment against Raymond property standing on the public records in the name of Ferguson, to the prejudice of rights of mortgage acquired by Billgery *quoad* this proceeding a creditor not of Raymond but of the title holder Ferguson, and if she could not seize directly she can, of course, assert no right to the rents and revenues of the property. Upon consideration of the whole case—

It is, therefore, ordered, adjudged and decreed that the judgment of the court below be avoided and reversed; that the demands of Mrs.

Baranco be rejected, that she pay the cost of her reconventional demand, and Joseph Billgery all other costs, including those of appeal.

It is further ordered that the rule taken by said Billgery upon the sheriff be discharged, and that his writ of seizure and sale be returned as having been prematurely issued and levied, and the seizure under it released and that his right to procure the issuance of a new writ according to law, and after proper and legal notice be reserved to him.

No. 6679.

STATE VS. MOSES HARRIS ET AL.

On the trial of a motion in arrest of judgment in a criminal case, evidence will not be admitted to prove any error complained of, unless the error appears on the face of the indictment, or the proceedings.

After a verdict has been returned in a criminal case, it is too late to object to the composition of the jury that rendered the verdict, on the ground that some of the jury were too ignorant, or too illiterate to understand the evidence. Such objection should have been made a ground of challenge to the disqualified jurors.

The objection that the jury in a criminal case were not summoned under an order of the court before which the accused was tried, will not be sustained, on a motion in arrest of judgment, when it appears that the jury was summoned by a competent officer, before a competent court.

In criminal cases this court have no jurisdiction of questions of fact.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *McVea*, J.

J. H. Lamon, District Attorney, for the State.

Charles O. Lauve for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the tenth of February, 1877, one George Washington was killed in the parish of Iberville. Four brothers, Moses, Robert, Henry and Joseph Harris, accused of the homicide, were arrested, indicted for manslaughter, tried, found guilty, and sentenced to hard labor in the State penitentiary for the space of seven years.

Three of the defendants—Joseph, Henry and Robert—attempted, but in vain, to obtain a new trial and arrest the judgment. They are now before us—and, as they did in the lower court—they contend here, that:

First—After the judge's charge to the jury, three of the jurors were taken out by the sheriff in the court-house yard, whilst the others were locked up in their room, and that this amounts to the prohibited separation which vitiates a verdict.

Second.—The jurors by whom they were tried and convicted are

illiterate and not able to understand either the evidence adduced or the law cited on their trial.

Third—The order commanding the sheriff to summon the jurors for the term at which they were tried, was issued by the clerk, not—as it should have been—under the authority of Charles McVay, who was then the judge of the Fifth District, but under the usurped authority of James L. Cole, who—at that date—had ceased to be a judge.

Fourth—They—the appellants—were already engaged in a scuffle with George Washington, when Moses joined them in the fight, stabbed and killed said Washington. That—as there was no complicity, nor concert of action between them and Moses, they—if at all guilty—are only guilty of an assault and battery.

1. There is—in this transcript—but one bill of exceptions; we are informed, by its recital, that—on the trial of the motion in arrest of judgment, three of the prisoners—Joseph, Henry and Robert—offered to prove the alleged separation of the jurors, and that the Judge excluded the evidence of that fact, on the ground that "the error of which they complain is not apparent on the face of either the indictment or the proceedings."

The Judge held correctly.

8 R. R. 513; 10 A. 265; 14 A. 827.

2. The defendants were tried together, and—as they were entitled to forty-eight peremptory challenges—they must have been tried by a jury of their choice. If—as contended—the members of that jury could understand neither the evidence nor the law, and their ignorance rose to the height of a disqualification, they should have been challenged when tendered to the accused. It is now too late to urge that objection. They took the chances of a verdict in their favor, speculated—it may be—on the pretended ignorance of the jurors, and can not be allowed—after conviction—to again rely on that ignorance to claim the reversal of an unexpected verdict.

7 A. 284; 8 A. 515; 25 A. 537.

3. The jury was properly drawn and properly summoned. This is not contested. The jurors themselves might have objected that, though regularly drawn, though summoned by a competent officer, to appear before a competent Court, the order to summon them was not issued under the authority of the judge of that court, and that objection—on their part—might have justified their disobedience to that order, but it neither does, nor can justify the too tardy complaint of the three prisoners.

If tenable, that objection could have been successfully urged but on the first day of the term, and not after trial and conviction, not in a motion to arrest the judgment.

4. Three of the defendants insist that there was no complicity, no concert of action between them and Moses, and that it would be an infamy to allow the verdict returned against him to stand against them. This constitutes a question of facts, one which was heard and passed upon by the jury and the district judge, one which—under the plain article of the Constitution of the State, we are not authorized to examine and review.

C. 1868, Art. 74.

The faithful counsel representing the appellants has attached to the transcript the evidence taken on the preliminary examination of his clients. He appeals to us to weigh that evidence, and to protect—against what he denounces as a great injustice and a terrible wrong, these guiltless unfortunates.

We have read every page of that examination, and ascertained that on the tenth of February 1877, one George Washington was assaulted and pursued by four ruffians. That—when knife in hand, moved by the manifest intention of inflicting death, Moses was following and threatening his victim, his brothers who had seen the knife, who could not be mistaken as to his intention, continued both the assault and the pursuit.

Whilst retreating, Washington fell, and—when the constable reached the spot, he found the four monsters on the dying man. In his own words, one held him by the throat, one by the hair and ear, one was across his breast, and one appeared to be holding the feet.

When wrested from the grasp of those fiends, Washington was a corpse. A physician was called, examined the body, found that two mortal wounds had been inflicted, and inflicted—in his opinion—with two different blades; one had penetrated the heart, and—through the opening cut by the other, the deceased's intestines were protruding.

If we could consider the facts relied upon by three of the defendants, we would certainly conclude that the grand jurors by whom they were indicted have reduced the proportions of their crime—the Court, the proportions of a richly deserved penalty—that every one of them was a principal in a most revolting and cowardly murder, and that—under a proper charge—every one of them should have been hanged.

The hour has struck when felons of all grades should realize—or, if they fail to realize—should be taught that the mission of courts is not to protect them against the recoiling of a violated law, but to protect society against them, their criminal attempts and nefarious deeds. They should be effectually terrified, or inflexibly punished—and when, as defendants, they enter the court, reeking with the blood of murder, they should tremble and not hope.

The judgment appealed from is affirmed.

No. 6658.

MARTIN SOYE VS. M. A. PRICE ET AL.

It is not necessary that a succession which has been accepted with benefit of inventory should be entirely administered and liquidated, before the property of the succession can come into the legal possession of the beneficiary heirs.

Unless opposed by creditors, or heirs of age, the natural tutor of minors may take in charge and administer, as tutor, the property of the minors; and his possession of the property, in contemplation of law, is their possession.

Heirs of age who are in possession of the property of a succession, and minor heirs in possession of it by virtue of its being under the control and administration of their natural tutor, may be sued by any creditor of the succession, in a court of ordinary jurisdiction.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

E. Bermudez for plaintiff and appellee.

Ogden & Hill for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The only question urged in this Court, is as to the jurisdiction of the Sixth District Court, parish of Orleans, so far as relates to plaintiff's demand against the minors Alice and Frank Nairne, represented by their natural tutor, George L. Nairne.

Mrs. Amelia Nairne, wife of George L. Nairne, during her life borrowed $2500 from the plaintiff and, with the authority of the Court, executed a special mortgage to secure it. She died leaving three minor children; one, Miss M. A. Price, by a previous marriage, and the two named by the marriage with George L. Nairne. Miss Price was soon after emancipated and dispensed from attainment of majority. George L. Nairne caused an inventory of his deceased wife's estate to be made and qualified as natural tutor of his two minor children. He applied for, and upon advice of family meetings, obtained authority from the Second District (Probate) Court, to enter into an arrangement with plaintiff on behalf of said minors—Miss Price joining him therein—for an extension of time on said debt; and in order to pay the interest thereon in advance, and taxes and insurance due upon the property of the estate, he obtained authority to mortgage on behalf of said minors, joined by Miss Price, certain other property of the estate to amount of one thousand dollars. These arrangements were all carried into effect—the interest paid, debt extended and additional mortgage executed. In his applications for these orders, the tutor represents that the revenues of the estate were barely sufficient, under the existing depression, to maintain the children, and that it was to their evident interest that the property of the estate should not be forced to a sale. There is no doubt, and we believe no dispute, that the tutor, and the (emanci-

pated) heir who had accepted unconditionally were in the full possession and enjoyment of the estate of the deceased. There was no administrator appointed, nor was there any one demanding such appointment. The estate so far as it belonged to the minors was *in fact* in the hands and under the administration of their tutor and, so far as appears is so yet. Soye, the holder of said mortgage notes, brought this suit in Sixth District Court, *via ordinaria* for foreclosure and for judgment against Miss Price and the minors, and there was judgment accordingly—the plaintiff renouncing any right against the minors upon the $2500 note beyond the property inherited. The minors appeal and present as ground therefor that the suit so far as it was against them on the $2500 note, a debt of their mother's estate, should have been brought in the Second District Court—the Sixth District Court, having ordinary jurisdiction only, being without authority to entertain it. In reply to this objection plaintiff refers to Art. 996 of C. P. which is as follows:

"The case is different when such estates are in the possession of heirs, either present or represented in the State, although all or some of those heirs be minors; for in such cases the actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators, if they be under age or interdicted."

In 2 A. 840 this court, citing 6 N. S. 521, held that an action for a debt of the succession was maintainable in the courts of ordinary jurisdiction against minors represented by their tutor, when in possession of the estate.

In Martin vs. Cannon, 25 A. 225, it was held that the Second District Court has no jurisdiction of a suit for succession debt, against the heirs who are in possession, citing Art. 996 C. P. It is not stated whether the heirs in this case were or not beneficiary.

A similar doctrine was held in Swin vs. Gordon's succession. 25 A 221 and 231—also 25 A. 230.

But the defendant contends that minors being of necessity beneficiary heirs, *can not have technically a legal possession* of the estate until there has been an administration thereof and that administration is terminated.

He cites in support of this proposition a series of decisions, commencing with Ingram vs. Ingram, 3 N. S. 371, where it was held that heirs of age and who receive an estate purely and simply may be sued in courts of ordinary jurisdiction. Also, 17 La. 500, where it was held that until a succession accepted with benefit of inventory be administered upon and liquidated, it must of necessity remain under the control of the Probate Court.

In 2 R. 30, it was said that it was not easy to reconcile the Code of Practice with itself on this subject—and the Court says that Art. 996 refers "either to heirs absolute, or beneficiary heirs who have come to the possession of an estate after it has been fully administered."

So in 4 L. 220—"Where some of the heirs are minors the succession must necessarily be accepted with benefit of inventory, and all claims against it brought, an administrator having been appointed, in the Probate Court." Again it is said:

"Art. 996, C. P., applies to estates accepted *absolutely*, or those which *having been administered* by a curator, etc., have come into possession of the heirs. If they be all of age, and accept unconditionally, they are immediately put in possession, and are suable before the ordinary tribunals for their virile portion of the debts as if contracted by them. If some of them be minors the succession can not be accepted by, nor for them, *but with benefit of inventory.*

"When thus accepted it can not be partially administered but must be *placed under an administrator*, and no *part comes legally into their possession as heirs*, until the *administration be terminated*, or a partition be legally made among them." 4 R. 20, 412; 7 R. 24; 17 L. 109; 13 L. 379.

It may, therefore, at least be said that all the decisions are uniform to the effect that where the heirs, whether pure and simple, or beneficiary, *are legally in possession* of an estate, they may be sued for its debts, in courts of *ordinary jurisdiction.* So that the controversy narrows itself down to this: Can beneficiary heirs, (minors are always such,) *come legally into possession*, without the estate having been previously fully administered and liquidated?

Notwithstanding the numerous authorities cited by counsel of defendants, from our earlier reports, we think it is now well settled that minors (who are beneficiary heirs of necessity) may come lawfully into the possession of the estate of their deceased parent without there having been any previous administration thereof. In 4 A. 561, "Labranche vs. Trepagnier," it was held to be settled "that the natural tutor or tutrix, *as such*, has a right to administer the succession of the deceased spouse, unless the heirs of age or creditors require the appointment of an administrator." This was but the affirmance of the same doctrine in effect, held by this Court in 1 A. 239; 2 A. 462; 3 A. 502.

In Monget vs. Penny 7 A. 134, it was held that "the wife's creditors need not provoke the appointment of an administrator to her succession, but may sue the natural tutor of its beneficiary heirs as its representative." See also to same effect 5 A. 180; 10 A. 534; 14 A. 641.

These cases clearly recognize the right of the natural tutor of the minor heirs of the deceased spouse, in the absence of opposition, to take

possession of the estate in his capacity as tutor, and to administer it as other property of his wards for their benefit. The possession of the tutor is the possession of the minor, and all his acts are in the name and on behalf of his wards.

But as an original proposition, and aside from these decisions, we think that a fair interpretation of Art. 996 itself shows that minors and beneficiary heirs may come into possession before the estate "has been fully administered and liquidated." When an estate has been fully administered and liquidated, there remain no "debts due from the succession." Why, therefore, does the Article speak of suing beneficiary heirs before the ordinary tribunals, "for debts due by the succession," if such estate *can not come into their possession until these debts are all paid?* The very fact that the Code gives a right to sue them for such debts when they are in possession, shows conclusively that they can obtain possession before these debts are paid and, therefore, before the estate has been "fully administered."

The true doctrine is this—that successions accepted under benefit of inventory should and must be administered where the creditors or heirs of age require it. But if no such demand for administration is made, the natural tutor of the minor heirs of the deceased may, as such, take possession and administer their interests therein, and that any creditor of the deceased may, under Art. 996, bring suit for their debts against the tutor in the courts of ordinary jurisdiction.

The well established jurisprudence under Arts. 65 and 66 of the Code of Practice confirms us in these views. Had the creditor in this case proceeded *via executiva* instead of *via ordinaria*, there being no administrator, his right to proceed, contradictorily with the tutor to enforce his mortgage can not be doubted. Again Art. 1671 of Revised C. C. gives the heirs, without qualification, the right when the estate is in the hands of executors to take possession, on tendering the amount of the movable legacies and giving security to creditors, as provided by Art. 1012. See Swin vs. Gordon above cited. We think, therefore, that the minors in this case were in the legal possession through their natural tutor.

We conclude, therefore, that the exception to the jurisdiction of the Sixth District Court was properly overruled, and as no other defenses are urged, and as we see no error in the judgment appealed from, it is affirmed with costs.

No. 6682.

STATE EX REL. FRED. DUFFEL, DISTRICT ATTORNEY PRO TEM., ET AL. VS. MORRIS MARKS.

A party is not eligible as District Judge who has not practiced law in this State for two years, next preceding his election.

In legal contemplation, a party can not be said to have practiced law, even though, as a matter of fact, he may have done so, if he has not previously qualified to practice, by complying with the requirements prescribed by the constitution.

Because one has acted as District Attorney, he can not be said, in a constitutional sense, to have "practiced law."

A mere resolution, passed by the Board of Administrators of the University of Louisiana, that the degree of bachelor of law shall be granted to a certain person, and directing the President of the University to confer said degree, and the usual diploma, followed by a refusal of the President to obey the direction, has not the character and authority of a diploma.

The degree of bachelor of law, conferred on a party by the Board of Administrators of the University of Louisiana, will not authorize him to demand of this court a license to practice law in this State, unless the diploma is signed by the President of the University, and the Professors of the Department in which the student has graduated.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Maher*, J., acting for *Flagg*, J.

J. C. Egan, Assistant Attorney General. *Frederick Duffel*, District Attorney *pro tem.*, *E. N. Pugh*, *E. P. Poché*, *H. F. Duffel*, *R. N. Sims*, *R. P. Landry*, and *T. R. Winchester*, for plaintiff and appellant.

J. D. Augustin, *Gus. A. Breaux*, *St. M. Berault*, *Emile Legendre*, *Jno. H. Ilsley & Son*, *William R. Mills*, *J. L. Gaudet*, *John Cheevers*, *L. De Porter*, *Gervais Leche*, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

DEBLANC, J. The transcript, in this case, is a duplicate of the transcript in case No. 6681, and the motion to dismiss the appeal, filed in this duplicate, is—with but a slight difference—the identical motion already passed upon by this court. That difference is simply this: the last day of the delay fixed by law for the return of such appeals, occurring on a Sunday, the district attorney *pro tempore*, apprehending the very objection raised by defendant, caused to be filed in this court, on the ninth day after the judgment was signed, one of the transcripts herein mentioned; the other transcript was filed on the eleventh, and could not have been filed on the tenth day, which, as admitted, was a Sunday. That both were filed in time is no longer an open question.

C. P. 318, 575. 8 L. 223. 6 R. R. 20. 14 A. 105. 24 A. 333.

The motion to dismiss is overruled.

ON THE MERITS.

The opinion of the court was delivered by

MANNING, C. J. The object of this suit is to test the right of the defendant to the office of District Judge of the fourth judicial District. It is alleged that he was elected to that office in November 1876, but that he can not hold it because of ineligibility, not having all of the qualifications prescribed by the Constitution. The special qualification wanting is, that he shall have practised law in this State for two years next preceding his election. art. 84.

The respondent, after making a general denial, bases his claim to the rightful occupancy of the judgeship upon a "degree of Bachelor of Law, duly conferred by the administrators of the University of Louisiana on the 24th. of April 1872," and in virtue of his election and commission and qualification as district attorney of the same district in 1872, the duties of which latter office he performed from that time until his election as judge. He alleges that he has practised law in this State for two years next preceding his election, the right to practice being based upon the Degree above mentioned, and the actual practice upon his performance of the functions of prosecuting officer, and upon certificates of clerks of courts and of litigants that he had practised.

It can not be presumed that the organic law, in using the words, "shall have practiced law in this State," can intend any thing but a practice under legal permission. Those who frame a fundamental law, or any law, can not be supposed to have in contemplation the conferring a benefit in express terms upon a violator of the law. If therefore a person shall practise law, without first obtaining legal permission and in defiance of prerequisites ordained as of essential compliance, he can not base upon the fact of having thus practised a legal right to do something else, of which a lawful practice is the condition precedent. The certificates of clerks, and the testimony of litigants, that the defendant had practised law for two years is of little consequence, unless they are accompanied by a satisfactory exhibition of the authority from which he derives his legal right to practise.

Nor is the fact of holding the office of District Attorney proof that the holder had 'practised law' in the sense of those words in the Constitution, for the same instrument fails to require that those officers shall be lawyers. art. 92. It is argued that the Constitution must necessarily intend *ex vi termini* when it provides for the office of district *attorney*, that he shall be an attorney at law, but it may be answered that the same instrument must equally intend that a parish judge should have been a lawyer, for men must be lawyers before they can in any proper sense be said to be judges, and if it requires a knowl-

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edge of law to be a district attorney, how much greater knowledge does it require to administer the succession system of our State.

The defendant's eligibility to the district judgeship depends upon his legal right to have practised law for two years next preceding his election. That right emanates from the proceedings of the Board of Administrators of tne University of this State on April 24th. 1872. They shall be copied in full:

"At a meeting of the Board, held this evening, the following preamble and resolutions offered by Mr. Fellows, was adopted by a vote of five to three in the negative, and a motion to reconsider which vote was laid on the table, viz.:

Whereas, the President of the University being present, and having stated that it would be impossible for him to declare which of the rejected students received three favorable votes on the examination by the professors, and which did not;

Therefore, be it resolved that the degree of Bachelor of Laws be granted to and conferred upon the following members of the class of 1871—72 of the Law department of the University of the State of Louisiana, namely (here follow several names and among them Morris Marks) and that the President of the University be directed to confer upon them the said degree of Bachelor of Laws, and that the usual diplomas be granted and issued to them."

The text of the law invoked by the respondent is;—"The administrators of the University of Louisiana shall have the right of conferring, under the common seal, on any person whom they may think worthy thereof, all literary honors and degrees known and usually granted by any university or college in the United States or elsewhere.

The degree of Bachelor of Law and Doctor of Medicine, granted by them, shall authorize the persons on whom it is conferred to practice law, physic and Surgery in the State." Rev. Stats. 1870 Sec. 127.

No diploma was ever issued to the defendant. The President of the University never conferred upon him the degree, as the resolution of the administrators directed. The Board resolved that the degree be granted to and conferred upon him, and to shew that their own construction of the scope of the resolution was, that the act was inchoate, proceeded on the instant and in the same sentence to direct that the additional, and supplemental act be done which was necessary to make the conferring the Degree complete, i. e. the President must confer it.

It is manifest besides that the two clauses of the law above quoted refer to two different kinds of Degrees, one of which is purely honorary and is conferred upon persons already distinguished in some branch of literature, science, or other learning, and the other is conferred upon students who have passed the examination necessary to entitle them to

it. The first of these degrees is to be conferred upon any persons whom the Administrators may think worthy thereof, and it is to be a literary honor, but the last is to have the greater effect of authorizing the recipient to practice law or physic. Can it be reasonably contended, or inferred, that power is thus given to the Administrators to introduce to the public, or rather to impose upon it, a person authorized to prescribe for the ailments of the body who has never read a line nor heard a lecture upon any branch of medicine? If it be true that the degree of doctor of medicine can be conferred by the administrators upon whomsoever they may think worthy thereof, although the recipient may be confessedly without diploma from any Faculty, and if that Degree thus conferred entitles him to practice physic, then an innovation has been made upon the established usages of universities which carries with it dangers of a most appalling character. And the same is of course true in the department of Law.

The statutes upon the subject must be construed together, and as a whole. In fact, the book known to the profession as the Revised Statutes of 1870 is but one Act. That revisal embodies the various laws on this matter under the head of 'Attorney at Law.' Secs. 111–130. The substance of those sections, necessary for consideration now, is as follows;—Any citizen of the United States, possessing the qualifications of a legal voter, except that of residence, shall be admitted to practice as an attorney at law in any court of this State, upon obtaining a license from the Supreme Court of this State. That Court shall grant licenses to applicants possessing the qualifications already mentioned, 1st. to all graduates of the Law Department of the University who shall produce evidence of good character; 2nd. to those who shall produce a license from any other State, or a diploma from any law school of any other State with evidence of good character, and who shall have been examined in open Court touching their fitness to practice law in the courts of this State, and who shall have been found qualified; or who, having a license from a Superior Court of any other State, shall have been examined by one of the judges of the Supreme Court, or by two District judges, and have been found qualified; 3d. to those who, upon examination before the Supreme Court, according to its regulations, shall have been found qualified.

It is not pretended or alleged that the respondent had or has a license from any other State, or a diploma from any law school of any other State, or that he was ever examined by the Supreme Court and found qualified, and therefore he is not in either the second or third classes. It is not pretended or alleged that he is a graduate of the Law Department of the University of this State, which would entitle him to a license from this court without examination by its members. It is

admitted that he never was licensed by this Court at all—that he never received any diploma from the Faculty of the law school, and it is proved that the degree of Bachelor of Law was not conferred upon him, unless the resolution of the Board of Administrators that that degree be conferred upon him, and the direction to the president to confer it upon him, be held to be equivalent to the actual conferring of the degree.

We do not think a mere transcript of a resolution of the Board of administrators stands in the place of a diploma and a degree, and when sec. 127 enacts that those upon whom the degree of Bachelor of Law has been conferred by the Administrators of the University shall be authorized to practise law, it must be construed with sec. 111 which prescribes that a license from the Supreme Court of the State must be obtained in order to enable any one to practise law, and with Sec. 112 which authorizes graduates of the Law Department of the University to be admitted to practise without examination by the Court, and because they are graduates. And that this construction of Sec. 127 (which is identical with Sec. 1359) is correct, is conclusively shewn by its concluding clause, for immediately after the provision that the degree of Bachelor of Law when conferred shall authorize the person receiving it to practise law, it is enacted that all diplomas granted by the Board shall be signed by the President, and the professors of the department in which *the student* may have graduated. And elsewhere it is enacted that the examination of candidates for their degrees in the medical and law departments shall be under the exclusive control of the Faculty of those departments respectively. sec. 1368.

The respondent was not a graduate of the Law Department of the University. The resolution of the administrators, which is the sole basis of the respondent's right to practise law, shews that he was rejected when he applied to be graduated. "Whereas the President of the University being present, and having stated that it would be impossible for him to declare which of the *rejected* students received" etc. Having been rejected, and being without diploma, without degree, without a license from this Court, the respondent nevertheless insists that he has practised law, as the Constitution requires he shall do for a given time, and is therefore eligible to the office of District Judge. We can not hold that the unauthorized practice of a profession entitles one to its highest rewards and honors, when its lawful practice is a condition or prerequisite of eligibility to them. Some of the members of the convention protested against the adoption of the Judiciary system as is now contained in the Constitution. The short time required for practise as a condition of eligibility to the district judgeship was one of the grounds of protest. The safeguards for the protection of the legal

profession and the judiciary, afforded by the present Constitution, are slender enough. The portals by which admission to the legal edifice is obtained are widened by the Constitution of 1868 beyond former precedent, and we can not enlarge them further without the express mandate of the law. The law has not thus commanded.

We have divested the case of all extraneous matter, of those features which are not essential to be noticed. For instance, Flagg, the former district judge was made one of the relators. On exception, his right to join the district attorney in the action was refused properly, and it remained good upon the relation of the latter officer alone. So, a new trial was prayed on the sworn allegation of the discovery of new and important evidence, and this was improperly refused, but the counsel for the relator in oral argument was content to rest the case upon the evidence received on the trial. The brief of the counsel for the respondent discusses this new evidence, which comes up in the record appended to the motion for a new trial, and from which it appears that the resolution of April 24th. 1872 was rescinded by the administrators on the 10th. of the following month, and it is argued that the Board could not, by thus rescinding their previous resolution, deprive respondent of a right which was vested in him by it. If the new evidence were before us properly we might be of the opinion that this is assuming that the respondent had a vested right upon the mere adoption of the resolution, but it is not necessary that we should pass upon that question.

We think the respondent was and is ineligible to the office of District Judge, and therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the respondent Morris Marks is not eligible to the office of Judge of the Fourth judicial District of this State, which office is now declared vacant, and that there be judgment in favor of the relator against the respondent for costs of both courts.

CONCURRING OPINION.

MARR, J. I do not think it was the intention of the legislature to empower the University of Louisiana to confer the degree of Bachelor at Law or Doctor of Medicine on any other persons than such as had been students and had graduated in the Departments of Law and Medicine respectively.

Universities consist of colleges and departments; and I know of no university which confers the first degree, whether Bachelor of Arts, Bachelor at Law, or Doctor of Medicine, on any other than the students

who have graduated in the academical department, or the law department, or the department of medicine, under its jurisdiction, except the University of London, founded in 1836, which has no schools, or colleges, or halls of its own, or subject to its jurisdiction; and which admits to its degrees such as can pass the rigid examinations which it prescribes, without respect to the schools or colleges in which they may have pursued their studies.

The Act of 1855, Relative to Attorneys, page 121, requires this court to grant license to practice law to graduates of the law department of the University of Louisiana; and this phraseology: "*Graduates of the Law Department*," is used in all subsequent acts on the same subject.

The Act of 1855, relative to the University of Louisiana, page 420, section nine, authorizes the administrators to confer, under their common seal, on any person whom they may think worthy, "all literary honors and degrees known and usually granted by any university or college," etc.

This evidently empowers the administrators to confer the honorary degrees, which are not dependent on examination, and are complimentary merely.

The next clause of this section provides that the degree of Bachelor at Law and Doctor of Medicine, granted by the administrators, shall authorize the person to practice law, physic, and surgery in this State.

We must refer to other parts of the statute, to ascertain who may be admitted to these primary degrees, Bachelor at Law, and Doctor of Medicine; and we find that the examination of candidates for these degrees is under the exclusive control of the faculties of law and medicine, respectively. Section 18, page 421.

I conclude, therefore, that the administrators have no authority to grant these primary degrees to any other than students who have passed their examination satisfactorily in the one or the other of the departments; and that the latter clause of section nine refers to and means "graduates" in the law department, and "graduates" in the department of medicine; and that the legislature, when in acts relative to attorneys it uses the words "graduates of the law department," does not mean to extend the rights and privileges which it grants to such "graduates" to persons not "graduates" of that department, upon whom the administrators may have chosen to confer honors and degrees.

In my opinion the power of graduation in law or medicine belongs to the faculty of law or of medicine exclusively; and that neither the administrators nor the judicial tribunals can, lawfully, nor do I think they should have power to control the faculties of these departments in the exercise of this discretion, which is wisely granted to them by section eighteen of the act of 1855, section 1368, of the Revised Statutes; and

which is in accordance with the practice of universities in the United States and elsewhere.

I think article eighty-four of the Constitution, which requires, for eligibility to the judgeship of the district court that the person shall have practiced law two years, means that he shall have practiced in virtue of lawful authority, a license granted in conformity to the laws of the State.

It is to be regretted that the students, including defendant, who were refused graduation by the faculty of the law department of the university, if they felt aggrieved, and believed themselves qualified to practice law, did not present themselves for examination to the examining committee appointed by this court. If they had succeeded before that committee they would have been licensed by the court, and would thus have obtained all the substantial benefits of graduation in the law department of the university.

I concur in the decree pronounced by the Chief Justice.

CONCURRING OPINION.

EGAN, J. I do not think that the possession or exercise of any office for which that qualification is not required constitutes one "learned in the law," in the sense in which it is used in the constitution as a necessary qualification for a district judge.

It is not pretended that the defendant ever obtained a license, *eo nomine*, to practice law either in Louisiana or elsewhere. There is no question in this case of the power, or exercise of the power of the Board of Administrators of the University of Louisiana, to confer honorary degrees of any class upon a person not a student, nor of the effect of such degrees when conferred. The evidence in this record, which is furnished by the defendant himself, shows that he was a student of the University, that he was examined for his degree by the professors constituting the Faculty, and, failing to pass a satisfactory examination, that he was rejected by the Faculty, who refused to recommend him to the Board of Administrators as one qualified to receive his diploma or to sign his diploma in accordance with the law and the usual rules of the University, when a student has passed a satisfactory examination; but that notwithstanding this rejection and failure of the defendant to be pronounced qualified or "learned in the law," by those who are most competent to do so, and *whose exclusive province* it is so to pronounce, the Board of Administrators undertook to pass and did pass a resolution, that his degree be conferred upon him. Upon this resolution alone the defendant rests his right, not only to a diploma, to his degree of bachelor of laws, but he further claims that that resolution of the Board

of Administrators of itself, and without any thing further, constitutes him learned in the law, and entitles him to practice law in all the courts of Louisiana. The law creating the University and regulating its departments and powers, R. S. 1870, sec. 1360, provides that all diplomas granted by them, (i. e. the Board of Administrators) shall be signed by the president of the University, the chairman of the board, *and the professors of the department in which the student may have graduated*, and by such *other officers* of the University as may be provided for by the laws of the University, and that it must be under the seal of the University. Sec. 1359.

This, then, is the evidence of graduation, of a degree conferred, which is contemplated and provided for by law, and which is in contemplation of every student who enters the portals of the University. Can it be said, then, that the degree is complete, and that all the rights and privileges derived from it exist till all this evidence of concurring will on the part of the officers of the University is obtained? If the defendant was really entitled to his degree and to have the diploma executed and delivered to him, when so much depended upon it why did he not present himself before the courts and compel its execution and delivery, and why, if the resolution of the board, upon which alone he relies, had all the effect of the diploma, which it simply directed to be conferred, did he not present himself with it before this court and have *the judicial recognition* of his right to practice law, which the law contemplates, R. S. 111 and 112, in conjunction with which the provisions of article 127 must be read, as they are all on the same subject-matter—parts of the same statute—and must be construed in harmony?

The University of Louisiana was established as an institution of learning, with a faculty of learned men in each department, with a prescribed course of study, in each of which proficiency (i. e.) learning, in which that faculty are made by the very terms and by the evident intent and reason of the law, "exclusive" judges. See R. S. section 1368.

The only power of the administrators, many of whom are not themselves learned in any department, is to grant the diploma after the student shall have passed his examination before the learned professors, and has been by them recommended for his degree. It is true that the Board of Administrators have the duty and power under the law to appoint a president and professors, but once that appointment has been made, that power is exhausted, unless a vacancy occurs, and once they receive their appointments, the independent and exclusive powers and duties of the professors are as clearly established and defined as those of the administrators themselves, of whom as to these powers the faculty is as independent as is the Board of Administrators of them. The very objects and aims of the University would be subverted were the theory

of the defendant to prevail that *the examination* by the faculty means nothing—that the prescribed course of study means nothing—and that a mere whim, a caprice of a board, in large part composed of men not themselves qualified for the task, should be able, against the protest of those who are especially qualified, to confer the honors of the institution upon the faithful and competent and the unfaithful and incompetent student alike. The absurdity of such an argument is apparent. The practice of all institutions of learning is against it, and the particular act of which the defendant claims the benefit was not only without warrant of law, but directly in the teeth of the spirit and letter of the law and a fraud upon it.

For these reasons, in addition to those given in the opinion of the Chief Justice, I concur in the decree in this case.

This opinion is intended to be applicable to both cases versus the same defendant.

DISSENTING OPINION.

DEBLANC, J. Defendant was elected and commissioned as Judge of the Fourth District of the State—this is admitted. From the month of December 1872, he practiced law in and out of his district—this is established. It is—however—denied that he ever was an attorney at law.

To repel that charge, defendant has introduced in evidence a copy of the proceedings of the Board of Administrators of the University of Louisiana, at a called session held on the 24th of April 1872, and held—I am convinced—to consider and discuss only one subject.

The members of the Board were certainly advised of the cause of that extraordinary session—and, right or wrong, whatever was proposed or done on that occasion, was knowingly proposed, deliberately done. The action of the Board may have been strangely irregular, but can we now avoid that action and destroy its effect?

At that session what did they resolve? "That the degree of bachelar of Laws be granted to and conferred upon Morris Marks and other students of the University, and that the President of said University be directed to grant said degree, etc.

Had the Board the power to so resolve? The second paragraph of section 1359 of the Revised Statutes provides "that the degree of Bachelor of laws and doctor of medicine, granted by them, shall authorize the person on whom it is conferred, to practice law, physic and surgery in this State."

Section 1360 ordains "that all diplomas granted by them shall be signed by the President of the University, the chairman of the Board and

the professors of the department in which the student may have graduated."

The last paragraph of Section 1359 refers, in terms which can bear but one meaning, but one construction, to the degree of Bachelor of Laws and doctor of medicine conferred by the Board of Administrators—: Section 1360, to diplomas granted by them, and which—when granted—must be signed as stated.

The first of said sections conveys the not unreasonable impression that any degree may be conferred on any one, by the Board of Administrators; the very next section seems to restrict their right of granting diplomas to only the students who have graduated in the University.

How reconcile these provisions, unless by holding that—under that as absurd as imperfect legislation, when the Board assumes the important prerogative of conferring a degree, the recipient needs but a certificate of that fact to exercise the chosen profession, and that—when the student has pursued a regular or a special course, when he has been examined and graduates, the diploma granted by the Board shall be signed by the President of the University and others.

The examination of candidates for their degrees in the law and medical departments is under the exclusive control of the faculty of each of those departments—that is eminently proper; but those faculties are not—as they should be—authorized, by our Statues, to grant degrees or diplomas. According to the letter of the law, their only mission is to either recommend or refuse to recommend the candidates, and to whom? To the administrators, under whose control and supervision, the University, and all its departments, have been placed by law, to the administrators who alone—it seems—have the power to confer degrees and grant diplomas.

As to the rejection or admission of candidates, is the decision of the faculty a final, an irrevocable decision. Were it dictated by hatred, impatience or injustice—and, in this instance—we are far, very far from presuming that it was, is there no higher authority to which the student could appeal for redress? Were the rejection as causeless as unjust, were it so regarded by the administrators without exception, by every teacher but one, would they be—either collectively or separately—powerless to defeat an admitted wrong, powerless to enforce a manifest right, powerless to protect, against an acknowledged persecution, the proscribed applicant? Assuredly not.

In May 1872, the Board rescinded the resolution of the twenty-fourth of April, and rejected in a lump those whom the Board itself had admitted by the wholesale. They were twice wrong, apparently at least—for, if they properly admitted, they improperly rejected. Be this as it may; without specifying the causes which prompted their action, without des-

ignating those of the already admitted candidates against whom those causes existed, the Board could not justly divest and destroy—as to all—a conferred degree and a vested right.

Whatever may have been the motives by which the Board was actuated, we are not at liberty to select between its first and authorized action, and its subsequent and too vague and indefinite contradiction. It had the power to admit, it did admit. It conferred on Morris Marks the degree of Bachelor of Laws, and—under their own grant, he was authorized to practice law in the State. Can we, after more than five years, reverse the first decision of that Board, and maintain its own unexplained reversal of that first decision. I believe not.

To sustain defendant's disputed title, there are four uncontradicted facts, one uncontradicted presumption: the degree of Bachelor of Laws was conferred upon him: he paid as such a license to the State: he has practiced law for more than two years previous to his election: he was elected to the office he claims—these are the facts. Though he could not remember by whom he was sworn, he testified that he took the oath prescribed by law—this is the presumption.

Against him, what is there? He did not obtain, or failed to procure the diploma which constitutes the evidence of a pre-existing right, the last and perhaps the not indispensable link of the chain of an attorney's title, when that title is granted by the administrators of the State University. What more is there against him? A doubt: the repeal of the April resolution may have been commanded by grave considerations, but those considerations have been neither published, nor proven—and he is entitled to the benefit of that doubt.

I respectfully dissent from the views and decree of the majority of the Court.

DISSENTING OPINION.

SPENCER, J. It is with regret, and with much reluctance and distrust of my own judgment, that I venture, in so grave a matter as this, to differ with the majority of my brethren, and to dissent from their conclusion—but I am constrained to do so by convictions not hastily formed.

I do not hesitate to say that, in my opinion, no one but an attorney at law can "practice" within the meaning of that article of the constitution which fixes the qualifications of district judges; and that, therefore, none but *attorneys at law* can be district judges.

Nor do I hesitate to say, that the fact of one having been district attorney *does not* make him an attorney at law, and does not give him,

therefore, the qualifications for the district bench. One does not become an attorney at law by or through being district attorney. That is not one of the modes prescribed of becoming an attorney at law.

If, therefore, the defendant was an attorney at law, and if he practiced as such for two years preceding his election, as judge of the district court, there remains no other basis for his pretensions than the action of the Board of Administrators of the University of Louisiana, conferring on him the degree of Bachelor of Laws. The first inquiry which naturally presents itself is, did that Board have the power to confer said degree?

Section 1359, Revised Statutes, page 269, says: "They (the Administrators) shall have the right of conferring under their common seal, on any person whom they shall think worthy thereof, all literary honors and degrees known and usually granted by any university or college in the United States or elsewhere. The degree of Bachelor of Laws and Doctor of Medicine granted by them shall authorize the person on whom it is conferred to practice law, physic, and surgery in this State."

If there is not imposed elsewhere some qualification or restriction of the power here conferred, I do not see how it is possible to doubt its plenary and absolute character. The first clause of the section gives the Board power to confer "*on any person whom they shall think worthy thereof all literary honors and degrees* known and usually granted by any university or college in the United States or elsewhere." The second clause of the section declares that "the degree of Bacheler of Laws * * * *granted by them, shall authorize* the person on whom it is conferred to practice law * * * in this State." Now it is matter of no moment whether the degree of "Bachelor of Laws" is a "literary degree" or not; for the power to confer both "literary degrees," *and* the "degree of Bachelor of Laws" is expressly and unmistakably given. So whether the latter is a subdivision of the former, or independent of it, makes no sort of difference.

Is this power to confer "literary degrees and honors" and the degree of "Bachelor of Laws" restricted or modified by other sections of the law? We are told that the power to confer "literary degrees" *is not*, but that the power to confer the degree of "Bachelor of Laws" is qualified and limited by section 1360, which provides how diplomas shall be signed. But is not a diploma as essential to the conferring of a "literary degree" as to that of the "degree of Bachelor of Laws?" and if this section, providing that diplomas shall be signed by certain officers, operates a restriction upon the power to confer the one degree, why not upon the power to confer all other degrees? I do not regard this section as operating any restriction upon the power of the Board in either case. A diploma is simply evidence of the grant. If the law gives the Board

authority to grant these degrees, and then directs that as evidence of the grant, certain officers of the university shall sign a diploma, these officers could not legally withhold their signatures. Their act in signing would be purely ministerial, and they could no more refuse to perform it than the clerk of this court could refuse to attest and verify an order or decree of this court.

I do not intend to assert that the members of the faculty are in fact obliged to sign a diploma for a decree conferred by the Board under the circumstances of this case. I rather think that their duty to do so is confined to the cases where they have examined and recommended candidates to the Board. I think it is too clear for argument that section 1368 in no wise qualifies the power of the Board in the matter under discussion. It simply gives the faculty the exclusive control of "the requisites for admission" (to the university of course), "the examination of candidates for their degrees" (referring of course to those who claim degrees *as students*), "the management of the pecuniary concerns, the salaries of the professors, and the tuition and terms of admission."

I conclude, therefore, that the Board of Administrators had the unqualified and absolute power of conferring "all literary degrees," as well as that of "Bachelor of Laws;" and *that* whether "Bachelor of Laws" is a "literary degree" or not—a point upon which I do not deem it necessary to express any opinion. It being therefore clear, in my opinion, that the Board had the power to confer on the defendant the degree of Bachelor of Laws, the next inquiry is, did it do so?

On the twenty-fourth of April, 1872, it passed the following resolution:

Be it resolved, that the degrees of Bachelor of Laws BE GRANTED TO AND CONFERRED UPON the following members of the class of 1871-1872 of the Law Department of the University of the State of Louisiana, namely: Morris Marks and others. And that the president of the university be directed to confer upon them the said degree of Bachelor of Laws, and that the usual diplomas be granted and issued to them.

A true copy.

[Extract from the minutes.]

Signed: H. R. SCHMIDT,
Secretary Administrators.

This language is certainly not ambiguous. It confers "the degree of Bachelor of Laws" upon Morris Marks, without "proviso" or "qualification." It does not *request* but *directs* that the president of the university confer that degree upon him and that a diploma "be granted and issued" to him.

The board by that resolution exhausted its power. It conferred the degree. It performed the legislative or judicial function. The neglect or refusal of the president to *formally* confer, announce, or deliver the

evidence of the grant could not have the effect of destroying the grant—the decree itself. I do not undertake to say that it was the duty of the president to comply with this order of the Board—for I think it might be plausibly argued that his duty in that regard was confined to graduates of the university. But I do say, that, if the Board had the power to confer the degree, and if it was the president's duty to deliver the evidence of it, his performance or non-performance of that duty could in no way affect the validity of the action of the Board. The diploma is but the evidence in convenient form of the fact that a degree has been conferred. It is but the evidence of a right, and not the right itself. It neither increases nor diminishes the extent or enjoyment of the right, which exists independently of it.

Whether the law conferring this power on the Board is wise or unwise, and whether the Board, in the exercise of its power in this particular instance, acted judiciously, are questions with which this court has nothing to do. This power, this discretion, had to be lodged somewhere; and like all other human authority it is liable to abuse. The law makes the Board the judge of *the worthiness* of those on whom it confers degrees. In my opinion its decision does not admit of review by any other authority upon that point. I say this, not because there has been any attempt in this case to show that the defendant was unworthy, but simply to meet that branch of the argument which is predicated upon the supposed impropriety of allowing men (who may not themselves be learned in the law) to admit persons to that profession.

If the Board had the power to confer, and did confer, on the defendant the degree of Bachelor of Laws, it is manifest that it could not by an *ex parte* and subsequent revocation deprive him of the grant or of any rights or franchises flowing from it. See *ex parte* Garland, 4 Wallace, page 347. This view renders unnecessary any discussion of the motion of the plaintiffs for new trial.

Having, as I think, shown that the defendant lawfully held the degree of Bachelor of Laws, the next inquiry is, what rights and privileges did it confer upon him? The law (sec. 1359 R. S.) answers the question. It "shall authorize the person on whom it is conferred *to practice law in this State.*"

What, if any, conditions precedent are imposed upon this authority to practice law? In my humble opinion there is but one, and that is that he take the oath prescribed. Did he take the oath is the next question? It must be borne in mind that that oath can, admittedly, be taken before any judge, justice of the peace, or clerk of court in the State—they being "authorized to administer oaths in all cases." The defendant swears that to the best of his recollection he did take the oath. True, a copy of the oath is not produced, but the defendant's statements

were admitted *without objection, and are uncontradicted.* We think this ought to be accepted, at least as *prima facie* proof—especially when coupled with the legal presumption resulting from a continuous and, so far as appears, undisputed possession of the status and practice of an attorney at law for four years preceding his election as judge.

But it is argued that there was a further condition imposed by law before he could practice: That it was necessary for him to obtain a license from the Supreme Court. Sections 111 and 112 of the Revised Statutes are cited as authority for this proposition. Those sections are in substance as follows:

Section 111.—Any citizen of the United States possessing the qualifications (except that of residence) necessary to constitute a legal voter, shall be admitted to practice as an attorney at law, etc., upon obtaining a license from the Supreme Court.

Section 112.—The Supreme Court shall grant licenses to applicants possessing the qualifications required by the preceding section; first, to *all graduates* of the University who shall produce evidence of good character; second, when they produce a license to practice law from any other State of the Union—or a diploma from any law school, etc., with evidence of good character, and shall have been examined in open court touching their fitness, etc., and are found qualified; third, when the applicants have been found qualified to practice law, etc., by an examination before the Supreme Court according to such rules and regulations as it may adopt from time to time.

I quote, also, section 113—"Any foreign lawyer, on presenting his license to any one of the justices of the Supreme Court, or to any two district judges with evidence of character, etc., who, after being duly examined, etc., shall be by said judges *licensed* to practice law in any and all courts of this State," etc.

Now do sections 111 and 112, fairly interpreted, convey the idea that *no one can practice* law without a license from the Supreme Court?

Section 111 simply declares that "any citizen" upon obtaining a license from this court "shall be admitted to practice as an attorney at law," etc. In other words, a license from this court shall be a sufficient authority to the holder to practice. But is that saying that *no one* shall practice *except he have the license of this court?* Surely not, for that would put section 111 in direct conflict with section 113, which says in substance that any foreign attorney shall be entitled to practice upon obtaining a license from two district judges or any justice of this court. And I submit such a construction of section 111 would also put it in conflict with section 1359, which declares that the holder of the degree of Bachelor of Laws, conferred by the Board of Administrators, shall have thereby authority (license) to practice law in this State. There is

no more reason for requiring that the holder of such degree should obtain a license from this court than there is for requiring it from the foreign attorney admitted by two district or one supreme judge. I do not understand that any one pretends that it is necessary in this last case. Yet if you give section 111 the interpretation contended for by making a license from this court an indispensable prerequisite to the right of practice, it covers *all cases*, and there are scores of lawyers in this State to-day who are practicing *illegally* under the belief that two district judges could examine and license them.

But it is also urged that under section 112 the defendant must have obtained a license from this court. I do not so understand that section. It declares that this court shall license, first, graduates of the University on proof of good character; second, those who produce a license from other States, or a diploma from other schools with evidence of good character; and, third, those who have been examined by this court and found qualified under such rules as it may adopt.

Now the defendant does not fall within or claim to practice under either of the three classes named. He does not claim to be a graduate of the university, or of any foreign law school, or to hold a license from any other State, or to have been examined by this court.

To my mind the conclusion is irresistible, that under certain given conditions and circumstances there are *three modes* provided by law for admission to the bar, and to the right to practicing law in this State:

First—By a license from this court. Sections 111 and 112, R. S.

Second—By a degree of Bachelor of Laws conferred by the Board of Administrators of the University. Section 1359.

Third—By examination and license of two district or one supreme judge, when the applicant is a foreign attorney. Section 113.

There is no law for saying that any one of these powers is subordinate to the others. They are, in their respective cases, sovereign and independent.

I think the defendant possessed the qualifications required by the constitution for district judge, and therefore that the judgment of the court *a qua* should be affirmed.

I therefore dissent from the decree in this case.

No. 6691.

STATE VS. DANIEL SHAY.

An accused person, who with full knowledge of the fact that the jury by whom he is to be tried was drawn from a list of persons, composed partly of those who had been excused from serving, goes to trial without making any objection to the composition of the jury, thereby waives his right of objection, and can not thereafter, on that ground, ask that the verdict of the jury shall be disturbed.

The question whether one of the jurors in a criminal case was, or was not disqualified to act as a juror, on the score of being too prejudiced to render an impartial verdict, is a question of fact for the lower court to determine, and of which this Court has no jurisdiction.

The place where an alleged murder was committed is set forth with sufficient certainty, when the indictment gives the name of parish in which the killing is charged to have been done, and states that it took place within the jurisdiction of the Court before whom the accused is tried.

In an indictment for murder it is not necessary to set forth the specific manner, and means of the killing. It is only necessary to charge that the accused did willfully, feloniously, and with malice aforethought kill, and murder the deceased.

It is too late to urge any objection to an indictment on account of any defect of form apparent on its face, after the jury has been sworn.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, for the State.

J. P. Smith and *J. H. Hagins* for defendant.

The opinion of the court was delivered by

DEBLANC, J. Daniel Shay was indicted for the murder of John McDonough. He was tried and the jury returned against him the qualified verdict of "guilty, without capital punishment. He applied for a new trial, but his application was refused. To obtain it, he relied in the lower court, and he relies here, on the grounds that—

First—No correct list of the jurors was served on him, as the only one which was served contained the names of twenty-seven jurors who—before his trial—had been excused, and he was apprised of that fact after nine of those by whom he was tried had been selected and empanelled.

If—as he states—he was taken by surprise, he ought to have then moved for a discontinuance of the trial, and insisted on his right to a correct list of the jurors who were in attendance. This he did not ask—and, by his consent to a continuation of the trial, after the discovery that many of the jurors, whose names appeared on the list served, had been excused, he waived, tacitly at least, a privilege created for the exclusive benefit of the accused.

23 A. 620; 14 A. 667; 12 A. 679; 6 A. 690; 2 A. 732.

The trial of a prisoner should be conducted—not only with a strict and unwavering impartiality—but, in the course of the trial, in composing the

jury, in taking the evidence, in the discussion of the facts elicited and of the law applicable to the facts, those who represent the State should be liberal and fair, and take no improper advantage. In Court, as in the jury room, every rational doubt should go to the credit of the accused; but, the generosity of the State has its limits and should not be converted into a protection to crime and criminals. One who—of his own accord—takes the chances of an acquittal by a jury, cannot—after conviction—object to that jury—otherwise, the first trial of every violator of the law would merely be to ascertain whether he should be acquitted, or—if convicted—how many causes were held in reserve to secure trial after trial.

7 A. 284; 8 A. 515; 27 A. 537.

In this, as in every one of our States, the law surrounds the prisoner with the most complete, the most protective guarantees. When brought to the bar of the court, he is not called upon to disprove the commission of the offence charged against him; the law presumes his innocence, and—until that presumption be torn into shreds, until his guilt be established beyond any reasonable doubt—be he a robber or an assassin—he cannot be convicted, he cannot be punished. The prisoner is invested with high, constitutional and extraordinary privileges—but, for the exercise of those privileges—the State had to and did fix an hour, and—in one of the cases referred to by defendant's counsel, the court held: "If one have good ground for continuing a cause, but go into trial, and fail to make the motion, this will not present a legal claim for a new trial."

Hardin's Reports, p. 515.

Second—Charles Reineck, one of the jurors by whom the accused was tried, had—before the commencement of the trial—openly expressed his belief that appellant was guilty as charged, and that if he were to try him, he could not help finding him guilty—and that, when examined on his *voir dire*—the said Reineck answered that he had neither formed nor expressed an opinion as to his guilt or innocence.

If Reineck did express such an opinion, and afterwards falsely denied that he had, he certainly was an incompetent juror—for, when locked by a prejudice, the door of the mind is as closed as that of the tomb; it may be re-opened, but seldom and by a miracle. Whatever is a good ground of challenge to a juror, is a good ground for a new trial, if the fact which would have authorized the challenge was not known until after the verdict, or until it was too late for the accused to avail himself of the knowledge of that fact.

It is, however, the peculiar province of the lower court to determine whether a juror is or was open to conviction or not. In this case, and as to Charles Reineck, that question was raised, tried and decided. It

does not appear that the district judge held that—even if proved, the disqualification urged did not constitute a legal ground for a new trial, and it does appear that he fixed a day to hear, and—on that day, heard the parties on that point.

Whether, on that trial, two, or ten witnesses were examined—whether, without additional evidence, the judge believed the juror's declaration and disbelieved the charge proffered against him—whether that charge was verified or contradicted, the record does not show. The prisoner's application is based on a question of facts: his application was passed upon and refused—the reasons for that refusal are no where mentioned, and—under our constitution, the law and jurisprudence, we are without authority to revise or reverse the decision of the lower court on this point.

C. art. 74, 26 A. 383; 4 A. 438—441; 2 A. 921; 6 A. 593.

Third—"The indictment—it is objected—does not, with certainty and distinctness, set forth the place where the crime is said to have been committed, or the instrument used, or the manner, or cause of the death."

In the margin of the indictment, the venue is stated as follows: *State of Louisiana, First Judicial District, Parish of Orleans.*

In the body—"*the parish of Orleans aforesaid, within the jurisdiction of the Superior Criminal Court for said parish.*" This is all that the law requires.

Rev. Statutes, Section 1062.

As the first, the second branch of this objection is untenable. In an indictment for murder, it is not necessary to set forth the manner in which and the means by which the death was caused. It is sufficient to charge—and it was done in this case, that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased.

Revised Statutes, Sect. 1048.

Fourth—There is nothing in the record showing how many or what grand jurors found the indictment. The names of said jurors are not mentioned.

On the first pages of the transcript, we find the statement "that the Grand Jurors of the State of Louisiana, duly empanelled, sworn and charged to enquire in and for the body of the parish of Orleans, this day came into Court, attended by their proper officer—and there being then and there present at least twelve of their number, and upon their oath and through their foreman, presented to the Court the following true bill of indictment, which is properly endorsed by said foreman, and entered and signed by the Clerk of the Court, etc. That statement is followed by the indictment, which—in substance and in form, is perfect.

The names of the grand jurors are not in the indictment, nor in the

written statement that at least twelve of them appeared in open Court and presented the indictment and true bill, but no such formality is required by law. Were it otherwise, it was too late after conviction, to urge any informality of that description. "Every objection to any indictment for any formal defect apparent on its face, must be taken by demurrer or motion to quash, before the jury be sworn and not afterwards."

Rev. Statutes, Sect. 1064, 22 A. 162; 27 A. 693.

The judgment appealed from is affirmed.

No. 5427.

LOUISA FREDERICKS, TUTRIX, vs. ROBERT FASNACHT.

When it clearly appears from the evidence that the intent of parties was to form a written contract, neither party will be bound until the contract has been reduced to writing, and signed by both. No alleged verbal agreement, in such case, can be invoked by either party against the other.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

J. H. Grover for plaintiff and appellee.

A. & W. Voorhies for defendant.

The opinion of the court was delivered by

MARR, J. This suit was brought by Louisa Fredericks, tutrix, and George Waters, her husband, co-tutor, to recover damages for injuries to real property, alleged to have been leased to Robert Fasnacht, the defendant.

Defendant denies that he leased the property, or received, or used, or occupied or injured it.

The proof is that one Peterson, agent for Mrs. Waters before her marriage to Waters, negotiated with defendant for the lease of the property. Peterson says: "I always thought, and was pretty sure the lease was consummated by him for his father. He never occupied it; it was the father always occupied it." In another place, referring to the fact that defendant had paid three months rent, he says: "He did not say he was paying for his father; but he made me understand when he took the lease it was for his father, when the verbal lease was agreed upon. We had a lease drawn up which was never signed; but it was understood it was for his father." Again, when asked directly, if defendant "did not tell him, at the time, that he was leasing for his father," he answers: "That is what he made me understand." Pressed by the repetition of the question, he says: "I can not say he told me distinctly it was for his father; but he left the impression on my mind that it was for his father."

Defendant testifies that in April, 1871, his father requested him to lease the property for him, for a term beginning first of May; that his father told him he wanted to occupy it with his family, and would give fifty dollars a month for it. That all he did about the matter was for account, and at the request of his father; that he had advanced the money and made payments on account of the rent, which he always charged to his father's account at the time; and that he never had any idea of becoming responsible for the rent.

The proof is that Samuel Fasnacht, the father, took possession about the first of May, and occupied the premises. That when Peterson and his principal, at different times, demanded the rent of defendant, he always referred them to his father; and that defendant did not live on the premises.

Peterson testifies that it was a part of the bargain, at the time he talked with defendant about leasing the property, that the lease should be put in writing; and that Peterson drew up a lease which defendant did not sign. When asked if defendant did not refuse to sign, he says: "He did not do it." When asked, "Did he not say he would not," he answers: "He delayed from time to time, and it was never signed. He said the old man would sign the lease; that was the way."

Defendant, when asked, "Did Peterson ask you to sign the lease?" answers: "Yes, I told him wait until the old man came, that I acted for him."

Mrs. Waters lived in the immediate neighborhood, and occasionally visited Mrs. Fasnacht. She saw Samuel Fasnacht committing depredations on the property; and complained to Robert Fasnacht, who said he could not do any thing with his father. Peterson says he informed Mrs. Waters of his negotiations with Robert Fasnacht. It seems that Robert was sued for the rent; that when the papers were served he handed them to his father, telling him that was the father's business, not his; and that Samuel Fasnacht settled the suit with Mrs. Waters, without the presence or interference of Robert Fasnacht.

It also appears that after the marriage with Waters, not earlier than August, possibly as late as October, 1871, a lease, made out in the name of Robert Fasnacht as lessee, was signed by Mrs. Waters and Samuel Fasnacht professing to act for his son. This lease was ante-dated first of May, corresponding with the beginning of the term. There is no proof that Samuel Fasnacht had any authority to sign or make any such contract for his son; and Robert Fasnacht testifies that he never gave his father any such authority; that he knew nothing of this lease until long after it was signed; and that he had never seen it until it was produced in court on the trial of this case.

Apart from the conduct and declarations of Robert Fasnacht, which

are consistent throughout this entire transaction, it is manifest that there was no contract of lease assented to by him, as lessee of this property. It is elementary in our law, that where the negotiations contemplate and provide that there shall be a contract in writing, neither party is bound until the writing is perfected and signed. The distinction is manifest between those cases in which there is a complete verbal contract, which the law does not require to be reduced to writing, and a subsequent agreement that it shall be reduced to writing, and those in which, as in this case, it is a part of the bargain that the contract shall be reduced to writing. In the first class of cases the original verbal contract is in no manner impaired by the failure to carry out the subsequent agreement to put it in writing. In the second class of cases, the final consent is suspended; the contract is incohate, incomplete, and it can not be enforced until it is signed by all the parties. Villéré vs. Brognier, 3 Martin, 349; Des Boulets vs. Gravier, 1 N. S. 421, 422; Blocker vs. Tillman, 4 La. 80.

This case illustrates the wisdom of the rule. If Peterson understood from the negotiations with Robert Fasnacht, that Robert Fasnacht was contracting for himself, and not as the representative of his father, it is plain that Robert Fasnacht had no such understanding; and when Peterson asked Robert Fasnacht to sign the lease, which he says the bargain required, and Robert told him to wait until his father came, that he was acting for his father, fair warning was given that Robert did not intend to take upon himself the obligations of lessee of the property which he had negotiated for as the representative of his father, Peterson might and should have brought the business to a conclusion by refusing to deliver the property until the bargain was completed by a lease in writing, which would have left no room for dispute as to who was the real lessee. There was ample time for this; because, as the proof shows, the negotiations between Peterson and Robert Fasnacht were in April, about a month before the beginning of the term.

The proof shows that Samuel Fasnacht did abuse the property; and he might well have been held liable for damages. There is no pretense that Robert Fasnacht did any of the wrongs complained of; and as he was not bound by any contract as lessee, and did not live upon or occupy the property, the court below erred in holding him liable, and in condemning him in damages.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and that there be judgment in favor of Robert Fasnacht, defendant and appellant, against Mrs. Louisa Federicks, tutrix, wife of George Waters, and George Waters co-tutor, plaintiffs and appellees, rejecting their demand, with costs in both courts.

No. 6419.

BRIDGET REARDON VS. DANIEL MORIARTY ET AL.

One who has executed a promissory note in error, for a debt not due by her, may legally resist the payment of the note, so long as the note is not in the hands of an innocent third person, who has taken it for value before its maturity.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

J. Q. A. Fellowes and *J. N. Hagins* for plaintiff and appellant.

McGloin and *Nixon* for defendants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff has injoined the seizure and sale of a house and lot in this City under a mortgage, and to pay four notes secured thereby. The sale under which she bought was provoked by the representative of her first husband's succession to pay debts. That representative was his daughter and sole heir. The settlement of the debts appears to have been made in an irregular manner. The widow and purchaser was required to furnish the money necessary for that purpose, and the sum she thus furnished exceeded the third, which the terms of sale required to be paid cash.

Bridget Reardon is an ignorant woman, and was assisted and advised in these transactions by her kinsman, Daniel Moriarty. Her husband was dead, and his succession belonged to her, as surviving widow in community, and to his only child, a daughter by a previous marriage, in equal shares. There were some debts to be paid. The property consisted of a lot and improvements in this city, appraised in inventory at $5000, furniture valued at $149, and $60 cash. A sale was had to pay debts, and to effect a partition. The lot and improvements brought $7,750.00. One third of this price was, by the terms of sale, to be paid cash—the residue in one and two years. The widow bought, and the cash was paid, and this cash payment was sufficient, or nearly sufficient, to pay the debts. At any rate the heir was not called on to pay any debt, or to contribute to such payment. She received one half of the credit instalments without diminution. Two notes, representing that moiety, were delivered to the daughter.

The plaintiff should not have executed any other notes than these two. She owned as much of the proceeds of sale as the daughter. There was no obligation upon her to give notes for what was her own, but she did give them, as she would no doubt have signed any other notes that Moriarty told her to sign. He took possession of them immediately—afterwards bought the two others from the daughter—and now attempts to sell the property under the mortgage securing the payment of all four notes. The plaintiff enjoins, and seeks legal protec-

tion from the rapacious pursuit of him, who was instrumental in imposing upon her ignorance, and obtaining her signature to obligations for money that belonged to her. Were the notes in the hands of innocent third persons, she would be remediless, but Moriarty has them, and brings them into court, and we can wrest them from him.

There is no doubt that Moriarty paid a part of the money for the plaintiff. He gave his check for the whole, but she had put him in funds certainly to the amount of a thousand dollars, besides making sundry payments of small sums then or thereafter. He has his action against her for the money thus loaned to her, or paid for her benefit, and to that action he should be remitted for its recovery. Under no aspect of the matter can he be justified in taking possession of the two notes, which represent the plaintiff's half of the proceeds of sale, and treating them as his own. She did not pledge them to him, nor were they deposited with him as collaterals, nor do they represent the sum loaned to her. It was perfectly competent for him to have taken her note for the sum actually loaned, and to have had it secured by mortgage, and that was the natural, proper, and straightforward form in which the transaction should have been clothed.

Besides, it is apparent that the plaintiff has given the two notes that went into the possession of the heir, for a larger sum than was coming to that heir. The account can be thus stated:

Assets;—proceeds of sale of lot		$7,750.00
Movables and Cash		209.50
		$7,959. 50
Claims;—On tableau	$2,802.60	
Vatter & Blanc	128.98	
Funeral expenses	173	3,104.58
		$4,854.92
Share of each		$2,427.46

The notes executed by the purchaser, who was the widow in community, and which were delivered to the heir, were for $2583.33 and thus exceeded by $155.87 the sum to which she was entitled. Besides, the widow was made to pay commissions on the value of the whole property, instead of the succession's half of it, and this excess of payment is $96.87. These two sums must be credited on the notes Moriarty acquired from the heir, and we justify this distinctly upon the ground that Moriarty was the person who instigated the settlement in the manner in which it was made, and conducted it for her.

It is therefore ordered, adjudged, and decreed that the injunction is perpetuated as to the two notes executed by the plaintiff for her own

half of the proceeds of sale, and that the other two notes be credited with $252.74 of same date as the notes, reserving to the defendant his right of action against the plaintiff for the money loaned to her, or paid for her and not repaid to him, and that the defendant pay all the costs of both Courts.

CONCURRING OPINION.

MARR, J. I concur in the opinion and decree pronounced by the Chief Justice, as far as it goes; but I do not think it goes far enough.

The proof is plain that the plaintiff was a married woman at the time she executed the notes in question; and I think the notes are void for want of the authorization of her husband.

This does not involve the nullity of the adjudication to her of the property which belonged to the community of which she was a member. She acquired a perfect title by the adjudication; and she is bound to pay according to the terms of the sale. Between the date of the adjudication and the giving of the note she married; and she was not legally capable of binding herself by note or mortgage, although she was bound by the adjudication.

The record shows that she was cited to answer, and that a judgment by default was entered and confirmed against her. In the petition brought in the name of herself and her husband it is stated that they were both cited; but this fact is not shown otherwise; and as the record does show the citation addressed to and served upon her alone, the presumption is that if there had been a citation addressed to and served upon the husband that fact would have been shown by the exhibition of the citation.

I consider the petition as the work of the attorney who drew it. No allegation of service had been made by Moriarty, and his rights were not changed by that statement. I do not think, under the decisions in Patterson's case, 5 An., Fasnacht's case, and Baines vs. Burbridge, 15 An., that this unnecessary statement, which, so far as the record shows, is not true, is to be taken as a judicial admission; which, in my opinion, means what is alleged by the one party, and admitted to be true by the other, or what is alleged by one as a basis of the right which he asserts, and which estops him.

I think the judgment by default was a nullity; and the entire judgment should be perpetually enjoined.

1. Because of the nullity of the notes and mortgage for want of the proper authorization, and the consequent want of capacity of the wife to contract.

2. Because of the nullity of the default taken against the wife with-

out proof of the authorization of her husband, or service of citation on him.

The right should be reserved to Moriarty to sue for and receive whatever may be due him for money lent and advanced, and to Mrs. Twohy, or to Moriarty, if he is her transferee, to recover her net half of the community, as heir of her deceased father, according to the terms of the adjudication.

CONCURRING OPINION.

EGAN, J. I concur in the decree in this case, and the more readily because the evidence fully establishes the fact that the defendant was a married woman at the time the notes were executed and judgment obtained against her upon void notes obtained from her through fraud and in fraud of the law, and Moriarty himself admits, in his evidence in the record, that he had another note of the plaintiff given him for something over $1500, about the amount which the evidence renders it probable that he advanced or loaned to her. The law classes the incapacity of the wife with that of other incapables. The fraud attempted to be perpetrated in this case can not receive the sanction of this court. The record of the suit vs. Wm. Sullivan does not disclose the fact that her husband was cited, or that she was otherwise authorized by law to defend it. The pretense that she concealed from the defendant the fact of her marriage is not sustained by the evidence; three witnesses swear that she told him she was married at the time the notes were given, and he himself admits he had heard it.

DISSENTING OPINION.

SPENCER, J. I can not concur in the opinion and conclusions of the majority of the court in this case. To my mind there is an insuperable obstacle in the way, to wit: *the thing adjudged.*

Michael Sullivan, plaintiff's first husband, died, leaving a single heir, Mrs. Twohy, child of a former marriage. Plaintiff was widow in community, and Mrs. Twohy administratrix of his estate.

The community property was sold and adjudicated to plaintiff, the widow, on twelfth April, 1873, for $7750, one third cash, the balance in one and two annual payments, with mortgage reserved. On seventeenth June, 1873, plaintiff, not to say clandestinely, at least secretly, contracted a second marriage with another Sullivan, to wit: Eugene.

On eighteenth July, 1873, a month after second marriage, she says Moriarty, her cousin, persuaded her, without her husband, to go to the

notary's office to fix up the title to the house she had so bought. She says Moriarty knew she was married. Moriarty denies it. It matters not. The act of sale in pursuance of the adjudication was drawn up by the notary and signed by the administratrix and plaintiff. Plaintiff executed notes for the deferred payments at one and two years—two at one and two at two years. Moriarty gave his own check for the cash part of the price, $2583, which was applied to paying the community debts. Plaintiff swears she furnished $1000 of this money paid by Moriarty—so that he in reality only furnished her $1583. There is no doubt, that as partner in community she herself owned two of the four notes so executed by her. Moriarty, however, took them, he says, as security for the money advanced by him. She says she does not know how he came by them, but that she supposed they were in the hands of the administratrix. For the sake of the argument, I concede that he took unlawful possession of the two notes belonging to her. He afterward bought the two belonging to Mrs. Twohy, so that he held all four of plaintiff's notes.

On the twentieth of April, 1875, Moriarty brought suit against plaintiff and her husband, Eugene Sullivan, on these four notes and the mortgage and vendor's lien securing them, as evidenced by the notarial act, and prayed for citation of both husband and wife.

On the eighth of May, 1875, final judgment was rendered (confirming a default of the fourth of May) in favor of Moriarty vs. Mrs. Sullivan, the plaintiff in this suit, for the full amount of the four notes, with recognition of mortgage, etc. The notice of this judgment was irregularly served; at least the return shows it to have been served upon one *Michael* Sullivan (the name of her first husband) instead of Eugene Sullivan, her second husband. Let us admit, too, that this was not a mere clerical error of the sheriff.

On the thirty-first of May, 1875, a writ of *fieri facias* issued on this judgment of Moriarty vs. Mrs. Sullivan, and the sheriff seized the mortgaged property, *in her possession*, and held and owned by her under the title stated above.

Mrs. Sullivan (Bridget Reardon) and her husband, Eugene Sullivan, thereupon sued out this injunction against Moriarty and the sheriff—in which she alleges, in substance, as follows:

That Moriarty had brought the suit above referred to "against your petitioner, Bridget Reardon, and *made your petitioner, Eugene Sullivan a party thereto*, simply to assist his said wife therein." "That *after citation of your two petitioners* the said Moriarty *obtained judgment by default against your petitioner, Bridget*, and had the same confirmed on the eighth of May," etc. She alleges that said four notes and act of sale and mortgage were executed on the eighteenth of July, 1873,

at which time she was a married woman, the wife of Eugene Sullivan, and that she executed said notes and acts without his assistance or authority, and "was persuaded thereto by said Daniel Moriarty, who well knew at the time that she was a married woman;" "that *in some manner unknown to her* said Moriarty came into possession of said notes, although by said notarial act it appears the possession thereof was given to Mrs. Twohy, administratrix of the estate of Michael Sullivan." That the said four notes and act of sale and mortgage are mere nullities, and not binding on her "for the reason that they were executed by her while she was a married woman and without the consent or assistance of her husband." That said transactions "were nothing but a mere fraud practiced upon your petitioner and known to have been so by said Moriarty at the time, and were null and void." That said Moriarty has "*obtained said judgment on obligations null and void*, and *that said judgment* is equally null and void and should be quashed, set aside, and rescinded, *especially for want of capacity of your petitioner to obligate herself in this manner.*" That said Moriarty has issued *fi. fa.* on such judgment, "and *seized the property of your petitioner.*" She prays for an injunction to restrain the sheriff and Moriarty, and for judgment rescinding and annulling the said judgment in Moriarty vs. Bridget Reardon. The injunction was granted as prayed for. Nothing is said about her having received no notice of judgment.

By a supplemental petition she alleges that two of the notes for which Moriarty had so obtained judgment against her were, in fact, her own property and did not belong to Moriarty. These are the whole of her allegations, and upon these this injunction was granted. The sole grounds, therefore, that she sets up for the injunction, and for the nullity of the judgment obtained against her by Moriarty are, first, that she was a married woman and without capacity *when she signed* the deed, mortgage, and notes, and did so without the authority of her husband. She does not pretend, however, that the adjudication upon which this deed, etc., was based was not made to her *during her widowhood.*

She does not pretend or allege that the property bought was not in her possession—on the contrary—that it was. She does not pretend or allege that the debt for which judgment had been obtained against her was the debt of her husband, Eugene Sullivan, or otherwise contracted in violation of prohibitory laws.

Her second and only other ground of injunction and nullity is that two of the notes embraced in said judgment did not belong to Moriarty but to herself.

Moriarty, in answer to the injunction, plead, first, by way of exception, that her petition disclosed no cause of action. In my opinion this

exception should have prevailed, if it had been tried preliminarily. But it was tried, with the merits and evidence offered without objection, which, I think, destroyed it. His answer sets up various defenses, but I shall notice but one, that of *res adjudicata*. He says that the judgment obtained by Moriarty against Mrs. Sullivan on these notes, being unappealed from, is *res adjudicata* as to the matters and things now urged by her. She seeks to enjoin and annul his judgment on the ground that she was a married woman, unauthorized, when she signed the notes and mortgage, and that two of the notes sued upon were, in fact, her own property. Now, to my mind, it is too plain for argument that these are matters which could only be set up and urged as defenses to the suit of Moriarty vs. Sullivan. It is elementary that whatever can or ought to be urged by way of defense can not be used to annul or enjoin. If the judgment was rendered on insufficient evidence her only relief was by appeal. She did not do so. But, as matter of fact, the evidence upon its face was not insufficient. It proved that the debt was contracted by her *before marriage and for her own benefit*, and that she was then in the enjoyment of the property for which the notes were given. So that, had she appeared and defended the suit, no court could have refused to give judgment against her on the ground of want of authority or want of consideration. If she had appeared, and plead and proved that two of the notes were her own property (as I think they were), then, to that extent, she could have defeated the suit. But is not the want of ownership, in plaintiff, of the notes sued upon, a matter that must be pleaded in defense? Can a defendant, after judgment against him, enjoin and annul it on the ground that plaintiff did not own the notes sued upon? Yet, that is what is sought here. I can not assent to such a proposition. I conclude, therefore, that upon the matters and things alleged by the plaintiff against the judgment enjoined, that there is the thing adjudged. I am aware that our courts have gone to great lengths to protect married women. But I have examined with care all the reported cases, and I do not find a single case where our courts have held the effect of the thing adjudged to be different, as regards married women, from what it is as regards others. The only exception ever admitted in favor of married women has been in cases where they attacked by injunction judgments against them, on their allegation and oath that the debt sued upon was that of the husband or community, and, therefore, contracted in violation of a prohibitory law, and against public policy, and under marital influence. But in the case before us there is not even an insinuation that the debt sued upon was that of the husband. On the contrary, it was beyond dispute contracted during her widowhood and for her own benefit. Here the controversy should stop, as here is the end and extent of the grounds

alleged by plaintiff for her injunction and action of nullity. But plaintiff's counsel urges and argues, *in his brief*, that in the suit of Moriarty vs. Mrs. Sullivan and husband, the husband was *not cited*, and did not authorize his wife; and asks us *to annul* the judgment on that ground. He insists that this is proved by the fact that in the record of that case, as copied into this transcript, no citation appears addressed to the husband, but only one addressed to and served upon the wife. I repeat that there is no allusion in the pleadings of plaintiff to such a defect On the contrary, in their petition for injunction, now before us, the plaintiffs distinctly *allege the very contrary*. Their allegations are in these words, that "Moriarty had brought said *suit against your petitioner, Bridget Reardon*, and made *your petitioner, Eugene Sullivan, a party thereto* simply to assist his said wife therein." "That after *citation of your two petitioners* the said Moriarty obtained judgment, etc. against your *petitioner*," etc. Upon the mere suggestion of absence of a citation to the husband in the copy of a record which was itself a mere instrument of evidence in this case, and without any allegation that such defect would be urged; on the contrary, with an express allegation that no such defect existed, can we proceed to annul the judgment in Moriarty vs. Sullivan? I say to annul it—for if we declare that that judgment is invalid for two of the notes upon which it is predicated, to that extent we annul it. Surely we can not. Had the plaintiff put Moriarty on his guard by alleging that the husband was not cited, or had she even not misled him by alleging that he was cited, there might have been plausibility in saying it was incumbent on Moriarty to prove as against this married woman the facts essential to the validity of the judgment. But in view of her own allegations, and by every rule and principle of law and practice, it seems to me that she is estopped and precluded. Her *demand for nullity* should, therefore, be rejected.

There was proof offered, *without objection*, that Mrs. Sullivan had paid or furnished $1000 of the payment of $2583 made by Moriarty for her account. I think this credit should be allowed, and to that extent the injunction should be perpetuated, and for the balance dissolved. Defendant should pay costs of both courts.

DeBlanc, J. I concur in the foregoing opinion.

On Rehearing.

Manning, C. J. The Justices severally adhere to the opinions

read on the former hearing, both concurring and dissenting, and therefore,

It is ordered and adjudged that our former decree remain undisturbed.

EGAN, J. I consented to the partial dissolution of the injunction because I considered the plaintiff bound to carry out the terms of the original adjudication, and the decree of the court, with all the facts before us, avoids circuity of action.

No. 6750.

SUCCESSION OF CHARLES P. BOUTTÉ.

The legal heirs of a succession, on giving the security prescribed by law, (if so required,) are entitled to be put into possession of the property of the succession when the legatees consent, and the creditors of the succession do not oppose.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

T. A. Bartlett, *S. R. Snaer*, and *E. K. Washington* for heirs and appellants.

W. O. Denegre for executor.

The opinion of the court was delivered by

MANNING, C. J. The heirs of Charles P. Boutté, who are his children and grand children, pray to be put in possession of his estate, and the Public Administrator, who has been appointed dative testamentary executor of the last will of the deceased, opposes their demand.

Boutté's will was probated in 1871, and his testamentary executor qualified under it. Although the debts are small, and the property inconsiderable, the administration of the succession has been prolonged until now, when the heirs apply for permission to terminate it, and the legatees file their consent thereto. The creditors, if there are any now, do not oppose it.

The Public Administrator alleges that there are suits pending against the succession, and that the funds in his hands can not be taken away until the legacies are paid. It is a sufficient answer to this to say, that the legatees join the heirs in their prayer to be put in possession of the estate, and the creditors do not object. The surviving widow also joins in the prayer for the termination of the administration. The petitioners must comply with the requirements of the law before being put

in possession, and the Public Administrator must account for his administration. Therefore

It is ordered and decreed that the judgment of the lower court is reversed, and that the petitioners be put in possession of the succession of the deceased upon giving security if required, and that the Public Administrator account for his gestion, the succession to pay costs.

No. 6370.

STATE EX REL. CARONDELET CANAL AND NAVIGATING COMPANY VS. MAYOR AND ADMINISTRATORS OF NEW ORLEANS.

It is the duty of the Mayor and Administrators of the city of New Orleans to set apart, and provide specifically, in the forthcoming yearly budget, out of the funds to arise from the *general* tax therein levied, means for paying *all* judgments against the city then registered in the office of the Administrator of Public Accounts, and unsatisfied, in the order of their registry. And this duty, the Mayor and Administrators may be compelled, by mandamus, to perform.

It is not their duty to levy a separate tax to pay such judgments; nor is it made obligatory on them to pay such judgments out of the fund in their hands set apart for contingent expenses; although they may, in their discretion, discharge the judgments out of that fund.

If the means arising from the general tax levied in one annual budget are not sufficient to pay all of the registered judgments, provision must be made in each subsequent budget, until all of such judgments are successively extinguished.

The fact that the term of office of the existing Mayor and Administrators of a city is nearly expired, is no ground for defeating, or delaying the legal proceedings of a creditor of the city who has a good cause of action.

APPEAL from the Superior District Court, parish of Orleans. *Lynch*, J.

H. D. Ogden for plaintiff and appellee.

S. P. Blanc, Assistant City Attorney, for defendants.

The opinion of the court was delivered by

MARR, J. Relator recovered judgment against the city of New Orleans, which was registered on the fourth of February, 1875, in the office of the Administrator of Public Accounts, as required by acts of 1870, No. 5, section two, and No. 7, sections four and nine.

These acts make it the duty of the auditing officer, the Administrator of Public Accounts, when a judgment is so registered, to warrant on the disbursing officer, the Administrator of Finance, for the amount without any special appropriation, provided there be money in the treasury, designated and set apart for the payment of judgments, sufficient to pay such judgment. If the amount designated in the annual budget, for the payment of judgments, be exhausted at the date when such judgment shall have become final and executory, the Mayor and

Administrators may, if they deem it proper, appropriate, from the money set apart in the budget for contingent expenses, a sum sufficient to pay said judgment; but if no such appropriation be made, then all judgments shall be paid, in the order in which they shall be filed and registered, from the first money next annually set apart for that purpose. Sections two and three, act No. 5, of 1870, Extra Session, page 11.

The Mayor and Administrators failed to provide for the payment of the judgment in the annual budget next in date after its registry; and the relator brought this suit in May, 1876, to compel, by mandamus, the performance of this duty.

The Mayor and Administrators answered, substantially:

First—That judgments amounting to $96,740 32 had been registered before that of relator, and must be paid before his.

Second—That it is not the duty of respondents to levy a tax to pay relator's judgment, other than the annual levy made for all purposes at the commencement of the year.

Third—That the contingent fund has been appropriated on the budget for specific purposes, and can not be diverted.

Fourth—That there are no funds in the treasury, or under the control of the respondents, set apart for relator's judgment.

Fifth—That there are immense judgments to be paid before relator's; and he is not entitled to any of the means sought for by him to be preferred to them.

Sixth—That the budget can not be changed or disturbed; that relator has no right to anticipate the action of the city in the next budget; that at the time the next budget will be adopted new incumbents will occupy the seats of respondents; and that respondents can not be ordered to perform that which they will not have an opportunity of doing.

The judgment of the court below decreed that "the writ of mandamus be made peremptory, so far as to compel Charles J. Leeds, J. G. Brown, J. O. Landry, E. A. Burke, Leon Bertoli, Leonce Bouny, Dennis McCarthy, and Edward Pilsbury, the mayor and administrators of the city of New Orleans, to place the judgment rendered in favor of the relator on the 26th of June, 1871, and all judgments registered previous to its registry, ON THE NEXT ANNUAL BUDGET, and to provide for the payment of all said judgments, in the order in which they are registered, through and by means of all taxes imposed, collected, or held for city current expenses, not levied or collected in pursuance of law for some other specific purpose."

The mayor and administrators appealed; and soon after the return day they were succeeded by the present incumbents, who have been properly made parties in this court. The appellee states in his

brief that the remedies refused by the district judge would have afforded immediate relief; but owing to the lapse of time since it was rendered, the judgment, as it now stands, gives all the relief which can be obtained by decree of this court. Our inquiry, therefore, will be limited to the judgment as rendered, without reference to the remedies asked for and refused.

The Act No. 5 of 1870 forbids the enforcement of judgments against the city of New Orleans by execution. It makes it the duty of the department of Public Accounts to register all judgments that have become final and executory when presented; and this was done with respect to relator's judgment. By section 124, of the act approved March 20, 1856, it was the duty of the city government to provide, in the annual budget, for all the matured debts and obligations of the city; and the adoption of the budget was to be considered the appropriation of the amount for the purposes therein stated. This section of the Act of 1856 is specially referred to and recognized as being still in force, in the second section of the Act No. 5 of 1870. It was, therefore, the plain duty of the mayor and administrators to have provided, in the next annual budget after February 4, 1875, for the payment of this judgment, registered at that date, and all the other then unpaid registered judgments. This plain duty they had failed to perform, although more than fifteen months had elapsed after the registry of relator's judgment before the suit was brought.

The city is not required to levy a special tax to pay registered judgments other than the levy made annually for all purposes; and a resort to the contingent fund, is discretionary, not compulsory. It is the duty of the city in making up the annual budget to designate and set apart an amount sufficient to pay all the registered judgments, and to pay them in their order out of the money so set apart.

This duty of the city does not depend on the amount of the judgments rendered, but on the fact of the registry. A sufficient amount must be provided, set apart; and if a sufficient sum should not be realized out of such appropriation in the annual budget next succeeding the registry to pay all the registered judgments, such as are not paid must figure, of course, in the next annual budget; and so on until they are all paid according to their respective priorities.

The changes which may take place in the administration of the city government, by the election of new officers, at the expiration of the current term, operate no change in the duties and obligations of the city, nor in the rights of its creditors. If a state of facts existed, at the time relator commenced this proceeding, which authorized him to invoke the aid of a judicial tribunal to enforce his rights, the judgment rendered contradictorily with those who were then

the Mayor and Administrators, would be equally obligatory on the new incumbents succeeding them.

These general observations suffice to dispose of all the objections set up by the Mayor and Administrators in their answer; and the judgment of the District Court orders them to do no more than the act of 1870, sections two and three, prescribes, and makes it their official duty to do.

We have just had occasion, in the suit of Strauss vs. the Administrator of Public Accounts, to consider the first section of this act of 1870; and have decided that it forbids proceeding by mandamus against the auditing and disbursing officers, respectively, to compel the issue or payment of any order or warrant, for any money claimed to be due from the city. The creditors of the city are remitted to the ordinary forms, and are required to bring their suits against the city as a corporation, that is, against the Mayor and Administrators, and not against any branch, or department, or officer of the municipal government.

There is no analogy between that case and this. Relator obtained his judgment against the city in the ordinary form of judicial proceedings; and it was properly registered according to the requirements of the act. But the duty still remained of providing for the payment in the only mode by which judgment creditors of the city are permitted to collect their judgments. This required the action of the Mayor and Administrators, in their aggregate capacity, as a municipal government; the adoption of the annual budget; the levy of the necessary taxes; and the setting apart of a sufficient amount to pay this and all the other registered judgments.

Perfect as the right of relator is to have provision thus made for the payment of his judgment, there is no means or process by which it can be enforced otherwise than by mandamus. The duty of the city to make this provision is not discretionary, either as to the time or the manner. The law imperatively requires that it shall be in the next annual budget, and by setting apart, appropriating, a sufficient amount out of the annual revenues. The duty of the Mayor and Administrators is plain, and the right of the relator is absolute.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to substitute for the persons named therein as Mayor and Administrators the persons who succeeded them, the present incumbents, viz.: Edward Pilsbury, Mayor; James G. Brown, Administrator of Public Accounts; Jules C. Denis, Administrator of Finance; John McCaffrey, Administrator of Improvements; Charles Cavanac, Administrator of Commerce; James D. Edwards, Administrator of Water Works; Robert E. Diamond, Administrator of Police; and John E. Rengstorff, Administrator of Assessments; and that said judgment be, in all other respects, affirmed with costs.

No. 6449.

SUCCESSION OF CELESTINE DORVILLE, WIDOW OF FELIX HENRY LOZE.

The executor of a succession which embraces a plantation among its assets is authorized to employ a competent person to take charge of the plantation, and keep its improvements in proper repair, when it appears from the evidence that it was impracticable to lease the place, and that the services of the keeper enured to the benefit of the property in his charge. A reasonable compensation to the keeper, in such a case, will be allowed as a privilege debt of the succession.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

John S. Tully & C. E. Schmidt, for appellant.

J. Duvigneaud and *W. E. Murphy* for appellee.

The opinion of the court was delivered by

EGAN, J. This is an appeal by one Dorville from a judgment of the Second District Court of Orleans, disallowing an account in his favor of $689, less a credit of $310, for which amount he was placed upon the account and tableau as a privileged creditor, the same being for fees as keeper of the residence and farm of decedent, a short distance below the U. S. Barracks, and near the Slaughterhouse, on the river front, under employment as such by the executor by special contract at the rate of $1 per day from seventeenth December, 1873, until the property was sold in the fall of 1875, the sixth of November. There is no dispute as to the time during which the appellant acted as keeper, and for which he charged in the account. The opposition is based upon the alleged fact that no keeper's fees at all should be allowed, because it was not necessary to incur the same—that other persons than Dorville could have been had to act as keeper without charge, and that the place could and should have been rented or leased out and thus the expense of a keeper avoided. The contract with Dorville and the regular and faithful rendition of the stipulated service by him are clearly proved, and not denied by any witness or contradicted by any evidence.

The duties of the keeper were to take care of the farm—to keep in repair the fences, which were numerous, old, and in bad repair. Besides the front and side fences, the latter of which were common to adjoining farms, there were several cross fences, besides the back fence. He also was charged with the duty of caring for and selling fruit from the place, of which there was considerable quantity and variety, and also to attend to the cattle and pasturing of cattle for pay upon the place, for which purpose pastures upon it were designed and used, it being very near the Slaughterhouse, and, therefore, convenient for that purpose.

The keeper performed all these duties faithfully and to the satisfaction of the executor, who frequently visited the place, and who required

of Dorville, and was furnished by him with a regular account of all cattle pastured upon the place, which furnished with the fruit sold, considerable revenue. Dorville also supervised one or two small tenants on the place, and collected the rent from them for the executor. The latter swears that he selected him because he knew him to be a man upon whom he could rely, and that he was a thoroughly honest man. The mere repair and keeping up of the numerous fences in their condition, and which it is evident was absolutely required in order to save the heavy expense of new fencing, and for the care of the place, occupied the keeper from four to six hours each day. His attention on the place was constantly required for its mere preservation, and that of the fruit, cattle, etc., and he could not and did not, by reason of this employment, seek or pursue other occupation for a livelihood. He was a relative of decedent, and had lived upon the place with her prior to her death, and it seems to us that he was every way a suitable and efficient person for such employment, and that he performed his duties faithfully.

It is true that two or three witnesses swear that they either had or knew of other farms upon which there were either no keepers or persons who lived upon them for the privilege of cultivation and were charged with the duty of keeping up the fences. These places were not, however, used for purposes of pasturage for hire, nor is their similarity in the nature and extent of the fencing upon them shown, neither is it stated that there was upon them fruit, either to be sold or cared for, nor is any thing said of the character or number of the houses upon them. Some of them are said to be several miles from the city, and they did not belong to successions, but to living persons who could themselves see to or care for them and make their own contracts. One witness mentions the proximity of this farm to the Slaughterhouse and to the city railroad as reasons why it did not require a keeper, and why one living upon the place could have got other employment.

We think the facts stated, together with the other evidence in the record of the uses to which the place was put (to afford pasturage to the cattle designed for slaughter) and the exposure of the fruit and everything about the place to plunder, loss, or destruction, from its being in a thoroughfare and near much frequented places and with ready facility of approach, really made the employment of a keeper all the more necessary. Indeed, the evidence shows that Dorville was more properly a managing agent than a mere keeper. As to the charge that the executor ought to have lived on the place, his reason for not doing so is very satisfactorily shown.

The Citizens' Bank had a mortgage upon it which was continually threatening foreclosure and under which the property was ultimately sold after having been once before seized at a time when the property

would have been sacrificed and when a sale was only prevented through the intervention of the executor in order that the property might bring a better price. The wisdom of this course is demonstrated by the fact that in the opinion of both parties it appears the property would not, when first seized, have brought more than, if so much as the mortgage debt; while, when it was sold, it brought very considerably more; enough to give rise to the present controversy by a creditor who otherwise would have had no interest.

The executor testifies that he could not make a yearly lease of the house or farm by reason of the constant threat and danger of foreclosure, and that he tried to effect a lease by the month and failed, as we can understand he might well do with a predial estate.

Another witness swears to the difficulty of making a lease otherwise than by the year, while the fact stated by the opponent's witnesses that they knew of other neighboring farms which were occupied and kept simply for the privilege of cultivation and with the obligation to take care of the fences without charge but also without revenue, (a fact which we can readily understand at that time of depression and prostration of material interests of every kind), really furnishes in itself a strong and satisfactory reason with the others already stated why the executor did not lease the place. He says he tried and could not do so; these facts support him in his statement; no witness contradicts the fact stated. It is not shown that any one was ready or willing to lease the place, and we have nothing to weigh against this uncontradicted affirmative, positive evidence, except negative testimony and the *mere opinions* of other persons, unsupported by any affirmative fact that the place could have been leased.

The executor appears to have exercised both good judgment and discretion in the selection of Dorville as keeper, and both he and Dorville appear to have been careful of and watchful over the trusts confided to them; there is nothing to impugn the good faith of the executor in regard to the employment and payment of a keeper. Much greater loss might well have occurred to the succession and creditors had he not done so, and even had he leased the place we doubt whether greater advantage would have resulted to the succession. Indeed, from the extent and bad condition of the fencing and the leaky condition of the roof of the house, not only was the difficulty of leasing increased, but from the public and exposed position of the property, all of the improvements were exposed to waste and perhaps absolute destruction by fire or plunder for fuel and other purposes, in close proximity as it was to the city proper and to public places, and on a public thoroughfare. The reasonableness of the price paid and value of the service rendered are sufficiently established, and the employment seems to have been proper under the

circumstances of this case to have been made in the exercise of a reasonable discretion on the part of the executor, and to have been both designed and to have resulted in benefit to the succession. The mere fact that the executor had filed two former partial accounts of the succession in which this claim does not appear, does not, in the face of the facts in the record, afford any sufficient reason of objection to his placing it upon this, his final account and tableau, and with its proper rank as a privileged claim, it being a reasonable, and, we think, a necessary expense incaring for and preserving the property of the succession, and the keeper having also, while discharging that important duty, added to the revenues of the estate.

It is therefore ordered, adjudged, and decreed that so far as relates to the claim of Dorville, as keeper of succession property, and any payments made to him by the executor on that account, that the judgment of the court below be avoided and reversed and the claim be re-instated upon the account and tableau as a privileged debt or expense of the administration as originally entered upon it by the executor, and that he be ordered to pay the same as stated by him in due course of administration as such.

It is further ordered that the opponent pay the costs of his opposition in both courts.

No. 6485.

GEORGE W. BANCKER VS. W. HARRINGTON & CO. ET AL. TEMPLE S. COONS & CO. INTERVENORS.

Lands situated in another State can not be seized in a garnishment proceeding instituted here.

The assignment of its assets for the benefit of its creditors, made by a defunct partnership to an individual member of a new partnership succeeding to the former business of the old concern, will not make the new partnership liable to the defunct partnership for the value of any of its assets, and therefore not amenable to a garnishment at the suit of any creditor of the defunct concern.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

A. & W. Voorhies, for plaintiff and appellant.

Clarke, Bayne & Renshaw for intervenors.

A. Pilié, curator *ad hoc*, for defendants and appellees.

The opinion of the court was delivered by

EGAN, J. Plaintiff, lessor, sued the defendants, lessees, and their sureties, for the lease given of the Arkansas Press, in the city of New Orleans. A large quantity of cotton in the press at the time, belonging

to other persons, and standing on the books of the cotton press in the name of Temple S. Coons & Co., commission merchants, for the several owners, was provisionally seized. Some of it was subsequently released by order of the plaintiff, and the remainder was released on the bond of the intervenors. This cotton was not liable to seizure or to plaintiff's privilege as lessor, and all controversy in regard to it has been abandoned by plaintiff's counsel in this court in his oral argument. An attachment was sued out by supplemental petition and garnishment proceedings instituted against Temple S. Coons & Co. and the members of said firm—Coons and L. O. Bridewell. They answered, denying any indebtedness to the defendants or the possession or control of any property or assets belonging to them. Their answer was traversed, and the traverse referred to and tried with the merits. Harrington & Co. had been agents for the Mississippi State Grange, and as such, and as commission merchants, had received the cottons provisionally seized for account of the several owners. They failed and suspended business, and turned over all the cottons conveyed to them by the Patrons of Husbandry to Bridewell, an officer of the Grange, selected as its agent to receive the cotton from Harrington & Co., who also made to Bridewell an assignment and delivery of their books, accounts, etc., for the benefit of their creditors of the Grange with whom they were largely in arrears. This assignment was accepted, and Bridewell with the aid of his firm proceeded to administer and control those assets for the benefit of those for whose benefit the assignment was made; with the consent and under the direction of the Grange he also turned over the cottons delivered to him by Harrington & Co. to Temple S. Coons & Co., who were selected as the new agents and commission merchants of the Grange and its members. All this occurred before the attachment of plaintiff. The books of Harrington & Co. were produced and examined, and reported upon by experts appointed by the court. From that report, and from the books, it appears that Harrington & Co. were indebted to some of their patrons, and others indebted to them, and while the books and accounts show a considerable sum in mere figures due to Harrington & Co. it is also shown that their indebtedness to those for whose benefit the assignment and delivery of their books, claims, etc., had been made was nearly as large; that the debtors were non-residents, scattered over a large extent of country, many of the accounts small, and, so far as appears, that they were, like the book accounts of other similar concerns, of comparatively little practical avail. Bridewell, when on the stand as a witness, swears *that through the influence* of the Grange he might be able to collect some of them, but that after his investigations into the affairs of Harrington & Co. he regarded the assets turned over to him as of very little avail, evidently not nearly

sufficient to pay the parties for whose benefit he held them. Aside from these there was transferred a tract of land in Mississippi, which, even if worth its estimated value, and if that value was realized, was insufficient to pay the beneficiaries under the assignment. That, however, is immaterial, as land lying in Mississippi could not be seized in Louisiana by process of garnishment or otherwise.

Under the facts presented, it is immaterial to inquire, as we are invited to do by plaintiff's counsel, whether the books of Harrington & Co. have been kept and balanced properly or not, as, even accepting his view of the question, it would not change the result, for the reasons before stated. There is nothing in the evidence then to contradict the sworn answers of the garnishees, and nothing to impugn their good faith in their dealings with the matters in controversy. Neither the intervenors nor Coons had any transactions or dealings with Harrington & Co., nor had Bridewell, as a member of his firm, any. As agent for the Grange and assignee for the benefit of the creditors of Harrington & Co. he received the cotton and turned it over to this firm, the new agents selected, and used his firm also for his convenience in managing the assets turned over under the assignment. There was judgment below in favor of the plaintiff against the defendants for the lease price and interest, and against him in favor of the intervenors and garnishees and dissolving the attachment and setting aside the provisional seizure.

It is correct, and is therefore affirmed, with costs of appeal to be paid by the plaintiff, who alone has appealed.

No. 6747.

WILLIAM A. GORDON VS. MISS MARIE C. GOULÉ.

The Second District Court for the parish of Orleans is without jurisdiction of a suit, brought by the purchaser of property at a tax sale, to be put in possession of the property.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Henry Denis for plaintiff and appellee.

J. Caldwell Peirce and *J. S. Whitaker* for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The plaintiff instituted this proceeding in the Second District Court of the parish of Orleans to be put in possession by the sheriff of property alleged to have been purchased at tax sale and described in the act of sale exhibited by him as "a certain lot of ground in square number one hundred twenty-five, bounded by Rampart, Basin, Custom-

house, and Bienville streets, having thirty-five feet front on Rampart street, with one hundred and twenty-eight feet in depth." The number of the lot is not given, and it would be impossible from this description to locate it with sufficient certainty to guide the court in adjudging or the sheriff in giving possession if the matter were properly before us, as it is not. The defendant excepted to the jurisdiction of the Second District Court *ratione materiæ*. The exception should have been maintained. The jurisdiction of the Second District Court is exclusively probate. Const. art. 83.

It can not be supposed that it was the purpose of the Legislature to enlarge the jurisdiction of that court, so specifically defined and limited in the constitution itself, by the terms used in act forty-seven of 1873 or act 105 of 1874, both general statutes for the forced collection of delinquent taxes, and regulating proceedings against delinquent taxpayers and their property, when that object or subject is not expressed in the title or body of either act. No such intention can be legally inferred from the general use of the terms "district or parish court" in the fourth section of the former act, nor of the terms "any district or parish judge" in the third section of the latter.

These are the provisions of law relied upon to sustain the plaintiff's demand. It is unnecessary to pass upon the other questions raised in the record.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be and it is annulled, avoided, and reversed; that the defendant's exception to the jurisdiction of the Second District Court of Orleans be sustained and the plaintiff's demand dismissed with costs of both courts.

No. 6580.

SARAH AND AUSTIN WOOLFOLK VS. MRS. EMILY WOOLFOLK.

The parish court is without jurisdiction of a suit for partition between the surviving widow and the heirs of the decedent, when it appears that the widow had accepted and disposed of her interest in the community, and that the heirs, who are of age, had unconditionally accepted the succession and been put in possession of its property. In such a case the succession no longer exists.

No intervention can be filed in a suit for a partition, after judgment decreeing the partition has been rendered. That judgment is definitive, and hence the suit can not be considered as pending until the final decree homologating the partition.

Parties who intervene in a partition suit can not be considered as third opponents to the execution of the judgment in the suit, unless they either claim to be owners of the property on which the judgment is sought to be executed, or claim a preference on the proceeds of its sale.

A suit for the nullity of a judgment can not be brought by way of intervention, or third opposition. It must be brought in the ordinary form, by petition and citation.

No valid judgment can be given in a proceeding wherein no citation issued to, and no answer, or appearance was made by the defendant.

APPEAL from the Parish Court of Iberville Parish. *Cole*, J.

Merrick, Race & Foster, and *Samuel Matthews*, for plaintiff and appellees.

Semmes & Mott, A. S. Herron, and *Barrow & Pope*, for intervenors and appellees.

The opinion on the original hearing was delivered by MANNING, C. J., and on the rehearing by SPENCER, J.

MANNING, C. J. Elise Labauve, Joseph Hernandez and others, judgment creditors of Emily Woolfolk, have appealed from a judgment of the Parish court of Iberville, dismissing their interventions wherein they seek to annul the decree of partition rendered by that court, and oppose the homologation of the proceedings founded upon it.

As our opinion is based upon the incompetency of the Parish court to render the decree of partition, we shall confine our recital of the facts to those bearing upon the question of jurisdiction.

Austin Woolfolk the elder died on 20th. of February 1847, owning property in Maryland, Tennessee, and Louisiana. He left five minor children, issue of his marriage with the defendant, to wit, Samuel who died prior to May 2 1861, unmarried, intestate, and without issue—Joseph B. Woolfolk, Louisiana T. Woolfolk, Austin Woolfolk, jr. and Sara Woolfolk. He bequeathed to his wife and minor children his property in Louisiana, to be held by them as they would have held it under the law of Louisiana, had he died intestate. The defendant, their mother, was confirmed as their natural tutrix by the proper court of Iberville parish on 26th. of February 1847, that parish being the domicil of the decedent. On 2nd of May 1861, the surviving children (Samuel being dead) were either of age, or had become *sui juris* by dispensation from the disabilities of minority through judicial emancipation.

At the close of the war in 1865 Emily Woolfolk had become pecuniarily embarrassed, as was also Joseph B. Woolfolk, the eldest son. Judgments for large sums had been obtained against her, and were duly recorded in the proper office of Iberville parish, and operated as judicial mortgages on the Mound plantation in that parish. That property being thus incumbered, Emily Woolfolk, by notarial Act of 20th. September 1865, sold to her son Austin all her community interest, and all the succession rights which she had inherited from her deceased son Samuel, in and to the property inventoried in the succession of her hus-

band, also deceased, and on the same day, Joseph B. Woolfolk sold to the same party all the succession rights, inherited by him from his father, and from the deceased Samuel. The inscription of the judgments of Hernandez and other opponents was anterior to the sales, and whatever consequences followed from these judicial mortgages, the sales did not include, nor did they divest the defendant of her usufruct, as surviving widow in community, of that half of the community property which belongs to the children. She owned the other half absolutely. The judicial mortgages affected both of these interests.

John Patrick, an adopted son of the elder Woolfolk, and Austin recovered judgments against Emily Woolfolk on 11th May 1866, the former for $2442,70 and the latter for $8424 with interest, and issuing executions upon them, seized and sold the usufructuary interest of the defendant in the community property, and became the purchasers thereof, each in proportion to his respective judgment. On 21 January 1869, John Patrick sold the usufructuary interest thus acquired to Austin Woolfolk, who thus becoming owner of the entire usufruct of his mother, sold to his sisters Sara and Louisiana on 10th. February 1869, one undivided third thereof to each. Austin and the two sisters thus became owners in equal parts of the usufruct.

But before the purchase of the defendant's usufructuary interest by Patrick and Austin, she had made a lease on 1 March 1866 to Patrick of the Mound plantation for four years from 12 January 1866, which remained in force until the same month of 1868, when it was rescinded by mutual agreement.

On the 9th. of November 1866, the Woolfolk children, including Joseph, instituted suit against their mother as executrix to compel her to account for her administration of the succession, and they also prayed to be decreed the owners of an undivided half of all the property of the succession situated in Iberville parish, and of one half of the sum due from her to the succession for moneys received from the proceeds of sales of property, and from other sources, which they alleged was $86,-015. They also claimed a tacit mortgage on the immovable property of their mother to date from 26th. Feby. 1847. Judgment was rendered against her without opposition, and it was decreed that Austin, and his sisters Sara and Louisiana, were the owners of one undivided half of the property inventoried in the Succession proceedings in the following proportions, viz Austin was owner by inheritance and by purchase of 42-160ths—Louisiana and Sara by inheritance, each of 19-160ths.

This decree also adjudged that these three, and Joseph, recover of their mother $39,877.57, each, his or her virile share, and that their legal mortgage, securing that sum dated from 20th. Feby 1847, and operated upon all of the defendant's property that was susceptible of mortgage.

Zenon Labauve, a judgment creditor of the defendant, having recorded his judgment on 3rd June 1865, and thereby acquired a judicial mortgage, appealed from this decree, in so far as it allowed the legal mortgage above mentioned, and this Court reversed the judgment *quoad* that mortgage, and declared that the only effect of a judgment upon this demand of the children in that suit was to close the administration by Mrs. Woolfolk as executrix, and fix the amount in her hands as usufructuary. Woolfolk v. Woolfolk, 20 Annual, 513.

This decision appears to have been unsatisfactory to all the parties to that suit. On the 10th. of February 1869 they entered into an agreement, wherein Mrs Woolfolk renounced the benefit of the plea of *res judicata* so far as the legal mortgage asserted by the children against her in that suit was concerned, and in consideration of $2000, she transferred to them whatever usufructuary rights she possessed, recognized the validity of the judgment of this Court so far as it fixed the sum of money due by her, and consented to an immediate judicial partition of the common effects. This agreement divested her of her usufructuary rights on and in the amount of the monied judgment recovered against her by her children, and she had been previously divested of these rights on all the residue of the community property by the judicial sale under the executions of Austin Woolfolk and John Patrick, and by the sale to Austin of 20th. Sept. 1865 she had divested herself of all interest as owner of her half of the community property, or as heir of her deceased son Samuel.

Having thus prepared the way for a partition, the suit to effect it was suspended until 7th. of June 1869. In the meantime however, viz on 1st March of that year, the defendant and her son Austin rescinded the sale of 20th Sept. 1865. She returned, or professed to return to him, the original consideration of that sale, $14,532, and the motive inducing the rescission is stated in the Act to be ignorance of the nature and extent of the incumbrances on the property existing at the time the sale was made.

Having thus re-invested their mother with the ownership of one half of the community property, and her share in the succession rights of her deceased son Samuel, this suit for partition was instituted on 7th. of June 1869 in the Parish Court for Iberville by Austin Woolfolk and his two sisters Louisiana and Sara. Joseph B. Woolfolk was not a party thereto, although interested as co-proprietor of the judgment for over thirty nine thousand dollars, recovered against the defendant as executrix, already mentioned.

The plaintiffs in this partition suit allege that the defendant had received in cash $83,952.76, and that therefore she should take in the partition less that sum, and the remaining property should be sold to

equalize the lots. They allege that the defendant, as partner in community, was entitled to one half, or 80–160 parts of the common property, and as heir of Samuel to 4–160 parts thereof—that Austin was entitled in his own right to 16–160 parts, and as heir of Samuel to 3–160 parts, and as assignee of Joseph to 16–160 parts, and that Louisiana and Sara were each entitled to 19–160 parts. They pray for a judicial partition of the common property, and also of the sum of $83,952.70 due by their mother, and further for recognition of a legal mortgage in their favor on all the property of their mother that was or is susceptible of mortgage.

The defendant permitted judgment by default to be entered against her, and there was a decree for a partition, and requiring the notary to take into consideration as part of the entire mass, the sums of money received by the defendant from sales of property, and from other sources. These sums constituted the amount of $83,952.76 above stated.

The common property was advertised for sale, and it was enjoined by the creditors. Pending the litigation Austin Woolfolk died, bequeathing to his mother all she was entitled to receive as his forced heir, and the remainder of his estate to his brother Joseph and his two sisters. Although Joseph thus became interested in the common property, he was not made a party to the partition suit, nor was Austin Woolfolk's succession represented except through a testamentary executor.

At this juncture, the injunction which had delayed the sale was dissolved, Woolfolk v. Woolfolk, 24 Annual, 282, and the common property was sold on 3rd. December 1874 for twenty-five hundred dollars. It was appraised for a much larger sum. The purchasers were Joseph and the two sisters in equal undivided shares. On the 5th. of same month the notary made a partition, whereby the hitherto common property was allotted to the plaintiffs in this suit and the defendant was settled with by allowing her credits on her indebtedness to her children.

At this stage of the proceedings, Mrs. Labauve and other judgment creditors filed interventions, and opposed the homologation of the partition on various grounds, and among them, that the partition was null and void *ab initio* for the reason that the succession of Austin Woolfolk the elder had been closed long prior to the institution of the suit—that the heirs, all being of age, had accepted the succession unconditionally, had entered into possession of the common property, and that they held it as co-proprietors with their mother, who had also accepted the community, and therefore the Parish Court had no jurisdiction of the partition suit.

The petition for emancipation of the minors—the sale from Joseph

to Austin—the lease and its rescission—the sale from Mrs. Woolfolk to Austin and its rescission—the suit of the children against their mother for an account of her administration of the succession, and the judgment rendered in that suit—all show that the succession of Austin Woolfolk the elder was closed, and that the parties had taken possession of the property, and disposed of it as owners. And this being true, it was no longer a succession that was sought to be partitioned, but common property of several owners of large value, and the Parish Court had not therefore jurisdiction of the suit for partition.

If the Court had no jurisdiction to decree a sale for partition, it is manifest that the purchasers at the sale made under that decree acquire no title therefrom. If they have any title, it can only be by the voluntary transfer of the parties, and hence none of the effects flowing from a judicial partition are produced. It is true that Mrs. Woolfolk, the defendant, may be estopped from questioning the validity of the sale, because she allowed the decree to be executed. It is also true that Joseph B. Woolfolk, who became a joint purchaser with his sisters, may be precluded from attacking the partition proceedings, but these estoppels operate against them, and have no greater effect than voluntary transfers. They do not change the character of the partition. They can not make that a judicial partition, which derives its force and effect from their consent alone.

It follows that the judicial mortgages of the opponents have not been displaced by the sale under the decree for a partition, and have not been transferred from the property to the proceeds. And therefore,

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favor of the Intervenors maintaining their oppositions and interventions, and dismissing the suit for partition at the costs of the plaintiffs therein.

ON REHEARING.

SPENCER, J. The facts in this case, so far as detailed in our former opinion, need not again be repeated. In that opinion we held that the parish court of Iberville was without jurisdiction, *ratione materiæ*, in the matter of the partition in this cause, for the reason that the widow having accepted and disposed of her community interests, and the heirs being of age having unconditionally accepted the succession of Austin Woolfolk, Sr., taken actual possession of its effects without opposition, after a decree recognizing their respective rights and liquidating their claims against the widow executrix, there was no longer a succession to be partitioned. We see no reason at present to change our opinion as

then expressed, but in the view we now take that question need not be considered.

In the application for rehearing there have been pressed upon our attention preliminary questions of practice which did not receive our consideration before. The decree of partition in this case was rendered in 1869, fixing the respective rights of the co-proprietors in the property, settling the accounts between them, ordering a sale to effect the partition, and referring the parties to a notary. In August, 1874, Mrs. Labauve, Hernandez, and the Union Bank, claiming to be judicial mortgage creditors of the Widow Emily Woolfolk, defendant, filed a third opposition to regulate the effects of the sale as to themselves and claiming the proceeds of her share by preference. The sale for partition took place December, 1874, and was immediately followed by a notarial act of partition. No proceeding for homologation appears ever to have been taken. In April, 1875, Mrs. Labauve and the other opponents dismissed as in case of nonsuit their said opposition, and on same day filed another proceeding, styled an amended opposition and intervention, in which they oppose any homologation of the partition (no proceeding to homologate, however, was pending), and pray that the judgment of partition and all proceedings thereunder be annulled for want of jurisdiction *ratione materiæ* in the parish court, etc. Copies of this "intervention and opposition" were served on plaintiffs and defendants, but no citations were issued. So far as appears, there was never any judgment by default entered upon this intervention against the defendants therein, nor was it ever put at issue by any appearance or answer. The minutes show, however, that the matter was assigned for trial, without objection so far as appears, and that a mass of evidence was offered by the parties *pro* and *con*, the trial consuming several days. There was judgment definitively dismissing "the intervention and opposition," and from that judgment this appeal is taken.

Under this state of facts, it is material to inquire what was the nature and character of this proceeding by Mrs. Labauve and others.

First—Was it an intervention, and if so was it in due form of law?

Second—Was it a third opposition and in due form of law?

Third—If neither an intervention or third opposition, was it an action of nullity or revocation, and in due form?

Fourth—Where the law requires that suits be brought in the ordinary form, by petition and citation, and that they be put at issue by default, or by appearance and answer, can parties waive these forms of law, *in toto*, and try a case without any issues being legally formed?

First—In the nature of things and by express letter of the law, C. P. arts. 389 and 391, intervention is permissible only whilst the suit is pending between plaintiff and defendant. If the suit has terminated

and judgment has been rendered, no intervention therein is possible. It is urged, however, on the authority of Stokes vs. Stokes, 6 N. S. 350, that a suit for partition is only terminated by the decree of final homologation, and that the judgment decreeing the partition, fixing the rights of ownership of the parties, and adjusting the collations between them is only interlocutory.

We think that the weight of authority as well as of reason is against the dictum of Stokes vs. Stokes. We consider that case overruled by Traverse vs. Rose, 10 L. R. 500; 11 L. R. 494; McCullom vs. Palmer, 1 Rob. 512; Blanchard vs. Blanchard, 7 An. 529, and other cases subsequent.

We are at a loss to understand why a judgment rendered upon issues regularly formed by petition and answer, passing upon the titles of the litigants, decreeing their respective portions in property, and fixing their indebtedness to each other, wants any of the essentials of a definitive decree. The rule or motion to homologate a partition when made is in some sort a new proceeding, requiring notice to the parties, and to be followed by another decree. We do not understand that upon trial of such rule one can again bring into question the matters adjudicated in the original judgment of partition; but the contest is confined then to things done in execution of it. It is doubtless true that until this decree of homologation and confirmation is rendered the partition can not be regarded as or have the effect of a judicial partition; but that does not prevent the decree of partition, in so far as it adjudicates upon the rights of the parties, as between themselves, from being final.

In this case, the decree of partition having been rendered long before the so-called intervention, and no proceeding for homologation being pending at the time it was filed, there was no suit, and therefore there could be no intervention.

Second—Nor can their demand be considered as a third opposition to the execution of the judgment of partition. Such opposition is permissible only in two cases—

1. When the decree is being executed upon property of which opponent claims to be the owner;

2. When opponent claims preference on the proceeds of sale. C. P. 396 *et seq.*

The parties do not occupy either position, and are not, therefore, their opponents.

Third—The demand is *in fact* one in nullity or revocation of the decree of partition. As such it should have been brought in the ordinary form, by petition and citation.

C. P. Art. 610.—"The party praying for the nullity of a judgment, before the court which has rendered the same, must bring his

action by means of a petition; and the adverse party must be cited to appear as in ordinary suits."

Fourth—"The joining of issue is in fact the foundation of the suit. * * * It is only after this is done that the suit begins." C. P. 359.

"Judgments may be annulled if the defendant has not been legally cited, and has not entered appearance, joined issue, or had not a regular judgment by default taken against him." C. P. 606, No. 4. See, also, 2 L. 171; 7 N. S. 285; 10 An. 147.

We are not prepared to say, in the presence of these provisions, that in courts of record, as ours are, parties can by silence waive and dispense with these essential legal forms, and try cases, as it were, without forms or pleadings. To tolerate such practice would be to strip judicial proceedings of all certainty, and render insecure property and rights resling upon judicial titles and decrees, and would lead to infinite confusion.

We think that the orderly conduct of judicial proceedings, as well as the public interest, require that we adhere to the rules of the Code and of the jurisprudence. The proceeding of Mrs. Labauve and the other so-called intervenors should have been dismissed as in case of nonsuit, being improperly brought and never put legally at issue.

It is therefore ordered and decreed that the judgment heretofore rendered by this court be set aside; and it is now ordered that the judgment appealed from, dismissing said (intervenors') demands (definitively) be reversed; and it is now ordered that the same be dismissed as in case of *nonsuit;* appellees paying the costs of appeal, and appellants those of the court below.

No. 3504.

M. MUSSON & CO. vs. A. FOSTER ELLIOTT.

Where cotton is nominally sold for cash, but the price is not paid on delivery of the cotton, and the vendor receives on the following day a part of the price, and accepts security for the balance, he thereby waives any privilege he may have as vendor, and is estopped from sequestering the cotton in the hands of a subsequent *bona fide* vendee, or pledgee of the cotton.

APPEAL from the Seventh District Court, parish of Orleans. *Collens*, J.

Clarke, Bayne & Renshaw for plaintiffs and appellants.

E. W. Huntington for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs sold one hundred and eighty-nine bales of cotton to Nevins & Co., the weighing and delivery thereof being

completed on 21st. of December 1869. It was a cash sale, and the full amount was $21,371.76 Nevins did not pay cash as agreed on. The plaintiffs demanded it on the 21st., and throughout that day and the next were importunate, and threatened seizure of the cotton. Shortly before 3 o'clock on the 22nd they were paid $15,741. by Hopkins the agent of Nevins & Co. who thus details the manner of payment ;— "at the urgent solicitation of Mr. Musson and to stop sequestration of the cotton, and interference with the regular course of the shipment, holding Mr. Nevins' procuration, I drew the bills of exchange sold to Mr. Elliott, and on handing them to him with the shipping document annexed, I received from Mr. Elliott a cheque for the balance due, five thousand dollars having been previously paid on account. The cheque was drawn to order of Nevins & Co., was endorsed by me as *per pro.* and handed by me to Mr. Musson immediately in the office of Elliott. Afterwards, and in order to satisfy Mr. Musson for the balance, we handed him also bills of lading, two series, as security or until Mr. Nevins was able to come out and make a final settlement with him."

The payment of five thousand dollars, of which Hopkins speaks, was an advance of that sum made by Elliott to Nevins on the 17th. or 18th. of same month, and is claimed by the defendant to have been made on this purchsae, which was made at that date, though the weighing and delivery had not been completed until later. The plaintiffs deny that this advance or loan to Nevins had any special reference to this purchase, or if it had, that it could affect them. Musson & Co. allege that the residue of the price, viz $5,630.76 was never paid, and on the 27th. of December they instituted this suit, and, sequestrated the cotton, which was then on board the ship in this port.

The cotton was released on bond, and early in January following, the defendant moved rules to quash the sequestration on the grounds that the affidavit did not state when the cotton was delivered to Nevins & Co., nor that it was an agricultural product of the United States, and that the privilege of plaintiffs was prescribed by the lapse of five days from the delivery of the cotton to Nevins, and was barred by want of registry, and that the cotton was in Elliott's possession at the time of seizure by transfer and sale from Nevins. It was agreed that the merits should be tried under these rules, and there was judgment for defendant.

The facts as disclosed in the evidence are, that the cotton was sold on the 17th. Dec. and the terms were cash. On the 18th. Nevins & Co. obtained from Elliott a promise to cash their sterling exchange to the amount of $20,741. and received $5,000 of that sum then, giving a receipt in the form of a pledge. The exchange was to be drawn against about two hundred bales of cotton. The cotton sold by the plaintiffs

(189 bales) was weighed and delivered on 21st. We have already stated the occurrences of the following days.

We do not find it necessary to decide whether the seizure was within the five days, designated by the act of 1855 as the time within which the vendor of 'agricultural products of the United States' shall be entitled to enforce his lien by seizure, nor whether the lien and privilege upon movables, such as bales of cotton, needs to be recorded to ensure its preservation to the vendor.

It is abundantly shewn that the sale of the cotton, made on the 17th., was perfected by the weighing and delivery on the 21st., and that the purchaser Nevins did not comply with the terms of sale, and that Elliott was fully aware of it. The plaintiffs made ineffectual efforts to obtain Nevins' compliance with the terms of sale on the 21st. He had been taken ill, and was not to be seen. These efforts were renewed on the 22nd, when Elliott gave to Nevins' agent the cheque for $15,741. in Musson's presence, to whom it was immediately transferred. The bills of lading for the cotton were at that moment in Elliott's possession to Musson's knowledge, and it was equally well known to him that the money was paid by Elliott because he held the bills. The money would not have been paid without them, says Hopkins. Musson said this was only a part of the price. There was a balance of over five thousand dollars. He demanded all of it. Elliott said it was all he owed Nevins, and would pay no more. Nevins was so ill as to create alarm, and time pressed. Then Hopkins bethought himself of satisfying Mr. Musson's demand by placing collateral with him. Nevins had two bills of lading for nineteen bales and thirty bales respectively, already on shipboard—on a different ship from that carrying the 189 bales—and he handed them to Mr. Musson as security, or until Nevins could come out and make a final settlement.

Musson took them—received them from Nevins as security for the unpaid portion of the price on the same day, and shortly after he had received from Elliott over fifteen thousand dollars, made on the faith of the bill of lading of the cotton he had sold to Nevins. He supposed forty-nine bales would yield about five thousand dollars, and so they would, had cotton preserved the prices then obtaining. Speaking as a witness, he says;—my dissatisfaction in not receiving full payment was expressed to Mr. Hopkins since the 21st, and when receiving the money due on account. The expectation of the balance being paid to me the next morning was one inducement to delay collection of the balance until then, when Mr. Nevins was expected to come to his office. I was handed by Mr. Hopkins bills lading to order but not endorsed for nineteen bales and thirty bales cotton on board the "Gardner Colly" which were worth, he supposed, in round numbers five thousand dollars.

But Mr. Nevins came to his office no more. He died early on the 23rd, and his death changed the whole aspect of the affair. The nineteen bales sold in England for only $1200 nett, and the unpaid vendor of the thirty bales seized them and there is a suit over the proceeds, so that the expedient devised by Hopkins to cover the deficiency of Nevins' payment was ineffectual, and Mr. Musson precluded himself, or his firm, from proceeding against the cotton bought by Elliott from Nevins to compel the payment of that deficiency. Whatever rights he may have had as vendor were waived by his actions on the 22nd, and he is estopped from subjecting the cotton to his demand under the circumstances appearing in the evidence, about which there is no dispute. The case in many features resembles Laughlin v. Ganahl, XI Rob. 140. No one has been at fault but the plaintiffs, and no one else should suffer for it. Lee v. Galbraith, 5 Annual, 343.

Judgment affirmed.

CONCURRING OPINION.

SPENCER, J. I am not able to agree with the court in its reasons for judgment in this case.

Admitting that Musson received from Elliott the balance, $15,741, due by Elliott to Nevins & Co. on the purchase or transfer of bills of lading of the cotton, and that he accepted from Nevins & Co.'s agent bills for forty-nine bales of cotton as collateral for the balance due Musson & Co., I am unable to infer from these facts that he renounced or waived the vendor's lien which he undoubtedly had on the cotton in Elliott's hands.

Nemo præsumitur donare. Renunciations are not to be presumed from acts done, unless those acts are inconsistent with the rights alleged to have been renounced.

Musson & Co. undoubtedly had a vendor's lien on the cotton for five days from its delivery. His vendee sold or pledged this cotton to Elliott. Musson threatened to seize the cotton under his privilege. Elliott very naturally sought to free the cotton from this undoubted claim, and paid, or caused to be paid, to Musson & Co. the balance of the price in his hands due to Nevins & Co; and Musson just as naturally received the sum so offered, and, with equal good sense, accepted the bills for forty-nine bales tendered him as collateral by Nevins & Co. But I see in this no evidence of renunciation. On the contrary, it had the effect of reducing the debt of Musson and increasing his security. Because I accept from the vendee of my vendee what the former owes to the latter, as

the price of the sale between them, do I thereby relinquish my privilege on the property for any balance due me? Is such an act inconsistent with an intent on my part to still look to the property for the balance due me? A sells to B a piece of land retaining the vendor's lien. B sells it to C. A threatens to seize for his money. C, having in hand a part of the price still due to B, hands it over to A, who receives it. This act would estop A from denying the sale from B to C, but not from asserting his privilege on the property, because the existence of that sale is not inconsistent with the existence of A's privilege. Nor was the acceptance of the bills for the forty-nine bales of cotton as collateral any waiver, renunciation, or estoppel, of the vendor's lien of Musson & Co. By taking additional security one does not lose or renounce the security he already has.

I think, however, that the plaintiffs, Musson & Co., have lost their recourse on this cotton in the hands of Elliott, by failure to assert their privilege "*within five days after the day of delivery.*" The delivery was completed on the twenty-first. Excluding the twenty-first, the day of delivery, the five days elapsed at the close of the twenty-sixth. The sequestration was taken out on the twenty-seventh.

The general rule is that the vendor's privilege is defeated by sale of the movables subject to it—C. C. 3227—but, by exception, it continues for five days "after the day of delivery" in sales of agricultural products. *Idem.* It is said, however, that this delay of five days is not a prescription, or subject to its rules. The Civil Code, after treating of the prescription relative to the acquisition of property, proceeds in articles 3528, 3529, *et seq.* to treat of the prescription which operates a release from debt. Art. 3529 says: "This prescription has also the effect of releasing the owner of an estate from every species of real rights to which the property may have been subject, if the person in possession of the right has not exercised it during the time required by law." Whilst this article was framed more particularly with reference to real estate, and real rights thereon, it serves to show that the effect of this prescription operates not only for the release of *persons* from *their obligations*, but also to extinguish incumbrances and obligations bearing *upon things*.

There was a vendor's lien in favor of Musson, bearing as an incumbrance on this cotton. The law declares that if the right to that privilege is not asserted within five days after the day of delivery it is lost, at least as against a third holder of the property. In other words, an action to enforce it is barred by lapse of time. The property is discharged from the lien, the incumbrance "by the effect of time," and this is prescription. C. C. 3420.

Article 3430 Civil Code declares that prescription is "acquired after

the last day allowed by law has elapsed." The twenty-sixth was the last day allowed by law for an action to enforce the plaintiff's privilege.

The Code of Practice treats in the main of the rules of procedure in courts of justice. We think the rule of art. 318 C. P. can not be extended to a case like this. It manifestly refers to mere matters of practice in the courts.

As I have said, I think the five days of art. 3227 C. C. constitute a prescription. As such it is not interrupted or suspended by the occurrence of *dies non*.

I therefore concur in the decree of the court in this case.

No. 5461.

JAMES J. O'HARA vs. CITY OF NEW ORLEANS.

No peremptory exception filed in this court will be noticed, unless filed while the trial of the case is still pending. It is too late to file such an exception after the case is submitted.

Under a contract with a city corporation to do certain work, a contractor can not claim compensation for new, and additional work done by direction of a city official, without the consent of the city, which was not stipulated for in the contract expressly, or by implication, and which cost more than the work actually contracted for.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

H. G. Morgan for plaintiff and appellant.

B. F. Jonas, City Attorney, for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the twentieth of November last this case was submitted to the court, and—on the twenty-third a plea of prescription was therein filed by defendant's attorney. At that date, this case had passed from the control of the parties and their attorneys, and no additional plea could then have been regularly filed in the same. It is true that prescription may be pleaded in the Supreme Court, but when? On the trial of the appeal and before its submission.

As justly remarked by Mr. Justice Slidell, the English translation of article 346 of the Code of Practice is not correct; the French text is in these words: "Les exceptions péremptoires qui concernent le droit, peuvent être allegués en tout état de cause, avant le jugement définitif; mais elles doivent être opposés spécialement, et *assez à temps* pour que la partie adverse puisse faire la preuve contre eux, s' il y a lieu."

The last paragraph of article 902 of said Code authorizes the party

to whom the plea of prescription is opposed in the Supreme Court, to ask the remanding of the cause for trial upon that plea.

The letter of these articles indicates that, in the appellate as well as in the lower court, such a plea should be filed *on the trial*, at any stage of the trial, and before submitting the cause to the court. Otherwise, how construe that part of article 346 which provides "that the peremptory exception shall be pleaded in time to allow the adverse party to bring his evidence, etc.—and that part of article 902 which gives to that party the privilege of having the cause remanded?

The plea of prescription urged by defendant was not filed at any stage of the trial, but *after the trial* and can not be considered.

On the eighth of June 1869, James J. O'Hara contracted with the city of New Orleans, to grade and shell Locust street, from Felicity Road to Washington street, for a price fixed in the contract. He complied with his engagement, and—on the twenty-eighth of March 1872, he accepted—from the City Surveyor—as a final settlement between him and the city, a certificate attesting that he was then entitled to the per centage which, as a guarantee and for the space of one year, the city usually retains on the stipulated price of work done under its contracts That price was $6391 83, and was due in the following proportions, to wit:

By the proprietors of the lots on the front of which the work was done	$5216 09
By the city	1175 74
	$6391 83

In 1873, on the twenty-eighth of February, James J. O'Hara brought this suit against the city alone, to recover from it the sum of eighteen hundred and twenty dollars, for extra work he alleges he has done in filling certain ditches bordering a portion of Locust street, which he graded and shelled under the already mentioned contract. That, under his agreement with the city, those ditches were to be dug and not filled, but that—owing to the delay which he experienced in obtaining from the city officers lines and levels which they were bound to furnish him, owing also to the construction of side-walks on Locust street one year after his engagement, he was compelled to fill, instead of digging the ditches alluded to, and that he had so done under instructions from the City Surveyor.

We admit that, when certain work is stipulated to be done under the directions of a street commissioner, that officer has authority to have extra work done, where it has been rendered indispensable by the action of the City Council subsequent to the making of the contract, and where, without such extra work, it would be impossible to comply with the contract—but, under no circumstances, can an official order any

new, any additional work, the cost of which, and so far as the corporation is concerned, would far exceed the cost of the work specified in the contract.

In plaintiff's bill, that prepared after the completion of his work, and which bears the date of the twenty-eighth of February, 1871, the amount charged against the city for grading and shelling the street is $1175 74. That amount was paid, and two years after the completion of the work, long after the payment of the account presented in 1871, plaintiff sued the city for $1820, the alleged value of extra work, and which exceeds by more than one third the whole of that part of the price for which the city was bound under the original contract.

The filling of ditches was certainly a fraction of the work delivered, received and settled for in 1871, and though—in the execution of the work—there may have been a difference between that which was specified and that which thereafter became necessary, it was at the date of the delivery and approval of the work that plaintiff should have claimed for all he had done, for all he considered himself entitled to. There was, between him and the city, but one contract—that of the eighth of June 1869; the City Surveyor testifies that he never authorized or directed plaintiff to do any other work than that called for by his contract. In so doing, he would have exceeded the bounds of his authority. For the work to be performed under the aforesaid contract, only one price could have been asked, only one price was to be paid, and—for the price agreed upon and fixed, plaintiff receipted in full, without reserving his non-asserted right to an extra compensation.

The views already expressed dispense us from discussing and passing upon the bills of exception taken by plaintiff: for, admitting that every answer excluded by the lower court would have been favorable to his cause, the excluded evidence would not have changed our conviction that he can not recover against the city, because:

1. If he performed any extra work, he did so—not at the request of the city—but, as he contends, at the request of the City Surveyer, and that official could not have legally substituted—to the parties' original contract—another, a different, a more onerous contract, one binding that corporation—without its knowledge or consent—to pay, for extra work, more, much more than it had agreed and bound itself to pay for the whole of the work.

2. In strict accordance with its obligation, the city has paid for every foot of work charged against it, in plaintiff's own account; and the terms of his receipts, in 1871, and 1872, for what he has done under the contract of 1869, and for whatever he then claimed and accepted as due to him under said contract, are alone sufficient to defeat his action.

The judgment appealed from is affirmed with costs.

No. 6818.

STATE EX REL. E. BORLAND, JR., VS. THE JUDGE OF THE SECOND JUDICIAL DISTRICT.

When the plea of prescription is filed in a suit, not as an answer, but as a peremptory exception, it will not have the effect of setting aside a judgment of default previously rendered in the suit; and on the overruling of the exception, thus filed, the plaintiff is entitled to introduce his proof to confirm his default, and to compel the judge *a quo* to hear his proof and pass on his application to confirm.

APPLICATION for a mandamus.

E. Howard McCaleb for relator.

Sambola & Ducros for defendant.

The judgment of the court was delivered by

SPENCER, J. The facts upon which relator bases this application for mandamus are as follows:

In the suit of E. Borland, Jr., vs. Effingham Lawrence, plaintiff had judgment by default entered on tenth May, 1876, against defendant on his failure to answer. On twenty-fourth day of October, 1876, defendant filed, as a peremptory exception founded on law, the plea of three and five years prescription, and prayed "that the judgment by default be set aside and plaintiff's petition dismissed without the necessity of a trial on the merits, and for general relief, etc."

"November 5, 1877.—On calling the docket of civil cases at issue the same were fixed as follows, to wit: 2284—E. Borland, Jr., vs. E. Lawrence, for Thursday, November 8, 1877."

"November 8, 1877.—Borland vs. Lawrence, 2284. This case was this day regularly taken up for trial on defendant's exception, etc."

"When after hearing the evidence and argument, the exception being submitted, the court took the same under advisement."

On the trial of this exception plaintiff offered the notes sued on and other documentary evidence, but on objection of defendant that the evidence could only be received to show interruption of prescription, "the court sustained the objection on the ground that the allegations of the petition are taken for true."

On the next day, ninth November, the court ordered defendant's peremptory exception to be overruled. Thereupon, we are informed by a bill of exceptions, the counsel for plaintiff "moved the court to confirm and make final the judgment by default herein entered," tendering in support and proof of his demand the notes, mortgage, and other documents in the record. The judge refused to permit the evidence to be filed or to entertain or hear the motion and evidence tendered, and

refused to hear and determine the case on its merits, for the reason that the case is not at issue, the judgment by default having been set aside on defendant filing his exception of prescription, and said exception having been overruled, there was no default to confirm, and that plaintiff must put the case at issue by again taking another default or waiting for defendant to file his answer.

We may here remark that we have a certified transcript of the case before us, and although defendant in his exception prays that the default be set aside, we find no order of court to that effect. Nor would the court, under the view the judge took, have been authorized to make an order setting aside the default. There is no law for setting aside a default by filing an exception. It is the filing of "*the answer*" which operates and authorizes setting the default aside. See C. P. 314.

If the plea of prescription was a peremptory exception founded on law, and not an answer, then the default was not, and could not be, set aside thereby. The defendant filed it as an exception and asked its consideration as such and as avoiding the necessity for trial of the case on its merits. The court considered, treated, and tried the plea as an exception, without any objection on plaintiff's part, so far as the record discloses. We incline to think that the exception of prescription may, when pleaded *before* answer, be tried as an exception, that is separately from the merits; but if pleaded *after* answer, it must be tried with the merits. C. P. 336, 345, and 346. We think, therefore, that the court properly tried the plea in this case as an exception.

But as we have seen, after that exception was tried and overruled, the case being on default, and the legal delays having expired without defendant having answered, by article 312 Code Practice plaintiff had the right to "a definitive judgment * * * provided he proved his demand." But the judge refused to hear his motion for final judgment, or to receive or consider the evidence he tendered in support thereof, and declined to hear the case on its merits. Relator thereupon makes this application for a mandamus to compel the judge to proceed to hear and determine said cause, and complains that his refusal is a denial of justice. We think relator is entitled to the relief sought, to the extent of compelling the judge *a quo* to entertain his motion, to receive and consider his evidence, and to pronounce judgment upon the case. See 13 An. 483. Relator asks that he be compelled to render judgment in the case, upon the evidence as tendered on ninth November, 1877, and as detailed in his bill of exceptions. Subsequently to relator's application for this mandamus, the record shows that defendant filed an answer. This subsequent act can not vary relator's rights. We must pass upon them as they existed at the time of his application to us. But as we can secure relator the rights claimed, to wit: a trial of his

case, without going to the extent asked, and without cutting defendant off from any legitimate defense he may have—

It is ordered, adjudged, and decreed that the mandamus herein issued be made peremptory, and that the judge of the Second Judicial District Court for the parish of Plaquemines do, on the first day of the next term of his said court, proceed to hear and determine plaintiff's motion for confirmation of default in the case of "E. Borland, Jr., vs. Effingham Lawrence," No. 2284 of the docket of said court, and to render judgment therein according to law. If, however, previous to said first day said defendant has filed an answer, then that on said first day the said judge fix said cause for trial, in accordance with the rules of his court, and that he proceed to try the same according to law and without unnecessary delay, and to render judgment therein. It is further ordered that defendant herein pay the costs of this proceeding.

No. 6665.

DUNCAN STEWART VS. CHARLES LACOUME.

The exemptions of property from seizure provided for by article 644 of the Code of Practice, and by the acts of 1872 and 1874, do not apply in favor of lessees, as against their lessors.

The surety on a forthcoming bond can only claim a release from his obligation, because the sheriff has made a return of the *fi. fa.* issued against the principal of the bond before the return day of the writ, by showing that he was injured thereby. And even then he can only claim a release to the extent of the injury proved.

The surety on a bond for the release of property provisionally seized by a lessor, becomes liable from the moment he fails to return the released property to the sheriff, when the latter, under a *fi. fa.* against the principal on the bond, makes a demand on the surety.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Kennard, Howe & Prentiss for plaintiff and appellee.

Hornor & Benedict for defendant.

St. M. Berault for warrantors.

The opinion of the court was delivered by

DEBLANC, J. For rent due him by W. J. A. Hughes, Duncan Stewart obtained a judgment against him, with right of pledge on the property, which had been provisionally seized to satisfy said rent. On the twentieth of September 1875, the property seized was released on a forthcoming bond subscribed by said Hughes, as principal, and by Charles Lacoume, as his surety.

On the twenty-second of September 1875, Hughes sold to Charles Lacoume, the furniture and effects subject to plaintiff's pledge, and which—two days before—had been released on bond. On the first of October, Hughes removed all of said furniture and effects from Stewart's house, to one leased by him from Charles Campbell, and—afterwards—took a rule to set aside the seizure, on the ground that the value of said property was under $600, and exempt by law from seizure by the lessor. On the third of November, that rule was tried and dismissed.

On the twenty-fifth of December, the sheriff of the parish of Orleans received a writ of *fieri facias* issued on plaintiff's judgment against Hughes, and—in his return on that writ—he states that he called on the principal and the surety on the forthcoming bond, to point out property for seizure, but that none was pointed out. That Hughes said he would surrender the effects which had been provisionally seized from him, but failed to deliver them in the custody of said officer, who—on the eighth of February 1876, returned the writ of *fieri facias*, with the endorsement "*nulla bona.*"

It was after that return that the present suit was brought against Charles Lacoume, as surety on the bond. In his answer to that suit, he contends:

1. That, though he instructed the sheriff to seize the furniture which had been released on bond, and informed him where said property was and could be found, the sheriff refused to seize it.

2. That said property was and remained exempt from seizure, and no bond could have been required for its release—and, if it was not exempt, his obligation as a surety has been destroyed by the sheriff's refusal to seize the effects subject to the lessor's pledge, and by the premature return of the writ of *fieri facias.*

To that portion of defendant's answer, in which he claims that the property provisionally seized is now, and was—when provisionally seized—exempt from seizure, plaintiff opposes the plea of *res judicata*, and bases that plea upon the fact that, in his suit against Hughes, the same exception was urged by the latter, tried and finally determined against him, and that the judgment dismissing that exception can not be collaterally attacked by Charles Lacoume. That plea is untenable.

The bond sued upon is made payable to Eugene Waggaman, the sheriff of the parish of Orleans, by whom it was transferred to plaintiff, and its condition is "that, if the defendant—W. J. A. Hughes—shall satisfy such judgment as may be rendered against him in the suit pending at that time between him and Stewart, then the obligation evidenced by the bond to be void, or else to remain in full force."

It is evident that the exemptions provided for in the 644th art. of the Code of Practice, and in the acts of 1872 and 1874, do not apply to lessees. The exemptions in their favor are specially mentioned in art. 2705 of the R. C. C. and the titles of the aforesaid acts which are, the first "An act to amend article 644 of the Code of Practice," and the other "An act to amend the act" so entitled, exclude the supposition that, in adopting both or either of them, the Legislature intended to amend article 2705 of the Civil Code.

Was Lacoume released by the fact that the writ of *fieri facias* issued against Hughes, was returned before the seventieth day? He was not, or—if he was—he has failed to show it. Had he proven that, on account of that premature return, any property of Hughes which could have been seized in the interval from the date of that return and that fixed by the writ for said return, is no longer subject to said writ, or had he proven that he has been, in any way, injured by said action, he could certainly claim that—to the extent of the injury sustained—he has been discharged from his obligation as a surety. This, he has not done.

We consider, as Lacoume does, that the bond which he subscribed in favor of the sheriff is and could be but a forthcoming bond. Whether it was or not, and by whatever name that bond may be called, has his obligation as a surety arisen, and—if it has—when? His obligation arose when, with the writ in hand, the sheriff went to him and asked him to point out property for seizure. He should—then—have returned the property which, by the forthcoming bond, had been taken from the custody of the sheriff.

Did he do it? He said, on the trial, that he had been informed, but did not know, that the sheriff had refused to seize the furniture which had been released on bond, on the ground that it had become subject to the rights of another lessor. As to Hughes, he testified that "he told the sheriff to get the furniture—that it was in house No. 427 Josephine street."

From two of the deputy sheriffs, we learn that Hughes and Lacoume were notified that the property would have to be brought back to the warehouse and delivered to the sheriff for identification. This was not done, and the condition of the bond was violated by the principal and his surety; and that surety, in whose name stands the title to the released property, and who has already obtained judgment against his warrantors on a bond of indemnity furnished by them to protect him against the effects of his own bond to the sheriff, was justly held liable.

The appeal, in this case, was not a frivolous one, and plaintiff is not entitled to the damages he claims.

The judgment of the lower court is affirmed with costs.

No. 6446.

FANNIE C. BIENVENU VS. E. T. PARKER, PUBLIC ADMINISTRATOR.

The legal representative of the minors' heirs of a decedent may enjoin the administrator of the succession from selling any property of the succession, to satisfy a judgment against the decedent which is null and void.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Chas. S. Rice for plaintiff and appellant.

A. Robert and *W. O. Denegre* for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff, alleging herself to be the widow of Aristide Bienvenu, and natural tutrix of his children, minors, represents that E. T. Parker, public administrator, administering her husband's estate, has obtained from the Second District Court of Orleans an order, and has advertised for sale all the real estate of said succession, to pay a judgment for which said deceased nor said property is liable. She alleges that the said judgment is a nullity, and that she has sued to have it so decreed; that it was rendered without citation against her husband and for a prescribed debt; and that the sale of the property therefor would irreparably injure her said children, who are sole heirs of their father. She therefore prays an injunction, which upon her oath and bond was granted.

Defendant took a rule to set aside the injunction: first, for insufficiency of the surety; second, that the petition discloses no cause of action; and, third, because of the things charged in the petition being barred by *res adjudicata*.

The rule was tried on the second ground, that the petition disclosed no cause of action. The judge sustained the rule and dissolved the injunction, and plaintiff appeals.

For the purposes of the trial the allegations of the petition are to be taken as true. If they are true—if the administrator is seeking to sell the real property of the estate to pay a debt that does not exist, he is seeking to perpetrate a great wrong on the minors Bienvenu—a wrong which courts can not sanction.

The judge *a quo* has not given us the benefit of his views, nor have the counsel stated them. If it is true that the judgment against Bienvenu was rendered without citation, it is an absolute nullity, and that nullity may be invoked by any one interested in doing so, and in any form of action, and whenever it is opposed to them.

We think the petition does show a cause of action.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed, and that this cause be remanded to be proceeded with according to law, appellee paying costs of appeal.

No. 6639.

JOHN F. FOLLETT ET AL. VS. SPENCER FIELD, PRESIDENT, ET AL.

When it appears that the parties in charge of the property and affairs of a corporation, as liquidators of the same, have been elected as such by the stockholders of the corporation, and their election has not been set aside, and no fear of fraudulent action on their part is alleged, no court is authorized to displace them, and appoint a receiver in their stead.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

H. E. Upton and *Hornor & Benedict* for plaintiff and appellees.

Bentick Egan for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. The plaintiffs are stockholders of the Ocean Dry Dock Company, a corporation domiciled in the town of Algiers. They brought this suit against the President and Secretary of said company, for its dissolution and liquidation.

This suit was filed on the twenty-first of February, 1877. On the same day plaintiff filed a rule, admitted by the court, in and by which defendants were ordered to show cause—on the twenty-eighth of February, 1877—why a receiver should not be appointed to take charge of the affairs and property of the Ocean Dry Dock Company, as prayed for in their original petition.

To that rule defendants excepted, on the ground that it was irregular and unauthorized by law—that it disclosed no reason for the interference of the court, and that the facts alleged by plaintiffs could not be tried in the summary form presented in said rule.

On the seventh of March, 1877, the rule was made absolute, and A. A. Woods appointed receiver of the Ocean Dry Dock Company, to collect its assets, take charge of, and care for its property, to demand and take possession of its books, papers and records.

The tenth article of the company's charter provides that "when the period shall arrive for the winding up of the affairs of the company, whether at the expiration of said charter—on the sixteenth of March, 1893—or if sooner determined upon by the stockholders, such liquidation shall be conducted by three stockholders duly elected by a majority in amount of the stockholders at a meeting to be convened for that purpose, etc.

In this case, a meeting of the stockholders was called, to take place on the fifteenth of February, 1877; and by whom and for what purpose was it called? By plaintiffs themselves and to consider the propriety of dissolving and liquidating the company. At that meeting, the dissolution which seems to be anxiously desired by every one of the stock-

holders, was pronounced by five of them, representing—as contended by defendants, 434 shares out of 830.

Plaintiffs admit that they appeared at said meeting, but charge that they were refused—by defendants—a hearing, oyer of the books and papers of the company, which were retained and controlled by said defendants. That—for those reasons—they retired from the meeting, taking with them a majority of the shares of stock of said company. It was then that, in accordance with the tenth article of the charter, Spencer Field, J. B. Williams and N. C. Folger were elected liquidating commissioners.

Under their own allegations, it appears that plaintiffs could have controlled the meeting of the fifteenth of February. The reasons given by them why they retired from it do not justify their course—for, on that day and on that occasion, considering their own allegations, they could have obtained not only the dissolution desired by all and opposed by none, but, besides, they could have chosen the liquidating commissioners, whose election is expressly provided for in said charter.

There can be no doubt as to the power of courts to appoint receivers to liquidate the affairs of an insolvent corporation; but when and under what circumstances? When there are no persons to take charge of, and conduct the affairs of said corporation. These are the very words of one of the decisions relied upon by plaintiffs' counsel. 1st Paige 387.

In this case, three of the stockholders of the dissolved company appear to have been elected as its liquidating commissioners; and—were their election set aside as null—it is doubtful that, under the parties' contract, a receiver could be appointed. The validity of that election is contested in the principal action, and—in that action, may be inquired into.

It is clear, however, that—whilst that election stands unreversed, and no charge of apprehended fraud is made against said commissioners, the appointment of a receiver is not only premature, but unauthorized.

One of the reasons given for the judgment in the rule is "that the company is without credit and means to care, *ad interim*, for the property—a dock which needs pumping and other attention, to prevent it from sinking." The appointment of a receiver would not add to the credit and means of the corporation.

The sixth article of the charter provides that, "unless removed for cause, two of the plaintiffs, Thomas G. Mackie and John F. Follett, shall be—until the expiration of said charter, the managers of the Dry Dock, and shall have power to purchase all materials necessary, make all contracts, employ all workmen and exercise a general supervision over the workshops of said company." With that important power in

their hands and under the circumstances already related, can they justly claim the appointment of a receiver? We believe not.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court appointing Alfred A. Woods as receiver to the Ocean Dry Dock Company be and it is hereby revoked, and plaintiffs' rule to appoint a receiver dismissed at their costs in both courts.

No. 6693.

THOMAS J. MESHEW, AVENDANO BROS. SUBROGATED, VS. S. F. GOULD. RULE ON SHERIFF'S KEEPER.

An agent, or depositary, in whose hands certain property attached in a suit has been placed for keeping and sale, by the parties claiming adverse rights in the same, can not be compelled by the attaching creditor, on a mere *rule*, to deliver said property, or proceeds of the same, to the sheriff. No action can be had against the depositary in such a case by the attaching creditor until his rights have been fixed by a decree rendered contradictorily with all other parties asserting an interest in the property.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

George L. Bright for plaintiffs and appellees.

Cotton & Levy for sheriff's keeper and appellant.

The opinion of the court was delivered by

MARR, J. The plaintiff, Meshew, issued a writ of attachment against the property of S. F. Gould, and attached a flatboat load of staves. The attachment was made on the twenty-sixth of January, 1875.

On the twenty-eighth of January an agreement was made as follows:

"Thos. J. Meshew, Avendano Bros. Subrogated, vs. S. F. Gould. No. 6293, Fifth District Court.

"Whereas, by virtue of a writ of attachment issued in the above suit, the sheriff has attached a boat load of staves, and Traylor & Knight claim about 18,000.

"And John E. Binns claims the balance of the staves seized by the sheriff, of which 3000 staves he alleges to have bought from Henry Bohannan, and 3000 made by himself (Binns) which he can identify, being on top and unmixed with any of the staves claimed to have been gotten out by Gould.

"Now, neither party admitting the claim of the other, it is agreed, to simplify the matter, *and to save expense*, that the sheriff shall appoint James H. Mehaffy keeper of all the staves, and he is authorized to sell the staves, the net proceeds of which he shall deliver to the sheriff.

"Traylor & Knight and John E. Binns will make their claim before the court.

"Mehaffy will sell each lot separately and render a separate account.

"This agreement to amount to nothing more than to substitute the money for the staves. Mehaffy agreeing to discharge his obligations as well as he can.

"New Orleans, January 28, 1875.

THOMAS J. MESHAW,
per T. AVENDANO,
JOHN E. BINNS,
STEPHEN TRAYLOR for self and
KNIGHT,
JAMES H. MEHAFFY."

On the eleventh of April, 1877, plaintiff took a rule on Mehaffy as follows:

"On motion of George L. Bright, attorney for plaintiff, and on showing to the court that J. H. Mehaffy was appointed keeper of the property attached, and took possession thereof:

"It is ordered by the court that said J. H. Mehaffy show cause on Saturday, twenty-first inst., why he should not deliver to the sheriff the property attached and intrusted to him for keeping."

If Mehaffy had paid no attention to this rule, and the court had passed upon it *ex parte*, it should have been dismissed. On its face there is no suggestion of fact which discloses any right or cause of action in the plaintiff to demand the specific thing which he asks the court to do. The rule shows that the property attached was intrusted to Mehaffy for keeping; and it states no reason for taking it out of his keeping, no right in plaintiff to provoke such an order.

The exhibition of the agreement of the twenty-eighth of January, 1875, makes the case more conclusive against the plaintiff. This agreement shows that Traylor & Knight claimed a part of the property attached; and that Binns claimed the remainder. These several claimants selected Mehaffy as depositary of the property, and charged him to sell it and deliver the proceeds to the sheriff. By its terms the agreement was for the benefit of all, not for the interest or convenience of the attaching creditor alone, whose right was not admitted, but was denied and contested. Plaintiff could not have maintained an action, in any form, to take this property out of the keeping of Mehaffy, without a rescission of the agreement; and the agreement could not have been rescinded without the consent of all the parties in interest, or by judicial proceeding contradictorily with all of them.

The rule simply fails to disclose any right of action. The agreement goes one step further and shows that plaintiff had no such right.

No such right could have existed in him, or in any other one of the parties to the agreement.

Mehaffy, however, appeared, and he excepted to the rule, on the grounds:

1. "The sheriff should be made a party to the rule, as a part of the proceeds of sale have been paid over to him, and the balance thereof retained for expenses incurred and paid out by this relator."

2. "The parties in interest appointed exceptor their agent to sell the property attached, and this is not the remedy to compel him to render an account."

"And should these exceptions be overruled, then your relator answers that he has sold all the property turned over to him as per the written agreement," etc., and he goes on to show what disposition he made of the proceeds.

For the purposes of this decision we need not inquire whether Mehaffy, under the agreement, is to be treated as the sheriff's keeper, or whether he is to be considered merely as the depositary of property in litigation, selected by the several claimants, and occupying the relation of agent towards them: because, under the first hypothesis, for any neglect or misconduct of the sheriff's keeper, with respect to the property, the parties in interest would look to and pursue the sheriff, not his keeper; and under the second hypothesis, it is manifest that a rule can not be maintained against an agent or mandatary to compel him to render an account of his agency.

The proceeding by rule is not the proper mode of instituting suits. If the parties choose to make up and try the issues on a rule they may certainly do so; but if exception be taken, the proceeding must be dismissed; and the complaining party remitted to his action, in the ordinary and appropriate form, by petition and citation.

The object of the rule is not to compel Mehaffy to perform any stipulation of the agreement. It is, specifically, to compel him to deliver to the sheriff, in kind, the property which he was charged, not merely to keep, but, also, to sell. If the property still remained in the hands of Mehaffy the plaintiff could not thus interfere with the rights of the other parties, and make their agreement nugatory by preventing the sale by the chosen agent of them all. If the property had already been sold it would no longer have been possible for Mehaffy to deliver it to the sheriff: and the court had no power or authority, under the rule, to compel Mehaffy to account for and deliver the proceeds to the sheriff, because no such thing was demanded in the rule.

But suppose the proceeding were regular: what are the rights of the plaintiff? The record does not inform us what disposition has been made of the attachment suit, nor of the claims of Traylor &

Knight and Binns to the property attached. The plaintiff will have no right to touch the property attached, or any part of the proceeds, unless and until there shall first be rendered a judgment in his favor, against Gould, with lien and privilege on the property attached; and against Traylor & Knight and Binns disallowing their claims to that property, in whole or in part.

The property in question had been shipped and consigned to Mehaffy by Binns. The account filed by Mehaffy shows that he had sold all of it and had paid to the sheriff all the proceeds that remained in his hands, after deducting certain advances and charges which might well be allowed as between him and his consigner and Traylor & Knight. It is eminently improper, therefore, that any proceedings should be had, or judgment rendered, against Mehaffy at the instance of the attaching creditor alone, until his rights and those of Binns and Traylor & Knight, with respect to the property attached, be determined. No judgment rendered in such a proceeding would conclude the other parties in interest; and if Mehaffy's liability should be fixed, in this proceeding, and he be ordered to pay over a certain sum to the sheriff, in the event that Binns and Traylor & Knight should make good their claims, in whole or in part, Mehaffy would be subject to like proceeding at their instance, to compel him to account to them, and pay over to the sheriff another and additional sum.

We think the district judge erred in maintaining the rule, and in rendering judgment against Mehaffy; and that the exception of Mehaffy should have been maintained and the rule dismissed.

This decision is not intended to have the effect of a final determination of the rights of the attaching creditor, or of the claimants of the property attached. Their rights, whatever they may have been, at the time of the taking of this rule, either under the agreement of the eighteenth of January, 1875, or otherwise, against Mehaffy, or against the sheriff, are reserved, and remain wholly unimpaired by the decision now rendered.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be reversed, avoided, and annulled, and that the rule herein taken be dismissed with costs in both courts.

No. 6766.

SUCCESSION OF H. PINARD VS. PETER HOLTEN ET AL. ON OPPOSITION OF MRS. HOLTEN.

Property purchased during marriage by the wife, in her own name, with her separate money, which she has always kept, the administration of which has never been under the husband's control, is her paraphernal property, and can not be seized by any of the husband's creditors.

Where the validity of a wife's title to property bought by her during marriage is assailed, and the property is claimed by the husband's creditors as community property, the wife may prove by parol evidence that the property was purchased by her with her separate funds.

The omission to state in the act of sale to a wife, of property bought by her during marriage, that it was bought with her paraphernal funds does not prejudice her title or increase the burden of proof which the law imposes on her in the vindication of her title.

Testimony given by a witness in one trial can not be introduced to impeach his evidence given in a subsequent trial, unless a proper foundation for it is laid by stating to the witness, at his examination on the second trial, what he had testified on the former trial.

Profits derived during marriage from the use of paraphernal funds under the control of the wife, are paraphernal.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Louque & Fernandez for plaintiff and appellant.

Cullom & Castellanos for defendants.

The opinion of the court was delivered by

MARR, J. Under a writ of *fieri facias* issued on a judgment in favor of the administratrix of Henry Pinard against Peter Holten, the sheriff seized and advertised for sale the undivided half of a lot of ground.

Mary Ann Coeller, wife of Peter Holten, filed a third opposition, claiming to be the owner of the property seized, and she obtained an injunction against further proceedings. She alleges, in her petition, that she acquired this property of Eisenman, by purchase, for five hundred dollars in cash, with funds derived from the income and revenue of her separate, personal, paraphernal estate, which she alone administered, independently of her husband, and which never came under his administration; that she has had real and actual possession of the property since the twenty-fifth of June, 1874; and that no other person has any claim or right of ownership to the same or any part thereof.

The administratrix answered by general denial; and she prayed for the dissolution of the injunction with damages.

On the first trial in April, 1875, there was judgment perpetuating the injunction. A new trial was granted, pending which the judge died. His successor in office heard the same witnesses on the second trial, in

April, 1877, and rendered judgment decreeing third opponent to be the owner of the property seized, and perpetuating the injunction; and the administratrix appealed.

The testimony shows that Mrs. Holten had served continuously in the same family, at Louisville, from the twelfth to the twenty-first year of her age. That she left her earnings in the hands of her employer until she was about to remove with her father to New Orleans. That she had no expenses except for clothing; that she married Peter Holten in 1869, about a year after her removal; that she never allowed him to have possession or control of her money; that he had been on the police force, had been addicted to drink and was fond of betting on horse races, at which he was not successful; and that she bought the small quantity of furniture with which they went to housekeeping. Holten was flour inspector in 1873, but it is not shown what he earned, or that he saved any thing, or that he had either property or regular calling.

Mrs. Holten was a hardworking woman; she kept house without a servant, and made and saved whenever she could. She says her husband supplied the money for housekeeping purposes. Her brother-in-law, Patrick Holten, took her money and speculated for her in city claims and securities, making from $300 to $400 profit for her. He made several returns to her, and when he was taken sick with his last illness he sent her, by his brother, James Holten, in March, 1874, the amount remaining in his hands, seven hundred dollars. James Holten testified that he had heard Patrick advising his sister-in-law to buy property with this money to keep it out of the hands of her husband.

It was shown that Mrs. Holten lent money to different persons, $550 to her brother to assist him in establishing a store at Bayou Goula; to James Lewis sometimes $50, sometimes $100, sometimes as much as $150; and to other persons, at different times, smaller sums. She testified that she gave money to Patrick Holten, to be used in speculating for her account, whenever he called for it; and that he accounted and made returns to her, sometimes in sixty, sometimes in ninety days.

In June, 1874, Lewis found an opportunity to buy some lots adjoining his property and near the place at which Mrs. Holten lived. He had not cash enough to make the payments and, knowing that Mrs. Holten had money, he proposed to her that she should join him in the purchase. The price of the three lots was $1800; and Mrs. Holten, considering the investment a good one, gave him $1000; and he made and completed the negotiation. The lot in question was one of the three, and the price paid was $1000 in cash. The conveyance was made, by notarial act, on the twenty-fifth of June, 1874, to Lewis and Mrs. Holten, authorized and assisted by her husband. The other lots were purchased

of Stewart, as Lewis testified, but the title was not produced, nor is it in question in this case.

If the testimony was admissible and the witnesses are to be believed, the proof is clear that Mrs. Holten purchased this property with her own separate, paraphernal means, which she alone administered, and which she never permitted her husband to handle or administer.

Counsel for the administratrix objected, on the trial, that the testimony was not admissible, on several grounds, all of which may be thus stated:

1. That the act of sale under which Mrs. Holten claims, which was recorded in the conveyance office, showed the property seized to be community property.

2. That the act contains no declaration that the purchase was made with the wife's paraphernal funds, or that the property was purchased for her own or separate benefit.

3. That the act of sale can not be changed or supplemented, nor can title to real property be proven by parol testimony.

First. The presumption is that all property acquired during marriage, by husband and wife or by either, belongs to the community. This, however, is a general rule subject to exceptions; and the presumption may be overthrown by proof. The recording of an act conveying property to the wife, which actually belongs to the community, certainly does not give additional credit to the husband; nor does it show that the property belongs to the community. It merely creates a presumption, and every one knows it is but a presumption, dependent on proof which must be sought elsewhere than in the act or in the registry. See Savenat vs. LeBreton, 1 La. 520; Dominguez vs. Lee, 17 La. 295; Terrell vs. Cutrer, 1 Rob. 367; Stroud vs. Humble, 2 An. 930, Metcalf vs. Clark, 8 An. 286.

Second. The two remaining objections may be considered together, and they have both been passed upon authoritatively by this court. In Terrell vs. Cutrer the precise objections were:

1. That a married woman who wishes to invest her paraphernal funds in the purchase of property must, in order to prevent its becoming a part of the community, declare, by *notarial act*, that she purchases for her sole account, and from what source she obtained the money given in payment.

2. That parol testimony is not admissible to prove that the purchase was made with paraphernal funds.

The court held that the law does not require the title to be by authentic act; and that the testimony was admissible. 1 Rob. 368.

In Savenat vs. LeBreton the proof was that the lot of ground in question was conveyed to the husband by the aunt of his wife, on

account of a sum of money deposited with the aunt, inherited by the wife. The court held that the lot was the paraphernal property of the wife, and she recovered it from the vendee of her husband. This decision was under the Spanish law; but the court said our Codes would, perhaps, be more favorable to the matrimonial rights of the wife than the former Spanish laws. 1 La. 523.

In Metcalf vs. Clark it was again urged that the investment of the paraphernal funds should be expressed in the act by which the wife claims to have acquired the property. The court said: "The objection does not appear to us to be founded in law. * * * The wife, if required, would be bound in all cases to prove the reality of the sale to her *dehors* the act." 8 An. 287.

As the taking of the title in the name of the wife does not, in a contest with creditors, create even a presumption that she made the purchase with paraphernal funds, the declaration to that effect in the act is of no force or value, nor does it relieve her of the burden, nor does the omission of any statement to that effect add to the burden which the law imposes upon the wife, to prove *dehors* the act, the facts necessary to establish a separate title in her. It is the proof of the fact, not any declaration of the fact, that she made the purchase for herself, with her paraphernal funds, that vests the title in her to the exclusion of the community; and that fact may be proven by any testimony which would be admissible in a judicial tribunal to establish any controverted fact. In Edwards vs. Edwards, 29 An. 597, where the creditor of the husband relied solely on the legal presumption resulting from the fact that the property was acquired during the marriage, we held that parol evidence was properly admitted to rebut that presumption.

On the second trial the counsel for the administratrix offered to introduce the testimony given by some of the witnesses on the first trial, to rebut and contradict their testimony given on the second trial. This was objected to on the ground, as stated in the bill of exceptions, "that counsel for defendant has not placed said witnesses on their guard."

We think the court did not err in rejecting this testimony. It is elementary that a witness can not be impeached by proof of contradictory statements made on some other occasion, without first laying proper foundation, by directing his attention to the former statements and giving him a fair opportunity to explain them if he can. The only foundation laid in this case was the statement made to Mrs. Holten, by her own counsel, who, at the beginning of his examination, on the second trial, said: "I will ask you precisely the questions that were asked you before." This is not the foundation which the law contemplates; but if the counsel for the administratrix had made this state-

ment, in his cross-examination, it would have been wholly insufficient. He should have informed her precisely what she answered on the former trial, not what questions had been asked. To tell a witness that the same questions would be asked, does not inform him what answers he made; and it would have been most extraordinary if the witness, after the lapse of two years, had answered the same questions in the same language, or even to the same effect, in a minute cross-examination.

Although the testimony was properly rejected, we have read it, and compared it with that given on the second trial. There are some discrepancies, particularly as to dates and amounts, with respect to which memory is necessarily and proverbially treacherous; but the material facts are not contradicted: that Mrs. Holten had and brought with her from Kentucky more money than she paid for the property seized; that she administered this money alone, without the interference or agency of her husband; that she made frequent loans to different persons; that Patrick Holten speculated with her money, on her account, and made profits for her; and that in March, 1874, a few months before she made this purchase, when Patrick was no longer able to attend to business, he sent to her by James Holten seven hundred dollars, the money remaining in his hands belonging to her.

The legal presumption that this property belongs to the community simply because it was acquired during the marriage is completely destroyed by the testimony in this case, which is not contradicted; and on a question of fact we should not be justified in disregarding the conclusions of two district judges, who successively tried the case, and who saw and heard the same witnesses, the one two years after the other. It was not shown that the community had any means or property. The advice of Patrick Holten to his sister-in-law, coupled with what is proven with respect to Peter Holten's habits, makes it improbable that he had saved much from his earnings, or that he furnished the money which Mrs. Holten lent on so many different occasions, or that with which Patrick Holten speculated so successfully for his sister-in-law, or the $1000 which she gave to Lewis to pay her part of the price of the property in question.

If during the marriage Mrs. Holten had saved the earnings of her needle, or of any other work or labor, and had invested them in property, it would have belonged to the community, because the labor, skill, and industry of husband and wife belong to the conjugal partnership; but the profits derived from the use of her money, the fruits of her paraphernal means, always administered by herself alone, did not belong to the community; and the property purchased by her with her separate paraphernal means, is also separate, paraphernal; and it is not liable for the debts of the husband or the community.

The judgment appealed from is, therefore, affirmed with costs.

No. 6300.

NATHANIEL MONTROSS vs. SAMUEL JAMISON.

Where property sold at public sale is bought by three persons in indivision, each being entitled, by agreement among themselves to a certain undivided portion of the property, any one of the common owners who has paid his share of the adjudicated price, has a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the co-proprietors is entitled to oppose the demand on the ground that the taxes on the property have not been paid.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

A. & W. Voorhies for the N. O. National Banking Association.

Armand Pitot for the Citizens' Bank.

T. Gilmore & Sons for the Hibernia Bank.

The opinion of the court was delivered by

DEBLANC, J. In and by a rule filed on the 16th of November, 1875, the Citizens' Bank prays that the civil sheriff of the parish of Orleans, be ordered to complete and give to said bank a deed of sale for the two undivided fifths of the property known as the Imperial—the whole of which, on the 18th of February 1873, was sold under execution, and adjudicated—as an entirety—to Paul Fourchy, for the New Orleans National Banking Association, the Hibernia National Bank and the Citizens' Bank.

The adjudicatees paid in full the amount called for by the writ under which said property was seized and sold, and—between them—they fixed as follows the proportion of each of them in the Imperial: the Citizens' Bank, two fifths, the Hibernia one fifth, the New Orleans National Banking Association, the balance. Under subsequent proceedings by the creditors in the first and aforesaid execution, the whole of the same property was again seized and advertised for sale. At the second sale, the two fifths previously adjudicated to the New Orleans National Banking Association were purchased by one of the seizing creditors.

That Banking Association alone opposes the granting of the order sought to be obtained by the Citizens' Bank. Its opposition is based on the grounds:

1. That the Imperial was adjudicated as a whole, not in parts; that but one title can be given, for the whole—to the three purchasers, and that no separate title can be given to each of them.

2. That the taxes due, or which—from the recorder's certificate, appear to be due on said property, have not been paid.

3. That—as the proportion of the New Orleans National Banking Association in the Imperial, was again seized and again sold—at the suit of the creditors by whom it had already been seized and sold—a decree

allowing the demand of the Citizens' Bank, might be invoked by those creditors as a bar to any attempt—on the part of the New Orleans National Banking Association, to compel a completion of its title under the adjudication of the 18th of February 1873.

Of these several grounds, not one is tenable.

It is admitted—by the New Orleans National Banking Association—that, after the adjudication to Fourchy, then acting for the three banks, the proportion of each of the banks was fixed by and between the interested parties, and—by that mutual agreement, the plaintiff in rule became the owner of two undivided fifths of the Imperial. At that time and under that agreement, would the New Orleans National Banking Association have objected to the completion and delivery, by the sheriff, of a separate deed of sale to each of the purchasers, for the acknowledged share of each of them in the joint purchase? Assuredly not. That bank can not justly, now, raise an objection, the maintenance or dismissal of which can neither increase nor reduce its rights.

The Citizens' Bank has bought—that is shown by the return on the writ: of the property adjudicated to the three banks, the Citizens' owns the two fifths, that is thrice judicially admitted—: of the proportion of the price for which it was liable, the Citizens' Bank has paid every cent, that is proven. That bank is asking, not the recognition of a disputed title, but the evidence of a title disputed by none, recognized by all. Under what rule of law or equity, could we ignore and disregard the sheriff's adjudication, the payment of its price, the parties' agreement as to their respective shares, and suspend the issuance to plaintiff of the muniment of its title?

The naked allegation that the taxes due on the Imperial have not been paid, is contradicted by facts and presumptions, by tax-receipts, the silence of the sheriff, the inaction of the collector. The certificates of recorders—here and elsewhere—often show, not what is due, but what was due. This, however, is no concern of the New Orleans National Banking Association, and—inasmuch as the collector does not complain, we take for granted that the bank has settled to his satisfaction.

If, as contended by the Banking Association, it has not forfeited or lost the title which it appears to have acquired on the eighteenth of February 1873, the apprehension that our decree on the rule might impair that title, or prevent its completion, is certainly unfounded. Far from inflicting the apprehended injury, that decree—if its effects extend beyond this controversy, could only be construed as the recognition of a common title, a fraction of which is claimed by appellants.

The facts disclosed on the trial justify the judgment of the lower court, and that judgment is affirmed with costs.

No. 6810.

EDMUND BROWN VS. EMILE BOUNY ET AL.

Where the property of a succession is sold by a mortgage creditor under executory process, without making the succession a party to the proceeding, and no fraud is shown, and it appears that the money was applied to the debts of the succession, the heirs can not annul the sale, and recover the property, without tendering to the innocent purchaser of the same, the price he had paid for it.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

E. K. Washington for plaintiff and appellant.

Jerome Meunier and *T. Gilmore & Sons* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff alleges in substance that he is the son and heir of Mrs. Causay Brown, who died in the State of Mississippi about the twenty-ninth April, 1873. That she owned certain property in New Orleans on which Bouny held a mortgage granted by her. That on the fourth May, 1874, Bouny sued out executory process, and sold said property without said Mrs. Brown or her succession having any legal notice thereof. That the property was adjudicated to the other defendant, McQuade, for $1389 at said sale. He alleges the nullity of the sale for the reasons stated, and cites Bouny and McQuade as defendants. Both defendants excepted that the petition disclosed no cause of action, and McQuade further excepted that restitution or an offer of restitution of the price paid by him was a condition precedent to plaintiff's action of nullity. On the trial of this exception plaintiff and defendants each offered in evidence the record of the seizure and sale case referred to.

The notices of judgment and of seizure, the sheriff's returns state, were served at Mrs. Brown's domicile in New Orleans by leaving them with plaintiff, her son, she being absent. The record of this seizure and sale shows that McQuade bought the property for $1389, and paid the cash, which was applied first to the costs, then to the taxes due on the property, and the balance, $1018, to the writ, which was not fully satisfied thereby. The plaintiff does not dispute—but, on the contrary, admits—that this mortgage debt was a just one. He does not allege that the property brought less than it was worth. It is indisputably proved that the proceeds of this sale went to pay just debts of Mrs. Brown; to wit: her taxes and this mortgage claim. There is no pretense or allegation of fraud in the defendants. Under this state of facts, it is almost elementary that plaintiff, who is the heir at law of the seized debtor, can not wrest this property out of the hands of an innocent third purchaser without restoring or offering to restore the amounts thus paid by him. It is very questionable whether, even if he had tendered the amount, he

could recover the property, without alleging and proving that he was injured by the sale. See Barrett vs. Emmerson, 8 An. 503; Stockton vs. Donnay, 6 An. 581.

Even a minor whose property has been alienated without the forms of law—or in violation of law even—can not recover it back without restoring the advantages he may have received. See 6 N. S. 684; 21 An. 385; O. C. C. 2226.

He who seeks equity must do equity. No court under the facts disclosed by this record would give the plaintiff this property without first requiring him to make restitution, and when this want of restitution or offer of restitution was set up by way of exception the court properly sustained it.

The judgment is affirmed, with costs of both courts.

No. 6605.

LOUIS FIX VS. SUCCESSION OF MRS. W. H. DIERKER.

In a possessory action the plaintiff's title to the property in contest is put at issue, and therefore its validity may be judicially inquired into.

A tax-sale of property, sold under an assessment made in the name of a deceased person to whom the property had not actually belonged, and without any notice served on any person in interest, is utterly without effect; and no judgment subsequently rendered on monition, can impart any validity to the title passed by such a sale.

So much of the price, paid by a purchaser of property at a void tax-sale, as was really due on the property for taxes, he is entitled to be refunded.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Louquè & Fernandez and *T. A. Flanagan* for plaintiff and appellant.

W. O. Denegre for defendant.

The opinion of the court was delivered by

DEBLANC, J. Plaintiff alleges that, on the 23d of October, 1875, he acquired, at a tax-sale, two lots of ground situated in the city of New Orleans, assessed in the name of Henry Dierker, and sold for the taxes thereon due in 1873. Those lots, which—together—had been assessed at from nine to thirteen thousand dollars, were purchased by plaintiff for less than five hundred.

Whose property was thus sold? Was it the property of Henry Dierker? It was not; it was that of his widow and children, a portion of which was acquired from plaintiff himself, by Mrs. Dierker, after the death of her husband, and for five thousand dollars. As to that portion, Fix knew that the lot seized as belonging to the husband, was and had not ceased to be the property of the wife.

The sales from the collector to Fix were confirmed by the Auditor. Relying on those deeds, and on a judgment rendered on a monition published by him, and by which those sales were homologated, he filed—in the Second District Court—a petition in which he prayed to be placed in possession of the property so acquired by him. He died, and Mrs. Fix is now prosecuting—in her own name and as tutrix of her children, the suit commenced by her husband.

She contends that her action is but a possessory action, and that defendant can not inquire into the validity of the title acquired by Louis Fix. This, evidently, is a mistake, and why? Because, to succeed in her application, the first condition imposed upon her by the law which she invokes, is "that she shall present her title to either the parish or the district court.

In this case, what are the facts? Henry Dierker died on the third of March, 1870. His property, if any he had, passed to his legal representatives. His wife died after him, and the two lots purchased by plaintiff were inventoried as her property. She bought one of those lots from plaintiff, and built on both at a cost of ten thousand dollars.

Though it does not appear that, at any time, Henry Dierker owned any portion of that property—though it appears that, from March, 1870, whatever he may have owned descended to his children, those lots were, in 1872, assessed in his name, and—thereafter—twice sold by the same collector and for the same tax. A son of Dierker wanted to pay the taxes and advised his mother to pay them. No—said Fix—let them sell the property. I will buy and return it to you. It was sold, he bought and refused to either return it, or allow the widow and son of Dierker to redeem it.

Two sales of that property were made by the tax-collector. According to his declaration, he annulled the first. Previous to the first of said sales, on the 22d of January, 1875, his clerk prepared a notice, addressed to Henry Dierker, who died about five years before, calling for the payment of the tax alleged to be due by him, another notice, one of seizure, addressed as the other to one who had ceased to exist, was also prepared by said clerk, and—through him—the collector heard that both of said notices had been served on Mrs. Dierker. After the first sale and its cancellation, the property—if seized at all—was seized, advertised for sale and sold without notice to either the dead man, his widow or children.

In June last, we held at Opelousas, and we adhere to that decision, "that, as the assessment stands in lieu of a judgment, where there is no assessment or judgment against the true owner, there can be no valid sale. That such a defect is a radical one," and—as a matter of course—one which can not be cured by monition. *Ante* p. 509.

Of what plaintiff has paid, he should be re-imbursed what was justly due, but that, and perhaps more, has been offered to him, and that he has refused to accept. The property, the possession of which is now claimed from the public administrator, never was in that officer's possession, and to that property Fix had no title.

The facts and the law justify the judgment appealed from, and that judgment is affirmed with costs.

No. 6466.

CELINA BOUTTÉ, WIFE, ETC., ET AL. VS. EXECUTORS OF FRANÇOIS BOUTTÉ ET AL.

Where two separate appeals from two separate decrees are granted on the prayer of one petition, and the appeal bond only refers to one of the decrees, the appeal from the decree not referred to in the bond will be dismissed.

One who has been improperly made a party to an appeal is not qualified to ask that the appeal be dismissed.

One who was not a party to the suit in the court below, can not be made a party appellee to it.

The widow and heirs of a decedent have a right to intervene and appeal from a judgment affecting the possession or title to real estate belonging to the succession, even when the executors of the decedent are parties to the judgment, and have appealed from it.

A party to a partition suit who has taken a devolutive appeal from the judgment ordering the sale of the property to effect the partition, can not, after the property has been sold, suspensively appeal from a decree of court ordering the sheriff to put the purchaser of the property into possession of it.

A wife is sufficiently authorized to take an appeal when her husband joins her in the petition for it.

When all the appellees are actually cited, it does not matter that the petition for appeal does not set forth the names of them all.

When the order for a devolutive appeal, and appeal bond are filed within a year from the date of the judgment appealed from, the appeal will be maintained, although it appears that the citations of appellees were not served until after the expiration of the year.

The probate court has no jurisdiction of a suit brought by the heirs of one succession, against the executor of another succession, for a partition of property which belongs, in certain undivided proportions, to both successions.

To maintain a suit for partition, the heir who brings the suit must make each one of his co-heirs a party to the proceeding. Every person interested, must be made parties to the suit.

In a suit for the partition of real estate owned in part by the heirs of a succession, the executor of the succession has no legal power to represent either the heirs, or the succession.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

McEnery, Ellis & Ellis and *T. A. Bartlett* for plaintiffs and appellants.

J. Ad. Rozier, *E. Bermúdez*, and *J. Meunier* for defendants and appellees.

The opinion of the court on the motion to dismiss was delivered by SPENCER, J., and on the merits by MANNING, C. J.

ON MOTION TO DISMISS.

SPENCER, J. Plaintiffs, as heirs of Charles P. Boutté, brought this suit against certain of their co-heirs, and against the executors of François P. Boutté, for partition of certain property in New Orleans, owned one third by Charles P. Boutté and two thirds by François P. Boutté. The widow and heirs of François P. Boutté were not cited or made parties to this suit.

On fifth August, 1875, judgment was rendered decreeing a sale of the property and partition of the proceeds. On fourth of December, 1875, the property was sold by Guinault, auctioneer, and purchased by Mrs. Anais Berens. The executors of François P. Boutté refused to give possession to the purchaser, and she thereupon took a rule on the auctioneer to show cause why he should not put her in possession. This rule was made absolute on fourth February, 1876. The executors still refusing, she proceeded against them for contempt, but they were discharged by the court. Thereupon the purchaser, Mrs. Berens, took a rule on them to show cause why the sheriff should not put her in possession. This rule was made absolute, and the sheriff ordered to put her in possession, by decree of date May 25, 1876.

On thirty-first May, 1876, the executors of François P. Boutté, his widow and heirs, by motion in open court took a suspensive appeal from this order or decree of twenty-fifth May, 1876, directing the sheriff to put Mrs. Berens in possession, and gave bond for $10,000, the amount fixed by the court.

On twenty-ninth July, 1876, the same parties (executors, widow and heirs of François P. Boutté), by petition, took a devolutive appeal from the judgment of partition of date August 5, 1876, and also from the decree on rule against the auctioneer, of date February 4, 1876, and gave bond. Other appeals or motions for appeal are in the record, but seem to have never been perfected by the parties asking them, and need not be further considered.

We have then before us—

First—A suspensive appeal from the judgment of twenty-fifth May, 1876, on rule against the executors of François P. Boutté, taken by motion in open court.

Second—A devolutive appeal from the judgment of fifth August, 1875, decreeing sale and partition. Appeal taken by petition.

Third—A devolutive appeal, by same petition, from the decree of fourth February, 1876, on rule against the auctioneer.

Mrs. Berens has filed motion to dismiss all these appeals, on grounds some of which will be hereafter stated.

We shall dispose of the three in inverse order, beginning with the third one, the appeal from the decree against the auctioneer. It was taken by petition. We find no bond of appeal. This third appeal was obtained by the same petition and order as the second above named, but the appeal bond only mentions the judgment of partition of fifth August, 1876. It does not cover the decree of fourth February, 1876. The appeal so far as relates to this decree of fourth February against the auctioneer must therefore be dismised.

The second appeal, as above stated, is taken from the judgment rendered fifth August, 1875, ordering sale and partition, in this suit of "Celina Boutté et al. vs. Executors of François P. Boutté." Mrs. Berens was *no party* to that suit *in the court below.* She can not therefore be cited and made *party appellee in this court.* She was improperly cited, and not being a party to the appeal, she has no right to move its dismissal, except so far as to have herself dismissed as improperly made a party. See 21 An. p. 117, Succession of Tyson.

It is therefore unnecessary to consider the various objections urged by her to appellants' appeal from this judgment of fifth August, 1875. She is not in a position to urge them, and is not legally before this court. A person not a party to the record below, *may be an appellant* but *never an appellee.*

The first appeal above stated, to wit: That from the decree on the rule against the executors of François P. Boutté, ordering the sheriff to put Mrs. Berens in possession, was taken by motion in open court by the executors of François P. Boutté, who *were* parties in the court below, and by the widow and heirs of same, who *were not parties* in the court below.

We see no reason for doubting the right of the widow and heirs, alleging injury to themselves from the order or decree of twenty-fifth May directing the putting in possession of Mrs. Berens, to appeal therefrom. The executors, in proceedings affecting the title or possession of the real estate, do not necessarily represent the widow in community and heirs at law. The conditions of the appeal bond are in accordance with the Code. Art. 579. But the executors seem to us to stand in a different position. We agree with the counsel for Mrs. Berens, that for them the right of appeal from said order did not exist. They were parties defendant in the partition suit, wherein was rendered a decree directing the sale of the property. If they desired to prevent the execution of that judgment they should have appealed *suspensively* from it.

They saw proper not to do so, and have taken only a devolutive appeal, which left the judgment, so far as they are concerned, executory. The mandate of the court for the sale accordingly issued, the property was sold, and adjudicated to Mrs. Berens. The decree or order directing her to be put into possession was only one step more *in execution* of the original judgment.

It is therefore ordered, first, that the motion to dismiss the appeal from judgment of twenty-fifth May, 1876, be overruled as to the widow and heirs of F. P. Boutté; and sustained so far as his executors are appellants. These executors, however, are *ex necessitate* appellees in the appeal taken by the widow and heirs. The appeal having been taken by motion in open court, and the bond being in favor of the clerk, all parties to the record not appellants are appellees. Second, that the motion of Mrs. Berens to dismiss the appeal taken from the judgment of partition of date August 5, 1875, be disregarded and overruled, she not being a party thereto. Third, that the motion to dismiss the appeal from decree of fourth February, 1876, directing the auctioneer to put Mrs. Berens in possession, be sustained, and the appeal dismissed.

ON MOTION OF CELINA BOUTTÉ TO DISMISS APPEAL.

The record in this case is very voluminous—unnecessarily so. It is confused. There are no less than thirty parties to it; and not less than six appeals, or attempts at appeals embraced within it. But as we stated in the opinion rendered on the motion of Mrs. Berens to dismiss, there are but three appeals before us, to wit:

First—That from the order directing the auctioneer to put Mrs. Berens in possession, of date February 4, 1876.

Second—That from the order of twenty-fifth May, 1876, directing the civil sheriff to put Mrs. Berens in possession.

Third—That from judgment of partition of date August 5, 1875.

In the opinion heretofore rendered we overlooked the motion of Mrs. Celina Boutté to dismiss. She adopts the objections of Mrs. Berens. We have already dismissed the appeal *first* above described. We have already considered the objections of Mrs. Berens to the *second* appeal, and as Mrs. Boutté urges and can urge none others than those of Mrs. Berens, it is unnecessary to refer again to this second appeal. But Mrs. Boutté occupies a different position from Mrs. Berens as to the above named *third* appeal. She is a party to it. Mrs. Berens was not. We must therefore consider the objections, which we declined to do for Mrs. Berens.

First—It is objected that Lucette Aleix is not authorized by her husband to take this appeal. The petition of appeal is that of the wife *and of the husband.* He joins her in it and this is sufficient.

Second—It is further objected that the executors of Charles P. Boutté are not cited as appellees. They were not parties below. Nor is the executor a necessary party to a suit for partition of an estate.

Third—The petition of appeal does not set out the names of all the appellees. It asks that all the parties to the suit be cited. *Id certum est quid redire certum potest.* They were all cited.

Fourth—The judgment of partition appealed from was signed Aug. 5, 1875. The petition of appeal was filed twenty-ninth July, 1876, appeal granted and order signed August 1, 1876, and bond filed August 3, 1876. The citations were served after the expiration of the year. The order of appeal was granted, and bond filed within the year. This suffices. 10 L. 150.

The motion to dismiss is overruled.

ON THE MERITS.

MANNING, C. J. Charles and François Boutté were brothers, and owned an improved lot in this city together, but in unequal parts. Charles owned one third only—François, the residue. Charles died leaving thirteen heirs. Afterwards François died, leaving a widow and twelve children, and his executors duly opened his succession. Some of the heirs of each brother were and are minors. This improved lot is their only property, but it is valuable, being appraised at forty thousand dollars.

Nine of Charles' heirs are plaintiffs in this suit, and the executors of François, and the four other heirs of Charles are defendants. It is an action of partition, instituted before the Second District Court of New Orleans.

The question of jurisdiction has been pretermitted in the printed briefs on both sides. Nevertheless we think it decisive of the controversy. There has been great doubt and incertitude in the profession as to the forum which has cognisance of partitions under the constitution of 1868, and there was good reason for it. The counsel of Mrs. Berens, the adjudicatee of the property at the sale under the decree for partition, refers us to art. 1022 of the Code of Practice as conclusive of the dispute—all partitions of succession property shall be made by the court of probates of the place where the succession is opened. But this is not a partition of succession property. It is property the partition of which one succession, a distinct entity, claims of another.

All successions, says the constitution, shall be opened and settled in the parish courts. art. 87. And therefore the succession of each one of the brothers by itself, and apart from the other, must be made in the

court having probate jurisdiction. No one would think of mingling the two successions in a common mortuary proceeding, because the decedents together owned property in common. This distinction seems to have been in some sort in the mind of the draughtsman of the petition, though he failed to act on it. He did not allege that the succession of Charles Boutté was opened in the Second court, and that certain property belonging to its heirs was required to be partitioned among themselves, for in that case the Second court would unquestionably have had jurisdiction of the partition of the property of that succession, i. e. of the one third of the improved lot. The allegation is, that certain named persons own property in common with the succession of François Boutté and other named persons—that these co-proprietors own it in certain designated proportions—that the petitioners are unwilling to remain any longer in a state of indivision with their co-proprietors, and ask for a partition. Here is not a succession to be settled, and property, exclusively its own, to be partitioned among the heirs to that succession. If after Charles' death, François, who survived him, had immediately thereafter sued the succession of Charles for a partition of this property, can it be doubted that the court of ordinary jurisdiction would alone have had cognizance of the action? How is the case altered when, François being also dead, a partition is sought of the property owned by two distinct juridical beings? The Second Court had not jurisdiction of the action, just as it is without jurisdiction of an action of partition between two individuals, who are majors and own property in common in their own right.

But if it had jurisdiction, it had not the proper parties before it. The Codes say;—the suit for partition ought to be instituted by the heir who wishes the division and the co-heirs or their representatives must be cited. Civil Code, art. 1252 new no. 1329. The heir desirous of obtaining a partition shall present his petition praying that his co-heirs be cited. Code of Practice, art. 1024.

None of the heirs of François Boutté are parties to this suit, and his executors are without authority to represent them, and without power to represent the succession in a suit of this kind. The heir is not bound by the judgment of partition if he was not a party to the suit in which it was rendered. Guidry case, 16 La. 157. All the parties interested in the property to be partitioned must be parties to the suit which demands the partition. Kendrick's case, 19 La. 36. Chalon v. Walker, 7 Annual, 477. In this last case, like the one before us, the executor alone was cited, and though there was a dissenting opinion read by Justice Preston, he concurred with the court on that point, saying—the action for partition is undoubtedly a real action, and the heirs should have been made parties to it.

It is said in appellee's brief that the succession of François Boutté is insolvent, and as his heirs have no interest, they need not be made parties to this suit. The record does not allege or shew its insolvency. But assume that it is insolvent, then its property can be sold to pay its debts under an order of sale from the probate court. One does not resort to an action of partition of realty to obtain the sale of property in which creditors alone are interested. The plaintiffs treated the succession as solvent by suing for a partition of its realty. But a better answer is, that this suit is not a proceeding in settlement of a succession, but a proceeding to separate the interests of one succession from the interests of another succession, leaving each of them to be separately settled in the probate court after that separation is effected. The articles of the Code, and the decisions of this court, cited by the appellee, have reference to cases wherein the co-heirs of the same succession are seeking to divide property which is common to all of them, and which they derived from a common ancestor.

The order of May 25 1876 directing the sheriff to put the purchaser in possession, and the judgment of August 5 1875 decreeing a partition of the property by licitation, are erroneous, and therefore

It is ordered adjudged and decreed that the judgment of the lower court decreeing a partition and sale of the improved lot owned by the two successions of Charles and François Boutté, and the order to the sheriff to put Mrs. Berens in possession thereof, are annulled, avoided, and reversed, and that the appellee pay the costs of this appeal.

No. 6835.

STATE EX REL. J. S. RAY, PUBLIC ADMINISTRATOR, VS. THE JUDGE OF THE PARISH COURT OF OUACHITA PARISH.

Where an executor's account, which he prays to be homologated, is opposed in several particulars, and the oppositions after adjudication below, are appealed to, and finally passed on by this court, and all the issues involved in the account definitively settled, the executor can not appeal from a subsequent decree of the lower court, homologating the account as settled by the judgment of this court

APPLICATION for a mandamus.

John Ray for relator.

Defendant for himself.

The opinion of the court was delivered by

MANNING, C. J. James S. Ray, the public administrator of Ouachita parish and *ex officio* dative testamentary executor of the succession of

J. M. Harris, filed his final account which was duly advertised, and by him prayed to be homologated. One of the creditors, a former opponent of various charges against the succession made by the executor, moved the court for its homologation in accordance with the prayer of the executor. It was unopposed, and no creditor, heir, or legatee complained of any part of it. There was judgment of homologation, and the executor applied for an appeal which was refused. Thereupon a writ of mandamus was obtained from this court in the usual form.

The judge of the parish court answers that his judgment was precisely what the executor prayed, and that he can not appeal from a judgment which, both in form and substance, was identically that recited and demanded in his pleadings.

Some time previous to these proceedings, the executor had filed a provisional account which was opposed, and the contestation thus formed was reviewed by us at the last term at Monroe. Succession of Harris, 29 Annual, 743. The whole litigation was before us then, and the various items opposed were examined with unusual minuteness of detail, and the account was corrected in many particulars. The only item not finally adjudicated then, was the executor's commissions, as to which there was judgment of nonsuit.

The account, subsequently presented to the parish court and now before us, appended to the judge's answer, is but a correction of the one previously filed and opposed. The changes made are those directed by this court to be made. The decree then rendered had accomplished all that was desired or needed by the parties, and the adjudication of the several claims, both of executor and opponents, was final. It appears however that the account, amended as we ordered, was advertised as a final account, and the opponent of the account in its original shape was the creditor who now moved its homologation in its amended form, and we are at a loss to perceive who has just cause of complaint. The executor obeyed the mandate of this court in making the corrections, and the opponents had obtained all they could in the way of correction.

The motive of relator in praying the appeal is stated to be to cure the informality and illegality of a decree of homologation rendered without the exhibition of vouchers, proofs, etc. But the trial upon that proof had already taken place. We considered it on appeal, and rendered a final decree upon every item except one, and the record itself contains the proof necessary to sustain that one in the absence of any opposition. It would seem indeed that the filing of our decree, rendered on the opposed account, was a termination of the controversy, and the executor had but to settle the succession in accordance with it. No other trial was needed unless the opposition to the executor's commis-

sions formed the only remaining issue, and no farther objection appears to have been made to that item. If this were an account, for the first time now presented to the parish court, and never before examined, and adjudicated, the case would be different. But we have seen it is otherwise.

The peremptory mandamus is refused at the costs of relator.

No. 5452.

CHARLES F. BEVENS VS. MEYER WEILL ET AL.

Redundancies in pleading will, on motion to that effect, be stricken out.

Before a judgment creditor, having a privilege on certain immovable property which has been really sold by his debtor to a third person, can seize and subject that property to his judgment, he must first bring a revocatory action and have the sale of the property annulled.

A valid sale of property may be made with a right of redemption reserved by the vendor.

The owner of property which has been illegally seized under a *fi. fa.* and offered for sale, will forfeit his claim for damages on account of the illegal seizure, if he himself has so acted, as to countenance the sale of the property under such seizure.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

Geo. L. Bright for plaintiff and appellee.

Singleton & Browne for defendants.

The opinion of the court was delivered by

MANNING, C. J. W. M. Pinckard improved certain lots in this city, owned by him, by the erection of buildings upon them, and executed a note to one Vanderwort, a builder, for five hundred and seventeen dollars and fifty-five cents, with acknowledgment of the builder's lien upon the property. This note and acknowledgment was duly recorded January 14 1873. Two days afterward, the defendant Meyer Weill became the owner of the note.

While the buildings were being erected Pinckard borrowed nine thousand dollars from the plaintiff Bevens which was expended upon them, but this was insufficient to finish them. On February 17th. 1873, Pinckard sold the whole property to Bevens for the sum thus borrowed, the buildings being then uncompleted, but it was stipulated in the act of sale that the vendor reserves to himself the right of redeeming the property until the 20th. of February 1874 by re-imbursing the vendee the price paid by him, i. e. $9000 together with taxes, insurance premiums, etc. Bevens on his part agreed to finish the buildings. It appears

however that the residence was habitable, since Pinckard occupied it as the tenant of Bevens.

This Act, thus passed by the parties, contains the recital of several mortgages and privileges which rest upon the property, and among them is the Vanderwort note. Pinckard states in his testimony that Bevens gave the notary money to pay this note, but the notary 'robbed it', to use his own expression. The act recites that all the parties holding these privileges and mortgages appeared before the notary (E. G. Wells) and released them, and authorized the Recorder of mortgages to erase them. Vanderwort was one of them, and he signed the act. The notary further recites that the vendor had produced before him four of the notes, secured by mortgage and privilege, and authorized the cancellation of them.

In due time Weill brought suit upon his Vanderwort note against Pinckard, claiming his privilege and praying its recognition, and setting forth its improper erasure from the mortgage-book. He had judgment accordingly, and issued execution upon it, which was levied upon the buildings, and they were advertised for sale. Bevens injoined the sale on the ground that the property seized belonged to himself. That is the suit now before us.

Weill, answering, denies that Bevens is the owner, and charges that the conveyance by Pinckard to him, though in the form of a sale, was in reality a security for the payment of a debt. The history of Weill's acquisition of the note is then given, and a recital of an alleged promise to pay by Bevens is made, and the improper erasure of the privilege is set forth at great length. The plaintiff moved to strike from the answer all that part of it, and the court refused the motion, and plaintiff reserved his bill.

The motion should have prevailed. The pleading of defendant is vicious because of redundancy. The sole question for consideration is, had Weill the legal right to seize property, the title to which was in Bevens and was real in its character, and force a sale of it, without first attacking the sale in a revocatory action. The authorities are very numerous and ancient that he can not. They were reviewed and commented on by us during the last term. Gaidry vs. Lyons, 29 Annual 4.

There was no simulation in the conveyance from Pinckard to Bevens. The parties frankly disclose the real nature of their act. It was a sale with a right of redemption, the time within which this right could be exercised, being prescribed, and the consequences of not exercising it being fully apprehended by both of the contracting parties. Pinckard says in his testimony that the time for redemption had passed, and the property belonged to Bevens. Bevens says the property is his, but Weill, or any other person claiming a privilege upon it can have it upon

paying what he paid for it. Being the property of Bevens, it could not be legally seized to satisfy a judgment against Pinckard without other preliminary proceedings than those taken in this case. The holder of a privilege is not without remedy. He has a hypothecary action for its enforcement.

The seizure of the buildings, separate from the ground, is not made one of the grounds of injunction, and it is unnecessary to remark that such seizure was illegal.

The judgment of the lower court perpetuated the injunction without damages. The plaintiff prays an amendment of the judgment, and an allowance of damages in accordance with the prayer of his petition. We should grant that prayer if it did not appear from the testimony that the plaintiff had encouraged the attempted sale of the property as a whole, as a means of realizing the amount it had cost him. It could not have been contemplated or desired by him that a seizure should have been made of the improvements apart from the ground.

The judgment is affirmed.

No. 6763.

SUCCESSION OF L. H. TABARRY.

A mortgage creditor of a succession, whose debt has not been novated, having failed to take any action in a court of ordinary jurisdiction to foreclose his mortgage, can not ask for the revocation of an order of sale of the mortgaged property, granted by the probate court on the prayer of the administratrix, on the ground that the property no longer belonged to the succession, but belonged to a third person, who, in purchasing the property from the decedent, had assumed to pay his, (the creditor's) debt.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

E. Bermudez and *A. Robert* for plaintiff and appellee.

Louque & Fernandez for administratrix and defendant.

The opinion of the court was delivered by

EGAN, J. Mrs. Tabarry, administratrix of this succession, obtained from the Second District Court of the parish of Orleans, where the succession was opened, an order for the sale of certain real estate, inventoried in the succession, for the purpose of paying debts. Tabarry had, while living, mortgaged this property to secure the payment of a certain promissory note for twelve hundred dollars, besides interest. John Carson, as the holder and owner of said note, took a rule upon the administratrix to show cause why the order of sale obtained by him

should not be revoked and annulled for the reason that the *succession "is not the owner of the property,"* by reason of the fact that Tabarry subsequent to the execution of the mortgage, had sold the lots of ground covered by it to one Aymes, *who had in the act of sale assumed to pay the note of Tabarry held by Carson.* The original mortgage imported confession of judgment, and contained the pact *de non alienando.* It is neither alleged nor proved that there was novation of the debt, that Carson accepted Aymes and released Tabarry, or that he has any other rights of mortgage on the property than those created by Tabarry. So far as the evidence discloses, he is still the creditor of the succession for the full amount of the principal of the note, certain amounts of interest having been paid and so indorsed on the note, which was extended each time, "without novation," as appears from the indorsements. No objection to the sale is urged on any other ground; no claim of right to sell under the mortgage instead of under the order of the probate court, but only the single objection that "the succession is not the owner of the property and that Aymes, who had assumed to pay Carson's debt, is the owner. We are at a loss to perceive what right exists in Carson under this state of facts to oppose the sale in question in this manner. If the fact which he judicially admits by his allegations be true, no sale of the property in the succession can affect his right to sell it or have it sold under his mortgage as the property of Aymes, even had he *released* Tabarry and accepted Aymes as his debtor, as he did not, for the only note which he holds is that of Tabarry, to secure which, the mortgage was given, and novation is expressly stipulated against each time the interest is paid. The administratrix could only sell such interest, if any, as the succession had, and whatever amount the sale would produce would inure to the benefit of the creditors of the succession, Carson among them, according to their respective rank, so that any fund derived from the proposed sale would go to swell instead of diminishing the means of payment of the debts of the succession, while upon the hypothesis of the plaintiff in the rule a sale of the property mortgaged to him in the hands of another person, who was really the true owner, could not in law affect either his rights or those of the true owner who asserts no right in this proceeding and makes no complaint. Were it however, true that Carson has an interest to be heard in opposition to the proposed sale, it is well settled that the only legal mode by which he could do so under such allegations would be by injunction, to obtain which he must make oath and give bond as required by law. There is no other legal mode of preventing the execution of the order of courts of justice, whether probate or other. The right which the plaintiff in the rule asserts is not in or under the succession, *but adverse to it.* It is not a complaint by a creditor or other party interested that the

administratrix is proceeding irregularly or illegally in the administration of succession property; but that she is treating and administering as property of the succession that which is not; and on which the plaintiff alleges he has certain mortgage rights adverse to the interests of the succession. From his standpoint we think the probate court was without jurisdiction to grant him relief by rule, petition, or otherwise, and that he either has no standing in law or that his rights should have been asserted in another court, and certainly by a different proceeding. It is suggested in the brief of appellee, but we find no motion in the record that this appeal should be dismissed for want of what is termed a counter letter and an answer of Aymes to the plaintiffs' rule, which were offered in evidence and for filing in the court below, but rejected, to which rejection the counsel for the administratrix took a bill of exceptions at the time, and which documents do not appear in the record. We can not consider this objection thus taken; nor is it necessary under our view of the case. The documents the want of which is complained of would only militate against the plaintiff in the rule if they were before us, and are not necessary to the determination of the cause. From the statements in the record and bills of exception it appears that the counter letter was a written admission by Aymes of the unreality of the sale by Tabarry to him, and that what is termed his answer to the rule amounted to the same thing. We think that whether the latter be considered a technical answer or not, both it and the so-called counter letter were legal evidence and should have been admitted to show that the act of sale from Tabarry to Aymes was a mere formal, without being a *real title*, and that the property was therefore in the succession. For that purpose the date of execution of the writings was immaterial. They would have bound Aymes, who could not after have disputed the right of the administratrix and succession to the property in question; and treated merely as evidence of title in the succession and of the right to sell it as its property that both papers should have been received in evidence, at least. That they were not so received was the fault of the appellee, who as a creditor of the succession had no legal right to make the objection that his means or sources of payment as such were thus increased instead of being diminished as he seeks by this proceeding to do. The present case looks to us very much like the attempt on the part of a mortgage creditor who has by his own laches or delay suffered the jurisdiction of the probate court for the sale of mortgaged property to attach to evade and avoid the consequent effect of the subjection of the proceeds to the ordinary rules of distribution under the succession law. The judgment of the court below sustained the rule and revoked the order of sale. We think this was error, and that upon the showing made the administratrix was entitled to the order of sale. From the

judgment revoking it under the rule of Carson the administratrix has appealed, and we think rightly.

It is therefore ordered and adjudged that the judgment of the court below be and it is avoided and reversed, that the order for the sale of the property in question be reinstated and enforced, and that the appellee pay the costs of both courts.

CONCURRING OPINION.

SPENCER, J. I prefer to rest my concurrence upon the proposition that the party should have proceeded by injunction, and therefore in court of ordinary jurisdiction.

ON APPLICATION FOR REHEARING.

MANNING, C. J. The application for re-hearing not being accompanied by a printed statement of the points and authorities on which the party founds his application, and time to file the same not having been applied for, as required by Rule IX of this Court, the re-hearing is therefore refused.

No. 6689.

HENRY ELLERMAN vs. JOHN MCMAINS ET AL.

A municipal corporation authorized by its charter to construct wharves on its river front, and impose wharfage dues for the use of its wharves, has the right to collect such dues, proportioned to the vessel's tonnage, on all vessels that land at, and make use of the wharves constructed by such corporation. The collection of such dues does not violate any provision of the constitution of the United States.

Where a municipal corporation, under the express authority of an act of the Legislature, is clothed with the exclusive right to collect wharfage rates from all vessels that shall make use of its wharves, the right is a vested right, and can not be abrogated, or impaired, by any subsequent act of the Legislature.

APPEAL from the Third Justice's Court, parish of Orleans. *Larescbe*, J.

F. D. King for plaintiff and appellee.

Chas. S. Rice for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendants are the owners of the steamboat Martha, which was wholly built in this State within seven years last

past, and is of more than one hundred tons measurement. The plaintiff, as lessee of the City of New Orleans of the wharves on the Mississippi river in its front, claims fifty-six dollars from the boat and its owners for the use of the wharves. The defendants claim exemption from liability for these charges under an Act of 1874, wherein it is enacted that any steamboat or other water craft, wholly built in the State of Louisiana, of more than one hundred tons measurement, shall not pay to any corporation fees for wharfage, provided that such exemption shall not extend beyond seven years from completion or registration of the vessel. Acts, p. 261. The plaintiff alleges the unconstitutionality of that act. The court so adjudged, and the defendants appeal.

The right of the City to establish charges for the use of the wharves constructed by her was conferred in the charter of 1836. Acts, pp. 33, 36. Similar grants of power were made in 1870, Acts, ex. sess. p. 35, and in 1871, Acts p. 147. Large sums have been expended by her authorities in the construction and repair of the wharves, and it is now no longer disputed that where the charge made by the corporation is for services rendered, or for conveniences provided, it can be lawfully imposed. The Supreme Court of the United States say in a recent case;—where a municipal corporation of a State has by the laws of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, it can charge and collect wharfage, proportionate to their tonnage, from vessels and steamboats mooring and landing at wharves constructed on the banks of a navigable river. Where it is clearly a duty or tax or burden, which in its essence is a contribution claimed for the privilege of entering the port, or remaining in it, or departing from it, imposed by the authority of the State, and measured by the capacity of the vessel, it is conceded to be prohibited. But where it is only a charge for services rendered, or for conveniences provided, it is lawful. The prohibition to the States against the imposition of a duty of tonnage was designed to guard against local hindrances to trade, and carriage of vessels, not to relieve them from liability to claims for services rendered. The tax or duty is laid by the sovereign. The charge for the use of the wharves is made by the proprietor, and it is the same whether made by the State, a municipality, or a private individual. The Keokuk case, reported in Albany Law Journal, Dec. 1877, p. 390.

The exclusive right to regulate and make improvements to the wharves, and to lease them, having been thus lawfully conferred upon and delegated to the City, it became the private right of the corporation and not subject to divestiture without due legal process and compensation therefor, as contradistinguished from a public right which may be abrogated by the State at its pleasure. The right to acquire, hold, and

dispose of property, though originally derived by a corporation from the legislature, is not subject to the absolute control of that Body. "The rule upon the subject, says Cooley, we take to be this. Where corporate powers are conferred, there is an implied compact between the State and the corporators, that the property which they are given the capacity to acquire for corporate purposes under their charter, shall not be taken from them and appropriated to other uses. If the State grants property to the corporation, the grant is an executive contract which can not be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and can not be taken away." Const. Lim. 238. And another writer thus clearly defines the distinction between the authority of the legislature over public and private rights of a corporation;—"Over all its civil, political, or governmental powers, the authority of the legislature is in the nature of things supreme, and without limitation, unless the limitation is found in some peculiar provision of the Constitution of the State. But in its proprietary or private character, the theory is that the powers are supposed, not to be conferred primarily or chiefly from considerations connected with the government of the State at large, but for the private advantage of the particular corporation as a distinct legal personality; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regulated *quoad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it is omnipotent." Dillon's Munic. Corp. § 39. The Act of 1874 was a partial revocation of the grant previously made to the City, and was not within the power of the legislature to make, for if it could revoke the grant as to vessels of over a hundred tons that were built in a particular place, it could revoke it as to vessels of any tonnage that were built at any place, and thus the legislature would effect the divestiture of a vested right. The State can not take away property or rights of this kind arbitrarily and without process of law or compensation, under the guise of encouraging the building of water craft within her own borders. If she can give the use of the wharves, free of charge, to boats because they have been built within the State and to encourage that handicraft, she can likewise give them free of charge to every vessel that is manned by natives of the State in order to induce her citizens to become hardy sailors and 'brave the terrors of the deep.' The act, under which the defendants claim exemption from liability to the payment of wharfage, being unconstitutional, is null and void, and judgment was therefore correctly rendered against them and the Steamboat Martha for the sum claimed by the plaintiff.

Judgment affirmed.

No. 6760.

SUCCESSION OF JEAN C. BOLLINGER. OPPOSITION OF PAUL AND MATHIEU BALLATIN.

The community formed by a man's second marriage can not be held liable for the value of property belonging to a former community, sold by him during his second marriage, unless it be proved that the proceeds of such property were expended for the benefit of the second community.

The debt due by a father to his children by a former marriage, for their half of the proceeds of the community property sold by him, is exigible against his succession, and its payment can not be defeated or delayed by any claim of usufruct made by the surviving widow of his second marriage.

Where a legacy in full property left by a husband to his widow is reduced, under article 1752 of the Civil Code to one of usufruct merely, the usufruct shall embrace one fifth of the husband's whole estate.

APPEAL from the Parish Court of St. Bernard Parish. *Morales*, J.

Sambola & Ducros for opponents and appellees.

Joseph Duvigneaud for Widow Bollinger.

The opinion of the court was delivered by

DEBLANC, J. Jean Christophe Bollinger died on the thirteenth of January 1876. He married twice: his first wife, Anne Marie Baudoin—died on the first of December 1854, leaving as her legal representatives two grandchildren—Jean Paul and Mathieu Ballatin. On the twenty-sixth of April 1855, four months and twenty-six days after the demise of his first wife, he married Christine Solomé Keiffer, from whom he had two children.

After that second marriage, three slaves belonging to the community which had existed between the said Bollinger and his first wife, were sold at auction for $1625, which he received. His grandchildren claim, as due to them, one half of the proceeds of said sale, and one half of the price of movables left by their ancestor.

We have not found, in the record, the evidence of any sale of any movable proven to have belonged to the first community above mentioned, and neither their alleged price, nor their appraised value can be allowed. As to the slaves, they were the common property of Bollinger and his grandchildren; but—though they were sold and paid for during the existence of the second community—it was not shown that the price paid for them was expended for its benefit, and—under the settled jurisprudence of our State, that community can not be charged therewith. 10 R. R. 18; 2 A. 44; 11 A. 297; 22 A. 513; 26 A. 606.

There is no doubt, however, that one half of the price of those slaves—eight hundred twelve dollars and fifty cents—is due to Jean Paul and Mathieu Ballatin by the succession of Jean Christophe Bollinger,

and that the usufruct claimed by his surviving widow and under his will, can neither retard nor affect the payment of that claim.

Not only is the transcript prepared without care, but one of the most important documents introduced in evidence—the deceased's will—has not been copied in the transcript. We learn from the parties' counsel and from the recital in one of the judgments appealed from, that a legacy from the deceased husband to the surviving widow has been reduced, in accordance with art 1752 of the R. C. C. from a legacy of property to one of usufruct.

In so far as it decrees that reduction, all the parties are disposed to acquiesce in the judgment of the lower court; but the widow complains of the clause in said judgment which limits her usufruct to exclusively the share of the deceased's estate, which accrues to the children of their marriage. In this, she is right. The very article of the Code relied upon by the counsel and the Court to reduce her legacy provides that, "*in no case shall the portion, of which the donee is to have the usufruct, exceed the fifth part of the donor's estate.*"

With the limitation placed upon it by the judgment, the usufruct allowed to the widow is not that which the parties' counsel and the Court recognize that she is entitled to, but only that which she would have had without the testament and under the law. The legacy—this is conceded—was properly reduced and reduced to its legal proportion. As to the exercise of that right, it was improperly limited to the share inherited by the widow's children from the succession of their father, and —in the words of the Code—must be extended to the fifth part of the testator's estate.

It is, therefore, ordered, adjudged and decreed that the two judgments rendered and signed in the parish Court of St. Bernard, on the thirty-first of May 1877, be and they are hereby annulled, avoided and reversed, and—proceeding to render such judgments as should have been rendered by said Court—

It is ordered, adjudged and decreed that Jean Paul and Mathieu Ballatin be and they are hereby recognized as creditors of the succession of Jean Christophe Bollinger for eight hundred and twelve dollars and fifty cents, to be paid to them in due course of the administration of said succession, with five per cent per annum interest thereon from the thirteenth of January 1876 until paid, and that they be classed as such.

It is further ordered, adjudged and decreed that the legacy from Jean Christophe Bollinger to his surviving widow be and it is hereby reduced, from a legacy in full ownership, to one in usufruct, and that the right of usufruct herein and hereby granted to said widow be by her exercised and enjoyed on the fifth part of the nett balance which

shall constitute, after its final settlement, the estate of Jean Christophe Bollinger.

It is further ordered, adjudged and decreed that, for the faithful discharge and fulfilment of her obligations as usufructuary, and only as regards that part of her usufruct which bears and which is to be exercised on the share of the aforesaid estate not inherited by her own children, the widow shall give security as required by law.

It is further ordered, adjudged and decreed that the costs of the appeal be paid by Jean Paul and Mathieu Ballatin, the costs of the lower Court by the succession of Jean Christophe Bollinger, and that all the rights of said grandchildren, as heirs of said deceased, are specially reserved.

And—inasmuch as the provisional account filed on the second of August 1876, by Mrs. Widow J. C. Bollinger, as testamentary executrix, has not been finally passed upon in the lower court,

It is further ordered, adjudged and decreed that this case be remanded to said court, to be proceeded with according to this decision and according to law.

No. 5331.

E. MARQUEZE & Co. vs. S. FERNANDEZ & Co.

Where a draft is drawn in favor of the payee on a certain fund to arise from the sale of property then in the drawee's hands, and the payment of the draft, by its own terms, is postponed to the payment, (out of the same fund), of a debt due the drawee, the drawee, who has not accepted the draft, is only liable for whatever balance of the fund may remain, after the payment of his own debt.

The drawee is not estopped from disproving erroneous statements made by him to the holder of a draft as to the amount of the drawer's funds in his hands, or as to the extent of his claim on those funds, when his statements have not induced the holder to alter his position to his prejudice.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

Lacey & Butler for plaintiffs and appellants.

A. & W. Voorhies and *Geo. L. Bright* for defendants and appellees.

The opinion of the court on the original hearing was delivered by MARR, J., and on the rehearing by EGAN, J

MARR, J. This is a suit against the drawees of a draft of which the following is a copy:

"$582 06 New Orleans, October 21, 1873.

"Yourselves being paid, out of proceeds of my rice, pay to the order of E. Marqueze & Co. five hundred and eighty-two dollars and six cents, value received, and charge the same to account of

"C. ESCANDE.

"To S. Fernandez & Co., New Orleans."

The petition charges, substantially, that C. Escande, a resident of the parish of Plaquemines, and others, for his use and benefit, had shipped sundry lots of rice to Fernandez & Co., and that Escande, being indebted to Marqueze & Co. in a large amount, gave them this draft on account. That when the draft was given defendants agreed to pay it out of the proceeds of the rice in their hands, they, however, first to pay themselves the sum of about $1200.

That, subsequently, on sundry occasions, defendants informed petitioners that they had sold the rice, and that the proceeds were sufficient to pay the $1200 and the draft held by petitioners; and they promised, repeatedly, to pay it. Notwithstanding their agreement and promises, defendants failed to pay any portion of the draft.

The defendants pleaded a general denial; and the court below rendered judgment in their favor, from which plaintiffs appealed.

Bonnecaze, of Marqueze & Co., testifies that when Escande came to their store he demanded a settlement. Escande said he had no money, but that he had some rice in the hands of Fernandez & Co., and some drafts drawn by planters against rice which was unsold. He gave the draft, and said Fernandez & Co. would pay it when the rice was sold. Bonnecaze said, you have given such drafts to other parties, and I will go with you and see if Fernandez & Co. will pay this draft. "Mr. Fernandez said, I will pay you first, and so as not to forget it I will put it down in my check book." He took a pencil and put it down in his check book. "I asked him if he thought he would have enough to pay this draft, and he said there would be plenty."

Bonnecaze also states that he would not have taken the draft but for this assurance. He sent his book-keeper to see if the rice had been sold. "I sent a dozen times, and he always said the rice was not sold. In the meantime, I could not collect the balance of my claim against Escande, because I was waiting for a settlement of this draft."

He says the debt to be paid to Fernandez & Co. first was about $1200, and "that was distinctly understood," from Escande and Fernandez & Co.

After this he met Fernandez at the Union Insurance Company. This was about three months after the date of the draft, and a very short time before the suit was brought. "We had a talk about this draft. He told me the rice was sold, but the account sales was not made. I asked him if he had enough to cover us. He said yes. Then I left.

"He always answered me that the account sales was not ready. One day I went there and asked Mr. Fernandez for payment, because it was preventing me to collect the balance of the money. He says, come in the afternoon. I returned in the afternoon, and Mr. Fernandez says, there is nothing left to pay your draft."

Bellocq, book-keeper of Marqueze & Co., testifies that, after Bonnecaze returned from the first interview with Fernandez, he sent him to see Fernandez, *and make it sure.* "Mr. Fernandez told me that he had some rice on hand for Mr. Escande, but it could not be sold; but there was plenty to protect our draft, and no other draft would be paid before this one. He always said there would be plenty to pay this draft after he was paid."

This witness saw Fernandez several times after the rice was sold; and Fernandez always gave the same answer, that there had not been time to make out the account sales. He said the draft would be paid as soon as the account sales were made out.

J. J. Fernandez, one of the defendants, when asked if he had ever told Bonnecaze or Bellocq that he had money in hand belonging to Escande, and that he would pay this draft, says:

"I could not have said so, because the account sales were not made up. It was impossible for me to say so, because Mr. Barrois attends to that department. It was impossible for me to say there was money, because Mr. Barrois is the one that attends to that."

He says he did not tell any one how much Escande owed his firm, and he could not without having the account sales in his hands. Before he saw Bonnecaze, Escande was indebted to Fernandez & Co. $3200 or $3300. "I knew we had so much rice, but I did not know what we would receive. No doubt if Mr. Escande had sent us all the rice we (would) have had enough; but he (sent) rice to others."

He does not remember what he said to Bellocq, but it was the same that he had told Bonnecaze. Escande requested him, if there was any thing left after paying Fernandez & Co. to give the preference to Marqueze & Co.; and that was the agreement. He exhibits the account showing balance against Escande, $369 19, and testifies that it is correct. The only other witness is Barrois, who proves nothing except that the account is correct; and that Escande was all the time since February, 1873, indebted to Fernandez & Co.

The account shows total credits $3255 13, of which four items are drafts of other persons indorsed to Fernandez & Co.—one credited nineteenth November, and three on the thirtieth November, 1873, aggregating $1627 40; three items under date thirty-first December, for rice received third, sixth, nineteenth September, aggregating $1376 01; and the other items, from thirty-first May to thirtieth June, inclusive, aggregate $251 72. On the debit side the entries beginning eleventh February, and end the fourteenth October; and they aggregate, including interest to twentieth January, 1874, $3624 32. It is not easy to see how Fernandez & Co. could have supposed, on the twenty-first October, the date of the draft in favor of Marqueze & Co., that there would be plenty of

money to pay their entire debt and this draft also; and it is equally difficult to understand how they could have made so great a mistake in so small an account. Instead of there being a surplus in their hands, there was a deficit, a balance due of $369 19; and if to this the amount of the draft, $582 06, be added, it will be seen that they were mistaken by $951 25 in the condition of an account footing $3624 32, every item of which had accrued, and must have appeared on their books, a week before the draft in question was drawn.

Besides, Fernandez & Co. must have been somewhat annoyed by the frequent calls of Bonnecaze and Bellocq, to inquire about this business; and there must have been some reference to the account in order to see how it stood. It is strange that the same answer was always made, that there would be plenty to pay the draft; and, after the rice had been sold, the same answer was made, and Marqueze & Co. were put off with the statement that Barrois had not had time to make up the account sales. It would have been the work of a short time only for a clerk to have made out the entire account; and it could have been no great affair to have made up the account sales of three lots of rice, two of sixty-one barrels and three sacks each, and one of forty-three barrels and three sacks.

The condition of this account and the testimony of Fernandez indicate that Fernandez & Co. expected to receive more rice from Escande than they had on the fourth October, and this expectation, probably, induced Fernandez to tell Bonnecaze, in the first interview, that there would be plenty to pay the draft. No doubt this statement caused Marqueze & Co. to take the draft; and that statement was confirmed by subsequent statements of Fernandez, during a period of three months, and in answer to direct inquiry. Marqueze & Co. considered the ultimate payment of the draft a certainty; and they had no reason to entertain any doubt on that subject.

Counsel for defendants refer to the act of 1858, now article 2278 of the R. C. C., which prohibits parol evidence of a promise to pay the debt of a third person. This is the same in substance as clause two, section four, of the English statute of frauds, which has been adopted in most if not in all of the States of the Union, which requires written proof of a promise to "answer for the debt, default, or miscarriage of another." It is well settled, in England and in the United States, that this statute does not apply to the promise of a debtor to pay the debt, or part of it, at the request of the creditor, to some other person or persons; nor to a promise to pay over to a third person, as directed, money remitted by or collected for the person so directing. In other words, this requirement of the statute is limited to collateral undertakings, as surety or guarantor, to pay a debt to which the promisor is otherwise a stranger;

and the liability of the drawee of a bill of exchange may be proven by his acts and declarations without writing or formal acceptance. Parsons on Contracts, vol. 3, pp. 24, 26.

The position of Fernandez & Co. is less favorable to them than it would have been if they had accepted this draft formally, without qualification, and in writing; because, in that case they would have been bound only according to its tenor and terms; and if nothing remained after paying the debt due themselves they would not have been liable on the draft. But they certainly did, by their conduct and statements cause Marqueze & Co. to receive and to rely upon this draft, and to regulate their conduct toward Escande, their debtor, accordingly. The legal effect is precisely the same as if Fernandez & Co., when Bonnecazo and Escande called upon them, had written on the face of the draft, "there will be funds in our hands sufficient to pay this draft, and we accept it payable when the rice is sold;" or if, after the rice was sold, they had said in writing: "We have funds in hand sufficient to pay this draft, and will pay it when the account sales is made up." The first statement induced Marqueze & Co. to receive the draft, with the full assurance that it would be paid when sales were made; and this was confirmed by frequent subsequent statements, which lulled these creditors into a false security, and prevented further efforts to collect that much at least of the debt originally due by Escande.

The draft is not ordinary commercial paper; but it is a mandate, qualified and conditional in its terms; and it was in the power of Fernandez & Co. to have made their liability wholly dependent on the contingency of the sufficiency of funds to pay it. They have dealt with it in such a manner as to incur all the liability of unqualified acceptors; and it is their own fault if the result is a loss to them of the whole amount.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and that plaintiffs, appellants, do have and recover of defendants, appellees, S. Fernandez & Co., and Salvador Fernandez, and Joseph J. Fernandez, the individuals composing said firm, *in solido*, the sum of five hundred and eighty-two dollars and six cents, with interest at the rate of *five per cent per annum* from judicial demand, twenty-third January, 1874, until paid, three dollars and three cents costs of protest, and costs in both courts.

ON REHEARING.

EGAN, J. A careful re-examination of this case satisfies us that our former decree was erroneous, and that of the district court rejecting the

demand of plaintiffs correct. We think that, giving to the evidence upon the subject of the promise to pay the draft sued on the largest limit, it amounts to nothing more than a promise to pay according to the terms and tenor of the draft itself; which were, "yourselves being paid (which means being first paid) out of the proceeds of my rice, pay to the order of E. Marqueze & Co. five hundred and eighty-two dollars and six cents." Thus, by its own terms, the draft affected the plaintiffs with notice, which they also had otherwise, that the drawer was indebted to the defendants, who were his commission merchants, and who had a privilege upon the proceeds of the rice, and that this indebtedness must be paid before any thing would remain for the payment of the draft sued on. No written acceptance appears upon the draft, although the evidence of the plaintiffs themselves shows that it was presented the day it was taken. It was given on account of an antecedent debt at the instance of plaintiffs themselves, and before the defendants had been seen or conferred with on the subject. The only hesitancy in taking the draft seems to have been, not on account of its being payable after the debt of the defendants, but because the drawer had given two other drafts against the same fund in favor of other persons, and, therefore, one of the plaintiffs and the drawer, Escande, went together to the defendants for the purpose of arranging with them to pay this draft in preference to the other drafts given by Escande, and not in preference to the debt of Escande to the defendants. Although the defendants declined to accept the draft, even according to its tenor, in which the plaintiffs acquiesced, and still retained the draft to take their chances of its payment, the defendants took a memorandum of the request of Escande that this draft should be preferred to the others given against the same fund. This is all, even according to the plaintiff's own evidence as to what transpired at that time. To that is referable, and by that should be interpreted, all the other subsequent evidence and conversations had between the parties, or their agents, in relation to the draft. So that it is manifest that the plaintiffs took and retained the draft knowing that its payment could be expected, and was to be made, only *out of the proceeds of rice* of the drawer in the hands of the drawee for sale, and, also, only after a known and existing debt of the drawer to the drawee *should be first paid.* There is no evidence that there was any surplus, that the rice brought more than the amount due to the defendants by Escande at *the time the draft was given.* On the contrary, it is distinctly shown by a well supported and detailed account in the record that the entire proceeds were absorbed and a large balance still due to the defendants on their own debt. All the other evidence relates to alleged subsequent conversations with one of the defendants, *not in relation to any acceptance* of the draft, but when the plaintiffs

sought *information* as to the *probabilities* and *time* of payment. Even accepting as true every statement made by the plaintiffs' witnesses, the admissions of the defendants, both as to the amount of their own debt and the sufficiency of the proceeds of the rice to pay plaintiffs' draft, are clearly shown to have been incorrect and made in error of fact (if made at all), and as they in no manner altered the situation of the plaintiffs, or put them "*in duriori casu*," the defendants are not estopped from showing the error, and are not bound by the admissions, even if made. Upon this, subject, however, the plaintiff's evidence is loose and unsatisfactory, and is directly contradicted by that of the defendants, which we think, on the other hand, is consistent with all the other evidence in the case, and by the undisputed facts and the probabilities, and it was, besides, easy for the plaintiffs' witnesses to have been mistaken, and to have inferred more than was said or meant from language and conduct which we must interpret by the light of the known facts of the case. The alleged admissions as to both the amount of the defendants' own debt and the proceeds of the rice, if made at all were made without reference to the books or accounts of sale, and by one of the defendants who neither kept nor had charge of either, and who, in the nature of things, could not be expected to be familiar with them without an examination, while as we have seen those books and accounts themselves, and the evidence of the book-keeper and accountant of the defendants, within whose especial knowledge they were, negative the truth of any such admissions. One of them is detailed as a mere Canal street conversation, away from defendants' place of business and not in business hours, between one of plaintiffs and one of the defendants alone, and the others are hesitatingly and unsatisfactorily put forth by the clerk of plaintiffs as conversations between himself and one of the defendants alone, while all are flatly and emphatically denied by the other party to the conversations. We think these come properly within the class of "loose conversations" had under circumstances when it would be impossible to convict the witness of perjury, and which, assuming that the witnesses were of equal credibility (and that the defendants are not supported by other known or admitted facts, as we think they are), would still leave the plaintiffs' case in so much doubt that they can not recover, and such was the opinion of the judge below who heard and knew the witnesses.

It is therefore ordered and adjudged that our decree heretofore rendered be avoided and set aside, and the judgment appealed from be and it is affirmed with costs of both courts.

No. 6546.

ROBERT WORRELL VS. JAMES H. VICKERS.

Prima facie, the sale, or *dation en paiement* of property, made by a debtor to his creditor, to pay a debt much smaller in amount than the value of the property transferred, at a time when the property is in imminent danger of being seized by the sheriff in favor of a lessor, is fraudulent; and the burden of proof is on the party claiming under such sale, or *dation*, to prove its *bona fide* character.

Under the allegation of fraud, or simulation, touching a transfer of property, every surrounding circumstance bearing on the transfer is admissible in evidence, and will be considered in passing on the character of the assignment.

The lessor's right of pledge can not be impaired by a sale of the property subject to that pledge, collusively made by the lessee to one of his creditors, and removed from the leased premises with the fraudulent intent of defeating the lessor's privilege.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough*, J. Trial by jury.

Garrett & Young and *Labatt, Aroni & Clinton* for plaintiff and appellant.

Farrar & Reeves and *E. H. Farrar* for third opponent.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues upon three notes, executed for the lease of the "Thistle Ridge" plantation for 1875, and obtained a writ of provisional seizure, under which twenty bales of cotton were seized. No appearance is made by the defendant. Robert Murdock intervenes, claiming eighteen of the bales under a sale from R. W. McBride. There was judgment, in accordance with a verdict of a jury, in favor of plaintiff against defendant for the sum demanded, being the amount of the notes with interest, subject to admitted credits, with a recognition of his privilege and right of pledge as lessor upon the property provisionally seized, reserving the rights of the Intervenor, and a judgment in favor of the Intervenor for the eighteen bales.

When the sheriff approached the house on the Thistle Ridge Plantation, with writ in hand, he met a wagon laden with cotton, and turned it back. The driver of the wagon says he was still on the Thistle Ridge place when the sheriff stopped him. The officer proceeded to the spot where the other bales were, and there found another Murdock, who announced himself to be the agent of the Intervenor. In a few minutes the loaded wagon arrived. It was now after sundown. Murdock asked the driver why he had come back, and the sheriff answered, by his order. The sheriff announced his purpose to seize all the cotton, mules, and implements. Murdock exhibited a bill of sale from McBride to the Intervenor of cotton, mules, and all movables on the place. The officer, a colored deputy, persisted in his purpose to seize. Murdock

told him it was not legal to make a seizure after sundown. Nothing was done.

The sheriff remained on the plantation during the night. The next morning the place was bare. The cotton and mules and wagons had disappeared. McBride naïvely says, the mules were kept out of the way. Eighteen bales of cotton were found by the sheriff on the adjoining land. The drivers testify that they hauled these bales from Thistle Ridge on that night, and that the cotton was raised on that place. It was the same that the sheriff found there. The hauling was by direction of the Murdock who was acting as agent of the Intervenor. According to his theory, the sheriff could seize only in the sunlight, but it was lawful to remove the objects of seizure even during the darkness of night.

The Intervenor claims these eighteen bales, under a sale from McBride of same day that plaintiff's petition was filed. McBride says he gave Murdock a bill of sale. None has been produced. The defendant Vickers is the son-in-law of McBride, and the latter says that he worked the plantation with his son-in-law, furnished the team and implements, and was jointly interested in the lease. He was indebted to Murdock about twenty-five hundred dollars he thinks. The consideration of the sale was the payment of this indebtedness. Both of them admit that the property thus sold was worth twenty-seven hundred and eighty-two 56–100 dollars. Murdock testifies that McBride owed him only seventeen hundred and fifteen 94–100 dollars. No money was paid at this sale, or afterwards. McBride thus sold to his creditor, in payment of his debt, property worth a thousand dollars more than the amount of the debt. Along with the statistics we have the information from McBride himself, that "this sale was *bona fide*, and not made with the intent to defraud any body."

There can be no doubt in our minds of the intent and object of these parties. The plaintiff in answering the petition of intervention expressly charges collusion between the intervenor and McBride for the purpose of depriving him of his recourse against the crop produced on Thistle Ridge, and the property used in and for its production. A sale, or a *dation en paiement*, by a debtor to a creditor of property of value largely in excess of the debt due from the one to the other, made under an impending seizure by another creditor of same property, lacks the element of *bona fides* on its face. Without explanation, the reality of such sale, or giving in payment, is not credible, and under the charge of fraud or simulation, all the facts and surrounding circumstances attending the transaction are properly inquired into. Montgomery v. Chaney 13 Annual 207. When these circumstances confirm the impression created by the suspicious garb in which the transaction is clothed, it is stripped of its pretensions to good faith or reality.

The plaintiff had a right of pledge upon the crop, and the movables used in producing it, to satisfy his claim as lessor, and he had fifteen days after their removal from the leased premises in which to pursue them. Code of Practice art. 288. The rights of the lessor can not be affected by a sale made by a lessee to one of his creditors, and a fraudulent removal of the property from the leased premises by an agent of the purchaser for the purpose of placing it beyond the landlord's reach. Denistown v. Malard, 2 Annual 14. Civil Code, arts. 3185, 3230, new numbers 3218, 3263.

It follows that the cotton seized provisionally by plaintiff is subject to his claim for rent, and his right can be exercised to the exclusion of the Intervenor, who has no valid claim to it until the plaintiff's judgment is satisfied.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court in favor of the plaintiff against the defendant for the amount of his demand and interest, and recognizing the plaintiff's privilege and right of pledge as lessor upon the property provisionally seized, be affirmed, and that the judgment of the lower court in favor of Intervenor against plaintiff and defendant is avoided and reversed. It is further ordered, adjudged, and decreed that the provisional seizure of plaintiff is maintained, and that he have judgment against the defendant for the costs of the lower court on the principal demand, and against the Intervenor for the costs of the intervention in that court, and all costs of this court.

ON APPLICATION FOR REHEARING.

A rehearing of this cause is granted for the sole purpose of ascertaining whether the payment of $500, imputed by the plaintiff with the consent of the defendant to the discharge of another debt than the rent, should not be held legally imputed to the rent, and to this point the attention of the litigants is directed.

ON REHEARING.

DEBLANC, J. The Thistle Ridge plantation was—in 1874—the joint property of plaintiff and defendant. Plaintiff's undivided half of said plantation was leased by defendant for the year 1875. The price of said lease was $1177.75, the last instalment of which was due on the first of October 1875. Not a cent of that price was paid at its maturity—and, to satisfy it, twenty bales of cotton raised on the aforesaid plantation, during the term of the lease, were provisionally seized on the eleventh of June 1876.

The order under which that seizure was made, issued on the ninth of June 1876, and Robert Murdock, who intervened in the suit between

plaintiff and defendant, claims that, on the day of the issuance of that order, he purchased from R. W. McBride, eighteen out of the twenty bales of cotton raised on the Thistle Ridge plantation and seized to satisfy the lessor's privilege. The place, or the half of said place—though rented by Vickers—was rented for the joint benefit of Vickers and McBride, but—according to the latter's declaration—without the consent of Worrell.

It was from plaintiff that defendant acquired title to one half of the Thistle Ridge plantation. What he may have paid and promised to pay for that half is nowhere mentioned, but it is in evidence that the portion so acquired by Vickers, was by him retroceded to Worrell—and that, in consideration of said retrocession, Worrell returned to Vickers the note he had subscribed for the price agreed upon, and Vickers gave him a a draft of $ 500.00

This transaction took place on the fifteenth of January 1876, and—at that date, Vickers was already indebted to plaintiff for the whole of the rent of 1875..... $1177.75

In all, not including the stipulated interest on the rental notes..... $1677.75

At that date—the fifteenth of January 1876—what was due from McBride to Murdock? The transcript contains no detailed account of that indebtedness, but the creditor testified that—during the year 1875, he had furnished supplies to the debtor, to the amount of..... $1715.94
during 1876..... 187.60

forming a total of..... $1903.54

and McBride—the debtor—declared that Murdock had furnished supplies to make the crop of 1875, that his bill for the supplies of that year, amounted to some $500 or $1000, and that—on the ninth of June 1876, the date of his sale to Murdock, he was owing him about $2500, and may be more.

When—in a court of justice—a right alleged by one is denied by another, it is not sufficient to establish that it is probable—but it must be established that it is legally certain that the right does exist: otherwise, the claimant must fail. Under the evidence adduced to sustain the intervention, how can we determine what McBride owed or owes to Murdock, and, of that debt, what portion was due in 1874 and which in 1875? McBride and Murdock do not agree as to either the amount or the dates of that claim: the first said: a portion of my indebtedness to Murdock accrued prior to January 1875: the other, that it accrued in 1875 and 1876; that—in 1874—McBride had, on his books, a credit of $40.

Murdock's intervention is based on a sale from McBride to him, and—though he has the evidence of that sale, he did not place it before the Court; he did not prove that the price fixed by the vendor and accepted by him corresponds to the value of the property he alleges that he acquired, nor did he prove how and when the acknowledged balance due by him on the acknowledged price was to be paid. Unexplained as it is, does not that omission, coupled with a delivery made on the eve of a delayed seizure, and the nightly exportation of the purchased effects, cast upon that transfer an authorized suspicion? It certainly does.

If Murdock did furnish the supplies—if they had not been paid for in full or in part, his lien was not recorded—and, if it did exist, Worrell was—in no way—informed of its existence, and received in good faith, and in satisfaction of a real indebtedness, every pound of cotton shipped, and every cent paid to him. As to McBride, he knew, and it is difficult to realize that—as his vendor, Murdock was not informed that every article of property embraced in the proposition which preceded the sale, and included in the sale which followed the proposition—mules, oxen, cotton in bales and cotton in seed, was subject to the undenied claim and undenied privilege of Worrell, as a lessor. McBride did not remember whether he told Murdock that said property was about to be seized.

Of what can Murdock complain? How is he aggrieved by the decree of this Court? His account against McBride is not in the record: the sale on which he relies was alluded to by the witnesses, but it was not read to the jury: we know—from their declaration—that it was made for $2782.56, but how was that price paid or to be paid, how settled or to be settled? If McBride's account was received in exchange of a part of that price, where is the receipt? What is to become of the balance fixed by and between those parties? Is it to be retained by the vendee, or returned to the vendor?

Deducting from the price of the sale	$2782.56
the price which he stated was fixed for the cotton provisionally seized	997.50
Our decree leaves in the hands of a creditor who has not established his claim, in the hands of a vendee who has failed to establish the legality of his title, a balance of property which he valued himself at	$1785.06
What property was so left? Eleven mules which McBride said he sold for	$1435.00
And other property for	350.06
	$1785.06

The imputation, by Vickers and to his own debt, of proceeds of cot-

ton which belonged to the planting partnership which existed between him and McBride, was certainly illegal, both as to McBride and as to any creditor of said partnership—but, though it may be that Murdock had a claim against it, that fact was not judicially shown, and it is shown that—not including the cotton provisionally seized—Murdock did receive, in satisfaction of his alleged claim, property which he valued himself at $1785.06.

Under these circumstances, it is no concern of Murdock whether the cotton seized was partly acquired from the laborers, and in what way funds which belonged to Vickers and McBride were disposed of and imputed by Vickers.

We adhere to the original decree rendered in this case.

No. 5918.

P. H. CUMMINGS, JAMES H. CUMMINGS, SUBROGEE, vs. J. M. SAUX.

A contract entered into by a member of a city council, either in his own name or in the name of another person, which the charter of the city prohibits him from making, is absolutely null and void.

Promissory notes given by a vendee for the price of a thing which the vendor assumed to sell, but which never had an existence, are utterly without consideration, and can not be enforced by the vendor or by any one who has acquired them after their maturity.

Contracts having an unlawful or immoral cause are not merely void themselves, but as a rule, can not be the basis of any valid auxiliary contract.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

Samuel P. Blanc for plaintiff and appellant.

Cotton & Levy for defendant.

The opinion of the court was delivered by

SPENCER, J. On twenty-third July, 1866, the contract for repairing and keeping in repair all the ballasted and macadamized roads in the city of New Orleans was adjudicated to one M. E. Stack for a period of three years, for the sum of ten thousand five hundred dollars per annum. By private agreement one Gabriel Correjolles became half owner of this contract.

On fifteenth November, 1866, by public act Stack and Correjolles transferred their rights and obligations under this contract to the defendant, J. M. Saux, for $5000, of which $3000 was paid cash, and the balance was to be paid on terms of credit, for which credit portion J. M. Saux executed his two notes at six months, drawn to his own order and by him indorsed, each for $1000, and delivered them one to Stack and one to Correjolles.

M. E. Stack, the adjudicatee, was the son-in-law of P. H. Cummings, who was at the date of the said adjudication to Stack and at the date of said transfer to Saux a member of the City Council of New Orleans. P. H. Cummings, claiming to be owner before maturity of the note so given to Stack, instituted this suit thereon against the maker, Saux.

The defense is in substance—

First—That M. E. Stack, to whom the contract was nominally adjudicated, was in truth the mere *alter ego* of P. H. Cummings, that Cummings was the real adjudicatee through the interposition of Stack, and that said Cummings being a member of the City Council was absolutely incapable of taking said contract, and that the adjudication thereof to him was null and void, as being *in fraudem legis*, prohibited by the city charter, and against good morals and public policy.

Second—That there was no consideration, at least no lawful consideration, for said note, said Cummings being himself in truth and fact the party who received said contract from the city and conveyed it to defendant.

After the institution of this suit, P. H. Cummings, plaintiff, died, and J. H. Cummings, his son, purchased his rights therein at succession sale for one hundred dollars, and has been formally subrogated thereto.

We have examined the evidence in this case carefully, and think that it clearly establishes the following facts:

First—That P. H. Cummings was at the date of the adjudication, and at that of the transfer to Saux, of the contract with the city, a member of the City Council.

Second—That Stack was the son-in-law of P. H. Cummings, and that he was merely a person interposed to bid in said contract for Cummings, and that Cummings was the real contractor.

Third—That the conveyance and transfer made by Stack to Saux was for Cummings' benefit, and that Cummings received the entire price from Saux and Stack no part of it.

So that the only questions are: First—Was the adjudication of the contract to Cummings, he being a member of the City Council, legal, or was it null and void? Second—If said adjudication and contract were null and void did the transfer thereof constitute a good and lawful consideration for the note sued upon?

Under the view we take, the question of the right of defendant to inquire into the consideration of the note in the hands of an innocent third person does not arise, since we hold that Cummings was himself the real party vendor.

First—The city charter provides that "no member of the Common Council shall hold any other employment or office under the government of New Orleans, while he is a member of said Council, and no member

of the Common Council, or any officer of the corporation, *shall be, directly or indirectly, interested in any work, business, or contract, the expense or price or consideration of which is paid from the City treasury*, or by an assessment levied by an ordinance or resolution of the Common Council, nor be the surety of any person having a contract, work, or business with the City, for the performance of which security may be required."

This is a prohibitory statute, and the prohibition has its foundation deep down in good morals and the public interest.

The Civil Code, art. 11, provides: "Individuals can not by their conventions derogate from the force of laws made for the preservation of public order or good morals."

Article 12.—"Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed."

Article 1885.—"The object of contract must be possible, by which is meant physically or morally possible."

Article 1886.—"That is considered as morally impossible which is forbidden by law or morals. All contracts having such an object are void."

Considered under the light of these articles of our Code, and of the charter of the city, we do not hesitate to say that the adjudication of the said contract to Stack for Cummings was absolutely null and void, and that consequently the alleged or supposed "contract to repair the roads of the city" never had any legal existence.

Second—Was the transfer of this void and illegal contract to the defendant a good and sufficient consideration for the note sued upon? Plaintiff's counsel contends that it was, and cites several decisions in support of his proposition. He refers us to the case of the Planters' Bank vs. the Union Bank, 16 Wall. p. 499, where the Supreme Court of the United States says:

"But when the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is then not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case."

And again to the case of Brooks vs. Martin, 2 Wallace, p. 79, where the same court use this language:

"We think that in point of fact the allegation of the answer—that the traffic in which this firm engaged was the buying up of soldiers' claims, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip—is true. We have

as little doubt that the traffic was illegal. Undoubtedly the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court should hesitate to enforce it in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or give them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin: 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin: 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal."

We do not think these cases go to the extent that counsel claims for them, nor do we think that the doctrine maintained by them would materially help the plaintiff's case. These decisions seem to rest upon this idea expressed by the court, that "the plaintiffs do not require the aid of any illegal transaction to establish their case." Can that be affirmed of P. H. Cummings, the plaintiff in this case, under the laws of Louisiana, with the execution of which this court is charged? Under the laws of Louisiana, as we have seen, the pretended contract to repair the city roads did not exist. It never drew the breath of life. It was still-born. Yet it was for this myth that the defendant executed the note sued upon. Nobody will dispute that *the cause of Saux's obligation was this supposed contract.* We find that *the cause* of his obligation never existed—that its existence was a legal and moral impossibility.

The Civil Code, art. 1887, says: "An obligation *without a cause*, or *with a false or unlawful cause, can have no effect.*"

Article 1889.—"The cause is illicit when it is forbidden by law, when it is *contra bonos mores* or to the public order."

And yet this plaintiff is seeking at the hands of this court the enforcement of an obligation, "without a cause," or what is the same thing, "with an unlawful cause." The injunction upon this court by the laws of Louisiana is that such an obligation "can have no effect." When the laws of our own State are so plain and so mandatory in their terms; when they tell us that *the cause* of a certain obligation *does not*

exist or *is unlawful*, and that we shall therefore give "*no effect*" to it, we must not, out of regard and deference to the opinions of any tribunal, however august, administering a different code of laws, disregard the plainest provisions of our own. By the laws of Louisiana, no man can recover upon an obligation "without a cause or with a false or unlawful cause," except under certain restrictions, the *bona fide* third holder, before maturity, of mercantile and negotiable paper.

"An obligation must have a lawful cause. If it have an unlawful cause, or one contrary to good morals or the public order, it can not have effect and its invalidity will taint any *collateral* or *auxiliary* agreement springing from it." 1 A. 178; 6 R. 115.

"Articles 1885 and 1886, C. C. (old), limit the rule contained in article 1960, that no one ought to be permitted to enrich himself at the expense of another, to cases in which the alleged benefit arises from a lawful act. From unlawful acts, though they may prove beneficial to others, no rights not expressly authorized by law can arise." 3 A. 203.

So that even if it were true (which, however, it seems by the evidence not to be) that the defendant made money out of this "contract," it would be no reason why Cummings should be paid something for nothing. If the defendant received money from the city, it was in payment for his labor and material expended in repairing the city roads—a debt which the city, in equity, ought to have paid, contract or no contract.

We see no error in the judgment appealed from, and it is therefore affirmed with costs of both courts.

No. 6816.

THE JEFFERSON & LAKE PONTCHARTRAIN RAILROAD COMPANY VS. THE CITY OF NEW ORLEANS.

An appeal will not lie from an order of Court granting an injunction on condition that the applicant furnish such bond as the court shall thereafter designate, when the appeal is taken before the amount of the bond is fixed. Such an appeal is premature.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Geo. L. Bright and *L. E. Simonds* for plaintiffs and appellees.

B. F. Jonas, City Attorney, for defendant.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by SPENCER, J.

DEBLANC, J. The plaintiff alleges that it is the owner of a tract of land, through which the city has forcibly, wrongfully and illegally dug

a canal. It alleges that it will cost $75,000 to refill the canal, and for the use made of the canal the city owes it $25,000.

The material allegation in the petition relative to the injunction is:

"Your petitioner shows: That the city of New Orleans, has no right to use and maintain on the land of your petitioner said canal and its embankments, and has no right to drain into said canal and over the property of your petitioner, and said city and its officers have no right to enter upon said land and trespass thereon and have no right to prevent your petitioner damming said canal so as to prevent the city draining therein." R. p. 5.

The prayer is "that the city of New Orleans, its officers and agents be enjoined and prohibited to use and maintain on the land of your petitioner said canal running from North Line street to Lake Pontchartrain and be enjoined and prohibited to drain into said canal and over the property of your petitioner and to enter upon said land and trespass thereon and be enjoined and prohibited to prevent your petitioner damming said canal so as to prevent the city from draining therein," p. 5.

The court ordered, "Let an injunction issue as prayed for on plaintiffs furnishing bond with surety, good and solvent, to secure the payment of such damages as may be sustained by the city in case it shall be decided, that the injunction has been wrongfully obtained. The amount of the bond to be fixed on rule to be tried contradictorily, p. 22.

From this order the city has taken a suspensive appeal, p. 25.

The appellee has moved to dismiss the appeal taken herein, on the following grounds:

1st. It does not appear by the transcript that the injunction will cause damage to the city exceeding five hundred dollars, therefore it does not appear that this court has jurisdiction.

2d. The order of the district court, which directs an injunction to issue, upon plaintiff furnishing a bond, the amount thereafter to be fixed by the court, is not final; for the court has not fixed the amount of the bond. Such an order works no irreparable injury to the defendant.

3d. No appeal lies from an order granting a preliminary injunction.

An injunction was applied for by plaintiff: the sworn allegations of its petition justify the presumption that its demand is legal, and—acting on that presumption—the lower court has ordered that the applied for injunction shall issue—but when? When plaintiff shall have furnished bond and security in an amount to be hereafter fixed, and how? On a rule to be contradictorily tried between the contending parties.

It does not appear that the contemplated rule has been taken and tried; the amount of the indispensable bond has not been fixed, and we are called upon to pass—not on any accomplished fact; not on any

decree which may now be executed, but on the mere apprehension that an acknowledged right may be enforced, that a suspended writ may be issued, that an irreparable injury may be inflicted.

From what has defendant appealed? Is it from a final judgment? It is not. Is it from any absolute order, by whatever name it may be called? It is not. The order appealed from is a conditional one: it does not interrupt—it does not prohibit the exercise of any right, the enjoyment of any privilege. In its actual form it has no force—no writ can issue from it—and, as it may never be completed, never executed, the defendant is—in no sense—exposed to any irreparable injury. 3d A. 217; 4th A. 307.

Its appeal is premature, and—for that reason—dismissed at its costs.

ON APPLICATION FOR REHEARING.

SPENCER, J. The order granting the injunction in this case is inchoate and incomplete until it is supplemented by another order fixing the amount of the injunction bond—so that the delays for appeal, if an appeal be permissible at all from such an order, would only run from the date of the supplemental order. We have lately held in the case of "The State *ex rel.* Paul Doullut vs. the Judge of —— District Court of Orleans," that an appeal will not lie from a preliminary order granting an injunction.

Rehearing refused.

No. 6814.

SUCCESSION OF MRS. P. J. MICHON. OPPOSITION OF MRS. LOUIS DUCOURNEAU.

The clause of a husband's will, by which his wife is constituted his universal legatee, on condition that if his sister survived his wife she should be entitled to have a certain sum from the wife's succession, does not involve a *fidei commissum*, or prohibited substitution. And hence on the death of the wife, who had accepted the husband's bequest, with the charge on it, the surviving sister of the husband has a right to claim the sum from the wife's succession.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

A. J. Villeré for executors and appellees.

A. & W. Voorhies for opponent and appellant.

The opinion of the court was delivered by

DEBLANC, J. The last will of Pierre Jerome Michon, probated on the sixth of April, 1872, is in the following words:

"NEW YORK, Septembre 19, 1871.

"Sain d'esprit, mais souffrant, je donne ici mes derniéres volontés, Mr. Gabriel Léaumont qui a en mains à peu près tout mon avoir, donnera à ma sœur, Estelle Michon, veuve Louis Ducourneau, trois mille dollars, et tout le reste à ma femme légitime, née Louise Mathilde Lacoste. Si ma femme mourait avant ma sœur, veuve Louis Ducourneau, la succession de ma femme serait redevable à ma sœur de trois mille dollars de plus."

That last will was probated as *a whole*, without opposition, and Michon's wife—as universal legatee of her husband, received—in money—about fourteen thousand dollars. She died on the eighth of May, 1877, and Mrs. Louis Ducourneau, relying on the last clause of her brother's will, claims from the succession of Mrs. Michon the sum of three thousand dollars. Her demand is opposed on the ground "that the condition imposed to the bequest from the husband to the wife, in the will of the nineteenth of September, 1871, is a *fidei commissum*, and, as such, null and of no effect under the 1520th article of R. C. C."

On Michon's part, there was no necessity to disguise or conceal—under a suspicious and prohibited form, his undeniable intention to add in favor of his sister, a conditional to an unconditional legacy. If, to carry out that lawful intention, he adopted a prohibited form, it could have been but through error, for he had the capacity to dispose as he did, and his sister the capacity to receive. That is not disputed.

He could legally have given what is claimed: did he give according to the form prescribed by our laws? Does his last will contain an immoral, unlawful or impossible condition—a substitution or a *fidei commissum*? There is not—in the will—any reprobated condition, and if there had been a substitution in any of its clauses, that including the substitution would have been null as to both the wife, as a legatee, the sister as a third person, and the sister, as an heir, would have then received the very amount which she now claims as a legatee.

R. C. C. 1520.

There is, however, no substitution in the last will of Michon. His universal legatee is not charged to preserve or to return a thing to a third person, in the sense of the first paragraph of article 1520 of the Code: but—to the legacy tendered by Michon to his wife, to a liberality which she could accept or refuse, Michon has attached the condition that—if she died before his sister—the latter would be entitled to claim, from her succession, the payment of a sum of three thousand dollars.

According to the French authorities, there is no prohibited substitution:

"Dans la disposition par laquelle un testateur, après avoir institué un légataire universel, grève ce legs du legs particulier d'une somme

d'argent pour être payée en cas de mort du légataire universel, sans parenté."

Gilbert, Codes Annobis, p. 385, No. 70, p. 386, No. 80.

It is contended that the obligation imposed by the will is that the wife, or her succession, shall return to the sister another thing than that donated, and that such a disposition constituted, under the Roman law, the *fidei commissum* prohibited by ours. In this, there is an error of fact. What did the wife receive? Money. What is claimed of her succession? Money. That which she received was hers and she had the right to dispose of it at her pleasure.

As well said in the case of Groves vs. Nutt: "The legatee did not promise to preserve the money, to keep each identical dollar and return that to her father's estate. On the contrary, she was to have the use of the money as long as she lived, and she *contracted* to return as much other coin only in the event she should die without issue. If that is a *fidei commissum* or a prohibited substitution, then the thing which the depositary receives and promises to preserve and return to the depositor or the sum of money which my friend receives from me and promises to return in one week or ten years, are *fidei commissa* and substitutions."

3 A. 122 and 123.

"Il suit de là," according to Marcadé, "qu'il ne peut pas y avoir substitution quand la libéralité a pour objet des choses fongibles, en sorte que le donataire ait la libre disposition de ces choses et soit seulement chargé d'en rendre d'autres de même nature, qualité et quantité, dans ce cas, en effet, il n'y a pas obligation de conserver."

Marcadé, vol. 3, p. 418.

Read with care, Michon's will is found to contain three distinct dispositions, or one universal legacy with two charges thereon imposed. By one of said dispositions, his wife is chosen and named as his universal legatee; the two others, or the charges on the universal legacy are in favor of his sister: if she survived him and his wife, she was to receive—at his death, the sum of three thousand dollars—at the death of his wife, as much. The words used by the testator to describe and convey his intention—"La succession de ma femme sera *redevable* (accountable) à ma sœur," indicates that, as the first, the conditional legacy to his sister was a charge attached to his universal legacy and imposed upon his universal legatee.

"C'est encore une règle également applicable aux testaments et aux contrats, de prendre dans le sens qui convient le plus à la nature de l'acte, les termes susceptibles de deux sens; par exemple, si le testateur charge son légataire universel de payer une somme à un tiers, on doit prendre cet ordre *pour un legs particulier* plutot que pour une reconnaissance de dette."

Coin. Delisle, Commentaire du Titre des Donations et Testaments, p. 447, No. 11.

"Comme la volonté du testateur fait la loi, le principe général est q'uil faut expliquer les difficultés du testament par la volonté du testateur autant que toute la teneur du testament la pourra faire connaître; il faut pour ainsi dire y suivre à la piste toutes les traces de cette volonté."

Same book, p. 446, second paragraph of No. 4.

At the death of Michon—less the unconditional legacy to his sister, the whole of his succession was given to and received by his wife, with full and unlimited power to dispose of it, of all that composed it. That legacy was accepted by the wife as made by the husband, with the charge thereon imposed, the condition thereto attached, and—as they are an inseparable part of the legacy—its acceptance carried with it that of said charge and of said condition.

When she applied for the probating of her husband's will, could the wife have divided the legacy and divided her acceptance? Could she have said: I take the legacy, but without the charge, without the condition? She could not. Can her collateral relations, called to and claiming her succession as legatees, disregard, divide or qualify her absolute, entire and unqualified acceptance? Can they change or reduce the effects of her acceptance, and of the decree rendered at her own demand and unreservedly homologating the will? They can not.

"There can be no doubt, as held by this court, that the acceptance of a legacy burdened with a *modus*, or lawful charge under a will, is itself a contract on the part of the person accepting, obliging him, impliedly at least, to comply with the condition imposed by the will and to acquit the charge imposed upon the legacy which he receives, and that—under the Constitution of the United States, neither the State where this obligation is contracted, nor any other State can—by subsequent legislation, absolve the obligor from such obligation."

3 A. p. 122; R. C. C. 1890.

Under the articles of our Code, the right acquired under a conditional bequest creates more than a mere implied obligation: it creates—on the happening of the condition—an express, civil, natural and corresponding obligation on the heirs and, on the universal legatee as on the heirs, to deliver the conditional, the particular legacy, or to acquit the charge imposed by the testator on his liberalities. There is but one way of avoiding that plain and positive obligation: it is by rejecting the disposition by which it is imposed.

Rev. C. C. 2030, 1614, 1633, 1758, No. 4, 1703.

What, as to his estate, were the testator's intentions? To transmit it to only two persons—his wife and his sister. In what proportion?

To his sister, he gave $3000, which were to be paid to her at his death; to his wife, he gave the balance of his estate; but the legacy to the latter was charged with the conditional obligation that—at her death—the testator's sister, if then alive, would be entitled to claim from the succession of his wife—as a debt—an additional sum of $3000. This charge was not to accrue at the death of the wife, but that charge accrued at the opening of Michon's succession and was merely suspended until the accomplishment of the condition attached to it—the predecease of the wife.

R. C. C. Art. 1698.

The last will of those who depart this life is the last expression of their love, friendship or gratitude, and—where it violates no law—that will, by far the most sacred of all sacred things, should be as respected as the grave of the dead.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be and it is hereby avoided and reversed, the opposition of Estelle Michon, widow of Louis Ducourneau, maintained, and the executor of the last will of Louise Mathilde Lacoste, deceased widow of the late Pierre Jerome Michon, ordered to class said opponent as a creditor of the succession of said widow Michon for the sum of three thousand dollars, with legal interest thereon from the twenty-fifth of June (1877) eighteen hundred and seventy-seven; the costs in both courts to be paid by the succession of widow Pierre Jerome Michon.

CONCURRING OPINION.

MARR, J. The right and power to dispose by will being granted by law, whenever a question arises as to the validity of a testamentary disposition which is clothed with the requisite formalities, it is not necessary for the legatee or beneficiary to show affirmatively that such disposition is authorized by law. On the contrary, the burden is on him who challenges its nullity to show that it contravenes some prohibition of the law.

The last clause in the will of Michon is peculiar. At first blush it appears to be an attempt by the testator to dispose, in the event that his wife should die before his sister, of that which would necessarily cease to be his at the moment of his death, and would become, *eo instanti*, the property of his wife as his universal legatee. This objection, however, on careful analysis, will be found to be more apparent than real.

The legal title to all that one dies seized of must vest, at the moment of his death, either in the instituted heir, or the universal legatee, or the particular legatees; or in those whom the law calls to the succession *ab intestato*. *La mort saisit le vif.* The testator may give to one the naked ownership of his entire property, or of such part of it as he

may choose, and to another the usufruct for life, or for a term of years; but there are no words in this will which tend to create a usufruct, or to separate the absolute ownership from the immediate and continued use and enjoyment.

The will is written in plain language; and it is not difficult to ascertain precisely what the testator meant and intended. After the particular legacy to his sister, he gave all the residue of his property to his wife. The legal title, the absolute ownership, vested in the wife, the universal legatee, without restriction or limitation. He did not intend to diminish or to impair the dominion and control of the universal legatee as owner; but he desired to provide for the contingency of the death of his wife before that of his sister. He did not attempt to vest any title in his sister to any part of the residue given to his wife; nor did he require his wife to give any part of that residue to his sister. He did not charge his wife to keep or preserve any sum for his sister, nor did he request her to make any testamentary or other disposition to take effect at her death, in favor of his sister. He intended that his wife should possess, own, and enjoy with all the incidents of absolute ownership; and that his sister, if she survived his wife, should have the additional sum of $3000.

This disposition is neither a substitution nor a *fidei commissum*. The distinguishing characteristic of a substitution is, that the charge imposed on the *gravatus*, the first taker, is that he shall keep and preserve the specific thing during his life, in order that it may pass and be transmitted, at his death, to the person designated; and it necessarily involves the *fidei commissum*, the trust, that the *gravatus* will keep and preserve that thing for the person who is to take it after him, by the will and appointment of the testator. No such charge was imposed upon Mrs. Michon by the will of her husband.

That which we call simply a *fidei commissum* differs from that disposition which is designated by the word substitution, in that the charge imposed upon the fiduciary, the *gravatus*, the first taker, is to be executed during his life, whether immediately after the death of the testator, or after the lapse of a certain time. No such thing was required of Mrs. Michon; nor was any charge to keep and preserve any thing imposed upon her by the terms of the will.

The testator having the power of disposal may make a conditional legacy, or an absolute legacy, at his option; and it is not unusual to find in wills legacies dependant on the survivorship of the legatee, or to take effect only in the event of the predecease of another. The law imposes the restriction that the condition upon which the legacy depends shall not be either illegal, or immoral, or impossible. Michon left no forced heirs, and his sister would have been called to his succession as

one of his legitimate heirs, for all that appears she would have been his only heir if he had died intestate. There can be nothing either illegal or immoral in that feature of a testamentary disposition by which the whole or part of a succession reaches one who, though not a forced heir, would have been called to the succession *ab intestato;* and the condition of the predecease of the wife was not only not impossible but it was actually realized.

If after the particular legacy to his sister, and the universal legacy to his wife, the testator, instead of using the phraseology, "*Si ma femme mourrait avant ma sœur, la succession de ma femme serait redevable à ma sœur de trois mille dollars de plus,*" he had left his sister the additional sum of $3000, in the event of her surviving his wife, he would simply have attached to the universal legacy the condition that this additional sum should be paid to his sister in the event of her surviving his wife. He did not intend to create a debt in favor of his sister to be paid by his wife; because that would have diminished the legacy to the wife. Evidently, and most naturally, he intended to make his wife the chief beneficiary of his will; and while, after his wife he preferred his sister, having already placed her above want by the absolute legacy of $3000, he desired to make additional provision for her only in the uncertain event of her surviving his wife. When the wife accepted the universal legacy, she assumed the obligation resulting from the conditional legacy in favor of the sister; and that obligation was one which might never become absolute or exigible: which could not become absolute during the life of the wife: which could become exigible only after her death; and which could be acquitted only out of her succession. Therefore, when the testator said in his will, the succession of my wife shall be indebted, or accountable, to my sister, he simply expressed precisely what would have been the legal consequence and effect of a legacy in favor of his sister conditioned upon her surviving his wife.

The wife might have lost by misfortune or imprudence, or might have squandered and dissipated by extravagance, not only the entire fortune left her by her husband, but any and all other property belonging to her, so that her succession might not have sufficed to acquit this legacy; but that circumstance could in no manner affect the validity of the disposition. The intention of the testator is clear: the purpose is lawful: the uncertain event contemplated by him simply as a possibility has actually happened; and it is not material to inquire whether he might not have chosen terms more apt, since those which he used suffice to show, beyond doubt, what his intention was, and to accomplish the purpose he had in view. The disposition in question violates no policy or prohibition of the law; and it must be respected and maintained.

I concur in the decree pronounced by Mr. Justice DeBlanc.

CONCURRING OPINION.

SPENCER, J. I think that the testament provides in substance, as follows:

First—An absolute legacy to the sister of $3000.

Second—An absolute legacy to the wife of the residue of the estate, with a charge to pay the sister $3000 if the sister survived the wife.

There can be no doubt that the testator could legally charge the legacy to the wife with the payment of a sum to the sister. It is equally certain that this sum imposed in favor of the sister could be made payable *with a term* or *on condition.*

If on condition, then that condition might be any future and uncertain event; such as the marriage of the wife or survivorship of the sister. The latter is the condition in this legacy. The fact that the testator says that "his wife's succession will owe the $3000" is only a manner of speaking induced by the knowledge of the testator that under the bequest his sister would only be entitled to payment after his wife's death, and therefore out of her succession. If the wife was not willing to incumber herself and therefore her estate with *this debt*, she could have renounced the legacy.

It is clear to my mind that this bequest to the sister by way of charge upon the wife's legacy is a mere conditional legacy, and not a *fidei commissum.*

I concur in the decree pronounced by the court.

No. 5492.

WILLIAM O'NEILL VS. THE CITY OF NEW ORLEANS.

The City of New Orleans is obliged to keep its streets, sidewalks, and bridges repaired, and if on account of its neglectful delay in making a needed repair a person suffers an injury, to which he has not contributed by any fault of his own, the City will be liable in damages for the injury.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J. Trial by jury.

Chas. S. Rice for plaintiff and appellee.

B. F. Jonas, City Attorney, for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the 18th of May 1872, while crossing from Magazine to Canal street, plaintiff stepped upon a flag-stone destined to span the gutter at the junction of those streets, one end of which was then laying in said gutter. He then and there slipped, fell with violence, broke his

right leg over the knee, and—on that account—was out of employment for the space of seventeen months.

He brought suit against the city, charges that the injury he has sustained was the immediate result of its neglect to perform a prescribed, an absolute duty, and claims against it, as damages, the sum of ten thousand dollars. The city, after a general denial, specially denied that it had knowledge or notice of the bad condition of the crossing on Magazine street, or that it neglected to repair the same.

Long before the accident, the flag-stone on which plaintiff slipped and fell, and on which—on the same day and before—others had slipped and fallen, had often been knocked out of place by drays and floats, and merely replaced, but never fastened over the gutter, except once, and then by driving a wooden pin on one side of the stone.

Not disposed to encourage any speculative litigation against the city, we have examined with care the evidence adduced on the trial. Not one of the witnesses who testified on that occasion, not even plaintiff, has attempted to exaggerate any of the facts related by them. That evidence establishes that, when the accident happened, plaintiff was sober, walking without haste, on his way to his home, and that he in no manner contributed to said accident.

The city's counsel contends that its authorities and employees can not ever be on hand to repair breakages. That, besides, this accident occurred in the broad day, that plaintiff was guilty of carelessness, of contributive negligence, and that the judgment of the lower court which allows him one thousand dollars, should—with the verdict on which it is based, be avoided and reversed.

By the twenty-sixth section of its charter, the city of New Orleans is bound to keep in repair its paved and unpaved streets, and—though not an insurer against accidents, the city is liable for those injuries which result from its neglect to maintain—in a safe condition—the sidewalks and bridges within its limits.

Dillon, on Municipal Corporations, sec. 789.

"It is the almost uniform doctrine of the courts, that municipal corporations are also liable when the wrong resulting in an injury to others, consists in a *mere neglect* or omission to perform an *absolute and perfect*, as distinguished from a discretionary, or imperfect corporate duty, or for the want of proper care of its officers or servants acting under its direction or authority in the execution of a prescribed duty."

Dillon, Municipal Corporation, sec. 778.

If an accident were to happen by the displacement of a flag-stone spanning a gutter, and before the city, in the discharge of an absolute duty, could have ascertained the condition of the crossing and have it repaired, it is clear that the city could not be held liable; but the fact of

such a displacement can and must be ascertained within a reasonable delay, within that delay which—according to circumstances—should be allowed to those who have the exclusive control of the streets of a city. In this instance, the flag-stone was, several times, raised from and placed over the gutter, without fastening it, by the neighbors and by the employees of the city.

That plaintiff might have avoided the accident, we admit—but how? By presuming that—on his route—there was some where a bridgeless gutter, by following another route, or by taking a cab or the cars. As well said in Hunt v. Pounal, 9th Verm., "In every case of damage occurring in the highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young,or restive, or old, or too headstrong, or the harness had not been defective or the carriage insufficient, no loss would have intervened. It is against these constantly occurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage is always perfect, and his team of the most manageable character and in the most perfect training, before he ventures on the highway. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants were liable."

The court said, in the case of the city of Joliet v. Verley: "travelers have a right in passing along such a place—a passage way to a bridge—to have at least a secure footing, and it was the duty of the city to provide one. Loose planks, so warped that a traveler can not step upon them without dangerous oscillation, may—in the opinion of witnesses—make a safe walk over such a place, but they do not furnish a walk having that degree of safety which the law requires. Sidewalks are to be used by common people, and only a few of them are expected to possess the skill of a Blondin."

35 Ill. p. 65.

"Where the loss is the combined result of an accident and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident; yet, if there be no fault or negligence of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the town is liable."

Palmer v. Andover, 2d Cush. 600.

In this case, the defect which caused the accident was often seen by and well known to some of those employed by the city to repair its streets, and—nevertheless—the crossing on Magazine street never was repaired. The flag-stone remained in that condition, a trap to the unsuspecting traveler, and—so far as we are informed, from the very

first day on which it was knocked out of place until the accident happened.

The city is evidently liable in damages.

Both parties complain of the jury's verdict; defendant prays that it be annulled—plaintiff, that the amount allowed him be increased. The facts and the law justify the jurors' verdict and the decree appealed from.

That decree is affirmed with costs.

No. 6610.

MRS. MARY E. KIRKPATRICK, WIFE OF O'BRIEN, VS. FINNEY & BYRNES ET AL.

A donation *inter vivos* of movable property can only be made in two ways; by act before a notary and two witnesses, or by actual manual delivery; and one who claims a movable in virtue of a donation, must prove that the donation was specifically made, in one or the other of those two ways.

A transfer, or donation to his wife of furniture, or other property made by an insolvent husband is, *prima facie*, fraudulent and simulated; and such property may be seized by the husband's creditors, and if seized, the burden will be on the wife to prove the real, and the *bona fide* character of the assignment.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Semmes & Mott and *J. E. Austin* for plaintiff and appellee.

Bentick Egan for defendants and appellants.

The opinion of the court was delivered by

EGAN, J. This suit is between the same parties, and was tried upon the same evidence with suit No. 6620 of the docket of this court just decided. It was brought to enjoin the seizure under the same judgment as in that case of certain articles of household furniture and personal property in the house occupied as a residence by plaintiff and her husband, J. J. O'Brien. The pleadings of both plaintiff and defendant are substantially and almost in terms the same as those in 6620. The evidence is not more satisfactory in support of the demand of the wife plaintiff in this case, than it was in that just decided. If entitled to any part of the property seized she has not identified it. Both claims rest substantially on a similar or the same state of facts, and are governed by the principles announced in the opinion in 6620; and for the reasons stated in that case it is unnecessary to pass upon either the plea of prescription or the validity of the judgment of separation. There was the same error in admitting in this case the evidence in the case for separation which has been remarked upon in case 6620. We are not

here called upon to pass upon the exemption under any law of any portion of the property of the husband. He is not before us asking such exemption, if entitled to it to any extent and for any reason. The claim asserted is that the property seized under execution against the husband belongs not to him but to the wife, *and is therefore* and *not by reason of any exemption in his favor*, not liable to be seized or sold to pay his debts. To avoid misapprehension, however, we may as well remark that in our opinion the exemption of fees and salaries of office can not be extended by implication to property purchased with them or with money derived from them.

It is therefore, and for the reasons given in 6620, ordered, adjudged, and decreed that the judgment of the court below be annulled, avoided and reversed, and the injunction sued out by plaintiff be dissolved, and her claim to the property seized under the *fieri facias* in this case be disallowed. As, however, the parties and sureties on injunction bonds are the same in this case and in case 6620, just decided, and as the judgment in that case awarded interest and general damages on the same debt and judgment, we simply decree in this case furthermore that the defendants Finney & Byrnes do have and recover from the plaintiff and John Phelps & Co. and Isaiah Green, sureties on injunction bond, *in solido*, two hundred dollars damages as counsel fees in this case and costs of both courts.

ON REHEARING.

In relation to the furniture other than the piano claimed by the plaintiff there is no proof of identity nor any of a donation by manual delivery or otherwise. It is too well settled to require the production of authority that no mere admission by the husband, whether judicial or other, of ownership in or of a donation to the wife can affect third persons or supply the place of that evidence of donation which the law requires. Neither is there any evidence of any formal act of donation or of such or any manual delivery of the piano by O'Brien to his wife so as to dispense with the written authentic act, which as a rule is required to effect a donation *inter vivos*. The only evidence is that at the time he purchased the piano the husband told Grunewald, the vendor, that he wanted it for his wife. The fact that the piano was found afterward in the common domicile of the husband and the wife—a domicile which in the other case we have decreed to belong to the husband—is of itself no evidence of manual delivery. A mere purchase with intention to donate, or the declaration of such intention is not enough; that intention must be carried out in some one of the modes prescribed by law. The general rule is the execution of a formal notarial act, C. C.

1536, 1538, the only exception to which in regard to property susceptible of it is *the actual manual delivery.* Neither are proved in this case. Had there in fact been such real manual delivery the plaintiff might have proved it by her own testimony at least, if not by that of other witnesses. The fact that she has not done so, nor even attempted to do so, by no means strengthens her pretensions in this respect. It has often been held by this court, and such is the law, that the fact of the husband in failing or insolvent circumstances transferring or attempting to transfer to his wife's name the whole of his property, as was done by O'Brien, is not merely evidence of fraud, but of simulation, and puts upon her the burden of proof. A piano might have been a very tasteful and appropriate gift from the husband to the wife, but that fact does not of itself prove that such was made. The same might be said of the furniture and other decorations of the common dwelling. It is not uncommon, indeed, it is most usual to furnish the marriage domicile with a piano, without making it a special gift to the wife, that it may be used by the family or for the entertainment of visitors and to gratify the taste of both. Nor, indeed, are ladies now-a-days by any means the only performers upon that instrument. These is no sufficient reason to exempt the piano from the fate of the remainder of the furniture seized.

The court was induced to grant a rehearing owing to an error into which we had fallen in our original decree, in allowing attorney's fees in this case as covered by the agreement of counsel. It is denied that such was the intention of the agreement, and although we can very well see how the defendants' counsel, as well as the court, was misled as to the scope of this agreement, we do not think its terms cover the present case. It is therefore ordered that the decree heretofore rendered by us be so amended as to disallow the defendants' claim for attorney's fees in this case, and that in all other respects it is affirmed, except as to the costs of appeal, which are to be paid by the appellee.

DISSENTING OPINION—ON REHEARING.

SPENCER, J. In order to maintain her suit for separation of property and dissolution of the community, it is not essential that the wife should be the owner of separate property, or that the husband should be indebted to her. It is now settled that where his affairs are so disordered and his financial embarrassments so great as to render any earnings or acquisitions of the wife by her own industry insecure, that she may maintain such a suit. Clark vs. Lowry, 10 A. 273; Webb vs. Bell, 24 A. 75; Davock vs. Darcy, 6 R. 342.

A wife's judgment may, therefore, be good so far as it operates a separation of property and dissolution of community—and bad so far as

it establishes title to specific property or indebtedness on part of the husband.

As against the creditors of the husband, the wife's judgment is no evidence of her ownership of property adjudged to her or of her husband's indebtedness to her. In other words, such a judgment does not *ex proprio vigore* prove or establish either ownership or indebtedness, as against the husband's creditors; and it is to this branch of such judgments that I think should be applied the rule so often recognized by this court, that the wife must prove *aliunde* (otherwise than by her judgment) the truth and verity of her paraphernal and dotal claims, as established by the judgment against the husband, whenever attacked or questioned by his creditors as fraudulent or simulated. The burden of proof is on her to establish her claims, and her judgment is not even *prima facie* evidence thereof. 2 A. 544; 8 N. S. 403, 459; 4 L. 422; 11 L. 534.

I think, therefore, that the judgment obtained by plaintiff in this suit against her husband was and is valid, so far as it separates her in property and dissolves the community. But, as I have said, so far as relates to the personal property and furniture, which is decreed to belong to the wife, the judgment is no proof of the fact of her ownership. It was incumbent on her to show *dehors* that judgment her ownership. I have critically and carefully gone over the whole evidence in both records and must say that I find no proof whatever that Mrs. O'Brien ever owned the furniture in controversy. In fact her counsel in the oral argument admitted that unless the husband's admission in his answer to the separation suit amounted to a donation, to a manual gift, or rather was good evidence of such gift, the wife had no claim to ownership. He rests the whole case on the proposition that the husband had made a gift of the furniture seized to his wife, and that the evidence, and only evidence, of that gift was found in the husband's said answer. Now let us see what was "claimed by the wife," and "admitted by the husband." She alleges that "*since her marriage with her husband*, she has become the owner of *certain personal property and household furniture in this city*, valued at $3000." The husband "admits his marriage with plaintiff and her ownership of the household furniture." What household furniture? The evidence taken in the case is equally vague as the pleadings. Only one witness even mentions where these parties were living. It is her brother. He says they were living at 459 Magazine street. That he had seen furniture in that house—parlor furniture, dining room and bed room furniture. That is all. He does not say that the furniture in 459 Magazine street was that claimed by the wife as her separate property, and admitted to be such by the husband. The judgment is equally at sea. It simply declares her

owner of the property described in her petition. The clerk, however, (who, by the by, was the husband himself) issued a writ of possession commanding the sheriff to put the plaintiff in possession of all the household furniture *in the premises* 459 *Magazine street.* The pleadings did not ask, the evidence did not prove, nor did the judgment decree, any right TO THAT writ. But suppose the wife had specified the articles of furniture claimed, their location at 459 Magazine street, and value. Suppose the husband had, with the same minuteness admitted her ownership, and even admitted that he had given her *that specific furniture*, and suppose we were to admit that that was sufficient proof of the gift of that particular furniture in the house 459. Yet when we open the record in this suit, we are unable to find a scintilla of evidence *that the furniture which was at* 459 *Magazine street, in June*, 1874, was or is *the same furniture* which the defendants *caused to be seized in the house of plaintiffs, on Jackson street, in November*, 1875, and which is now in controversy. We think, therefore, that there is no legal or sufficient proof that J. J. O'Brien ever, in point of fact, gave or intended to give his wife the furniture under seizure and control in this case.

If the intent of the husband to give his wife the furniture mentioned in her petition for separation were ever so clearly expressed, it would be ineffective for want of identification of the objects intended to be given. The gift of "a lot of furniture in the city of New Orleans, worth $3000," is void for uncertainty, if for no other reason.

So far as relates to the furniture, therefore, I find it unnecessary to decide whether the husband's admission of the wife's ownership is sufficient proof in itself of a donation; first, because, if it were, the intent to donate would be without effect for uncertainty as to its objects. Second, because, if its objects were specified and identified as the furniture in No. 459 Magazine street, there is no proof of the identity of that furniture with that seized in the house on Jackson street.

The case, however, is different with regard to the piano which was acquired *after the dissolution* of the community. After the community is dissolved—that ideal being has ceased to exist, there can be no presumption that property acquired in the separate name of the wife belongs to that being which had ceased to exist before the acquisition. But the fact that the wife has acquired property in her own name, after the dissolution of the community, does not estop or prevent the creditors of the husband or of the community from showing that it belongs in fact to the husband. And the fact that the wife had no means or sources of income enabling her to make the acquisition, and that the husband had such means would be cogent proof that the husband had paid for it, and was in reality its owner, and that her title was fraudulent and simulated. Such fact being shown, the *onus* would certainly be on her to

show affirmatively where she acquired the means of purchasing it. But in this case, as we understand her counsel, the wife does not pretend that she purchased the piano with her own funds—or rather with funds derived from any one else than her husband. Her proposition is that the husband bought the piano for and as a gift to her. I think the evidence of Grunewald, the vendor, shows that such was the fact, and that this evidence is strengthened by the inherent probabilities of the case. A piano is such an article as a newly married man would most likely make a present of to his wife, on going to housekeeping. Such a gift is essentially free from that suspicion of fraud and simulation which would inevitably attach to the case where the husband pretended to have given all his household effects to his wife. It would be difficult to convince me of the *bona fides and reality* of such a transaction. It would bear the brand of falsehood on its very front.

But, as stated, I think the evidence in this case shows that the husband bought the piano for and as a present to his wife. Donations of corporal movables, accompanied by *a real delivery*, are subject to no formality. O. C. C. Art. 1526. But if there is no *real delivery* they are void unless passed before a notary and two witnesses. C. C. Art. 1525. I think that there was a real delivery in this case—i. e. that the piano was put into the possession and under the control of the wife, as completely as it could be in the nature of things—where the donor and donee lived together. There was here then "a manual gift." The only remaining question is, are such gifts lawful between husband and wife? Art. 1739 O. C. C. declares that "Either of the married couple may, either by marriage contract or during the marriage, give to the other in full property all that he or she might give to a stranger." Art. 1742, "All donations made between married persons, *during marriage*, though termed *inter vivos*, shall always be revocable." It seems, therefore, that the only difference between the power of giving to a stranger and that of giving to a husband or wife consists in the revocability of the latter gifts. Whilst, therefore, the right and power to give, during marriage, to each other, exists in the husband and wife, courts will scrutinize rigidly such transactions where they are made to the prejudice of creditors. Such contracts are open to a double suspicion—to that attaching to all gratuitous contracts, created by Art. 1975 C. C., and to that growing out of the relations of the parties. I think, however, that the gift of the piano in this case was not *a mere simulation*, and, therefore, even if made *in fraud* of the creditors, that it can be questioned only by the revocatory action, not by seizure. The injunction should, therefore, as to the piano, be perpetuated, with reservation to the creditor of the right to proceed by the revocatory action.

I therefore dissent.

No. 6846.

THE STATE EX REL. T. S. ELDER VS. THE JUDGE OF THE THIRD DISTRICT COURT ET AL.

An appeal will not lie from an order of court made in execution of a previous judgment of that court.

One who has tacitly allowed a judgment to be rendered against him, can not assail it collaterally, on a rule taken by a third person to carry the judgment into effect. He must proceed by a direct action to annul.

The execution of a judgment can be arrested in but two ways, by a suspensive appeal, and by injunction.

A party condemned for a less sum than five hundred dollars can not appeal to this court, although it may appear that the property of defendant, seized in execution of the judgment against him, is worth more than $500.

APPLICATION for writs of mandamus and prohibition.

McGloin & Nixon for relator.

Henry Denis for respondents.

The judgment of the court was delivered by

MANNING, C. J. The city of New Orleans, having obtained judgment against T. S. Elder for $175 for taxes, a writ of *fieri facias* issued, and a piece of real estate situated there was seized and sold by the sheriff, and adjudicated to Mrs. Adams on her bid of $226, which she paid. The adjudicatee then took a rule on the sheriff to shew cause why he should not execute to her a formal act of sale, and put her in possession of the property, which the sheriff answered by alleging that the taxes for 1872 on that property were still unpaid (the sale was for the taxes of 1874), and that he was prohibited from making title until all arrear taxes were paid. He also asked that the State and Elder be made parties to the rule. No appearance was made by pleading by any other than the sheriff, and the court made the rule absolute upon payment by the adjudicatee of the State taxes of 1872. Elder, who without filing any plea or answer, had appeared by counsel on the trial of the rule, or in its argument, prayed an appeal, which being refused, he obtained a mandamus which he now seeks to have decreed peremptory.

An appeal will not lie from an order made in execution of a judgment of a court. The proper course is to appeal from the judgment itself. Boutté v. Executors of Boutté, not yet reported. When the adjudication was made, its legal effect was to transfer to the purchaser all the rights and claims of the defendant in the judgment. The sheriff is thereupon bound to pass an act of sale to the purchaser, and to put him in possession of it. Winn v. Elgee, 6 Rob. 100. It is the adjudication that gives the title. The sheriff's deed is an additional muniment of title to the purchaser, but the defendant's rights are divested by the

judgment, the execution, and the adjudication. Jouett v. Mortimer 29 Annual, 206. Nor can the defendant, who has permitted a judgment to be entered against him without objection, attack it under cover of a rule. He must proceed against it directly by an action of nullity. Lannes v. Workingmen' Bank, 29 Annual, 112. As he could not arrest its execution, by appealing from an order in aid or furtherance of that execution, but must resort to an injunction to stay it, (State v. Judge of 2d Court, 9 Annual, 301) so he can not after it is executed, arrest the making of title, by setting up defects by way of answer to a rule which he should have pleaded before.

There is another objection made by the respondents, viz that this court is without jurisdiction. The property sold is conceded to be worth over five hundred dollars. The judgment under which it was sold is for less than that sum. It is the latter that determines the jurisdiction of this court. If it were a third person who is deprived of the possession of this property, the case would be different. But where a party to a suit finds himself condemned on account of a demand less than five hundred dollars, he has no appeal though the value of the property may exceed that sum. The contestation is about the validity of the judgment. Suppose a mortgage of $226 resting upon Elder's property, which we may concede is worth several thousand dollars, is about to be enforced. No appeal would lie from the decree enforcing the mortgage by a sale. Gustine v. Oil Factory, 13 Annual, 510.

The remedy of relator is of another kind. The peremptory mandamus is refused at his costs.

No. 5982.

E. C. PORTER VS. PIERRE MORÈRE ET AL.

A judgment dissolving an injunction bars the plaintiff from obtaining a subsequent injunction, on any of the grounds in existence prior to the judgment of dissolution, and of which he could have availed himself on the trial of the first injunction.

The unexplained use of the words "without prejudice," in a judgment dissolving an injunction, will not convert the decree into a mere judgment of nonsuit.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee*, J.

Merrick, Race & Foster for plaintiff and appellee.

S. Belden and *G. Duplantier* for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff acquired certain lots in Carrollton by purchase in 1863. She was at that time a married woman, and not sep-

arated in property from her husband. The record does not disclose with whose funds the payments were made, and the legal presumption is they belonged to the community of acquets.

In January 1871 Mrs. Porter borrowed fifteen hundred dollars of the defendant Morère, and executed her note for that sum and a mortgage upon this property to secure its payment, being authorized by her husband thereto. In May 1874 Morère obtained executory process upon this mortgage, and advertised the property for sale, and this sale was prevented by Mrs. Porter's injunction in the following July. The grounds of that injunction were, that she was the owner of the property advertised for sale, and that it was her homestead, and the residence of herself and her children (her husband having died in 1872)—that the note and mortgage were executed in error and through fraud, and to pay a debt of her husband—that she was not authorized by any judge to execute the mortgage after the forms provided for married women.

Morère answered this injunction, and on hearing, it was dissolved in January 1875, whereupon the sheriff re-advertised the sale and in March following the present injunction was obtained on these grounds—that if the property belongs to the community which is denied, she can not be sued individually for the debt created by her, not having accepted the community—that she was married at the time of executing the note and mortgage, and no part of the consideration of the note enured to her benefit, or to that of her separate estate—that she was not authorized by any judge to execute these instruments, and she was incapable of binding herself for the debts of her husband—that her signature was obtained through fraud and by unlawful means.

To this petition the defendant pleaded *res judicata* and the general issue, and made the answer to the first injunction a part of the answer to the present suit. There was judgment perpetuating the injunction, and the defendant appeals.

The brief of plaintiff's counsel discusses elaborately the various questions of the inability of a wife to make certain contracts, her want of power to bind herself for her husband's debts, the necessity of certain forms in the execution by her of a mortgage &c. We do not think those questions are open for discussion or consideration in the present case. The plea of *res judicata* is a bar to this suit. All the grounds for injunction set up in the second suit existed prior to the first, and some of them were specially pleaded in the first petition. A judgment between the same parties dissolving an injunction is a perpetual bar to subsequent contestation upon grounds that existed anterior to the suit in which the judgment of dissolution was rendered, and of which the plaintiff in injunction might have availed himself in the first instance. McMicken v. Morgan, 9 Annual, 208. Fluker v. Davis, 12 Annual, 613. Even

where the first proceeding was not an injunction, but a rule resorted to for the purpose of arresting an execution, and a judgment was rendered upon it, this court held that the judgment discharging the rule was equivalent to one dissolving an injunction, and would sustain the plea of *res judicata*. Trescott v. Lewis, 12 Annual, 197. The reason of the rule is obvious, and the statement of it is its justification. A creditor might be perpetually baffled if successive injunctions could issue from the same court on the same grounds, and thus the door would be opened to endless litigation.

The plaintiff however contends that a saving clause in the first judgment relieves her from the application of this plea. The injunction was dissolved 'without prejudice.' The decree says no more than that. Whether it means without prejudice to either party to sue hereafter for damages, or without prejudice to any other subsequent proceeding by either, does not appear. The plaintiff insists that the addenda of those two words makes the judgment one of nonsuit, and cites the following authorities to support that position; 7 Annual, 665. This is the case of Goodrich v. Pettingale in which it is said—"in the opinion, the court nowhere state it as a matter of judgment by them, that the attachment had been legally executed. It is merely stated that it is urged that the lots in question, having been attached in 1836 in the suit brought by Goodrich v. Pettingale, they could not be sold to his prejudice. * * * * The decretal part of the opinion is explicit, that the injunction should be perpetuated. The reservation in favor of Goodrich was not put in the form of a decree, and amounts to nothing more than that he should not be prejudiced by the decree. As the supreme court therefore, in neither its opinion nor decree, declared the attachment valid and as the district court had not passed upon its validity at all, we can not consider the validity of the attachment a matter adjudged." The distinction between that case and the one before us is obvious, and need not be elaborated.

Mr. Hennen's Digest is next referred to. The first reference in that book is the case already quoted in 7th. Annual, and the next in Wells and Hunter, 5 New Series, 120 wherein it is held that "a judgment dissolving an injunction is very often as one of nonsuit, and forms then no *res judicata*, but here the dissolution took place after a plea of the general issue, and the evidence was held to be in favor of the defendant." Precisely what was pleaded and decided in this case.

The second reference is Levistone v. Bona, 4 Rob. 459, and there the decision is, where an order of seizure and sale was enjoined by a third possessor, and his opposition to the seizure was tried in the absence of his counsel and dismissed, and the injunction dissolved, and another writ of seizure was issued which was again opposed by the same party,

held the first judgment was not pleadable in bar of the second suit. Because the opponent had no opportunity of supporting his opposition by proof, but here there was a trial on the first issue in which both parties participated, and because the Code of Practice thus provides. art. 536.

3 Rob. 460 is Fisher v. Vose, in which the question is not touched even remotely.

21 Annual, 324 in Citizen's Bank v. Crooks, which repeats the well established rule that when it is manifest that the plaintiff in injunction will be entitled to a new writ, if the first were dissolved, the case will be remanded to enable him to supply the evidence omitted.

These authorities do not help the plaintiff's case, and independent of authorities, as an original proposition, we do not think the mere words 'without prejudice' unexplained by the judge convert his judgment into one of nonsuit. Her injunction should have been dissolved. Therefore,

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the plea of *res judicata* is sustained, and the plaintiff's injunction is dissolved and her suit dismissed at her costs in both courts.

No. 6864.

STATE EX REL. ALICE MCCLOSKEY ET AL. VS. THE JUDGE OF THE SECOND DISTRICT COURT.

Where parties have been recognized by a formal decree of court as legatees of a succession, no appeal will lie from a subsequent judgment on a rule taken by them, or on the application of the executor, ordering him to sell property enough to pay the legacies.

The appropriate process to arrest an order of sale, rendered on a rule to show cause why property should not be sold is the process of injunction, not appeal.

Neither the legatee of an annuity in a succession, nor the residuary legatee, has a right to frustrate or retard the sale of property prayed for by particular legatees for the payment of their legacies.

APPLICATION for a mandamus.

Thos. J. Semmes and *James Timony* for relator.

E. Bermudez for respondent.

The opinion of the court was delivered by

MANNING, C. J. Several legatees of Hugh McCloskey, having obtained a judicial recognition of their legacies contradictorily with the executors of his will, took a Rule on the latter to shew cause why sufficient property should not be sold to satisfy them. One of the executors

answered that it was inopportune to sell at this time of the year. The other made no objection. The widow of the deceased, and the Roman Catholic Bishop of Derry, Ireland, intervened and joined the executor in opposing the sale. They are the relators. The first is a legatee under the will of her husband of two hundred dollars per month during her natural life. The last is the residuary legatee. The Judge made the Rule absolute, and one of the executors then filed a petition, praying the sale of all the property, alleging that there were other legacies besides those of the plaintiffs in the Rule that were unpaid, and it was ordered accordingly. The intervenors then moved for a suspensive appeal, which was refused, and having obtained a mandamus provisionally, now pray that it be made peremptory.

The Code orders thus;—In default of funds sufficient to discharge the debts and legacies of sums of money, the testamentary executor shall cause himself to be authorized by the court to sell the movables, and if they are insufficient, the immovables to a sufficient amount to satisfy those debts and legacies. art. 1661 new no. 1668. The legatees, having obtained judgments, could proceed only by Rule to enforce them. The rule was their process in execution of their final judgment. An appeal does not lie from an order or judgment making such rule absolute. The appeal should have been taken from the judgment for the legacies. Boutté's Suc. Opinion Book 46 fol. 485.

The court could not do otherwise than order the sale. Some of the legatees desired it to pay them, and the executor prayed for it to pay all. The legatees who desire the payment of their legacies should not be delayed until the unanimous consent of all can be obtained, on the ground that the interest of some will be promoted by the delay.

The order of sale having been made, its execution can not be arrested, save by an injunction. The bond which must be given to obtain that writ affords a more direct and a more adequate remedy than an appeal bond, and a party, defeated on a rule to shew cause why property should not be sold to pay a judgment, can not substitute an appeal from a judgment making that rule absolute to an injunction restraining the sale. State vs. Judge of Second Court, 9 Annual, 301.

The counsel for the relators urge that the particular legatee of the annuity prefers to have it secured by mortgage on the real estate, and does not claim its capitalization, and the residuary legatee concurs with her in opposing the sale, because such sale will result in a reduction of the legacies and leave no residuum. The legatees who pray the sale appear not to apprehend the reduction of their legacies, or are indifferent to it, and the residuary legatee can not postpone the sale until such time as will put his loss beyond peradventure. If the legatee of the annuity can prevent the sale because she prefers to retain her mortgage

upon the property as it now stands, the property can not be sold during her life, since her annuity has that duration. What may be the rights of the several parties upon the fund produced by the sale has not now to be determined. The obligation of the executor to sell under the order as granted, and the inability or want of power of the annuitant and the residuary legatee to check the sale by such appeal as was prayed, are the questions now dealt with.

The peremptory mandamus is refused at the costs of the relators.

No. 6833.

STATE EX REL. GEO. E. PARIS VS. ALLEN JUMEL, AUDITOR, ETC. E. C. PAYNE ET AL., INTERVENORS.

Where an act of the Legislature makes a new law for the assessment of property, and a new Board of Assessors are appointed under that law, whose pay is conditioned on their doing the work of assessment, and they actually do the work, *they* will be entitled to the appropriation made for the compensation of such assessors, and not any previous Board of Assessors who were *functi officio* when the work of assessment was done.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

Chas. S. Rice for relators and appellants.

B. F. Jonas for intervenors and appellees.

The opinion of the court was delivered by

MANNING, C. J. The relators allege that they were assessors for the City of New Orleans from the first day of January 1877 to the 20th. of April of same year, and are entitled to a salary for their services during that time at the rate of four thousand dollars per annum—that the legislature, on April 4th. of that year, appropriated twelve thousand five hundred dollars as compensation to the assessors of the City, and they are entitled to be paid out of this fund—that they have demanded their warrants of the Auditor for the sums respectively due them, and that he has refused them, whereupon they prayed and obtained a writ of mandamus.

In answer to the rule to shew cause why the writ should not be made peremptory, the Auditor avers that the Board of assessors appointed under an Act of April 20th. 1877 claim that this appropriation was made for their benefit—that by the terms of the act, one half of the appropriation is to be paid to the mayor of the City for contingent expenses and clerical force, and the other half to the new board of assessors, and that he can not pay to either of these rival claimants without an adjudication of their respective rights.

Edward C. Payne and four others intervene and allege that they constitute the new board of assessors, and that they have made the assessment for 1877, and are alone entitled to the compensation for that service provided by the legislature.

The relators, six in number, were appointed under an act of March 16th. 1875, which fixed the salary of each at four thousand dollars per annum, and in addition thereto directed that they should receive a commission of five per centum on the taxes of all taxable property, not on the rolls of 1874, which shall be discovered by them and placed on the books of 1875, and further that for their necessary expenses, clerical labor, etc. an appropriation of seven thousand dollars should be made. Acts 1875 p. 33.

On April 20th. 1877 a new provision was made for the assessment of property in New Orleans, whereby the board of assessors was to consist of five members, each of whom should receive a salary of twenty-five hundred dollars per annum for the year in which a new assessment is made, and a smaller sum for other years, one half of which compensation was to be paid by the State, and the other half by the City, and for clerical force and contingent expenses, the City council might provide for the expenditure of a sum not exceeding twelve thousand five hundred dollars per annum, of which one half should be paid by the State upon the warrant of the mayor. Acts 1877, p. 154.

On the 4th. day of the same month and year, the general appropriation bill was passed which contained four several appropriations of compensation for the assessors of the City aggregating twelve thousand five hundred dollars. Acts 1877, pp. 77—79.

If the claim of the relators be well founded, they are entitled to be paid over seven thousand dollars for services rendered as the board of assessors for three months and twenty days, during which time it is not pretended that the assessment of 1877 was made. It is obvious that the two Acts of that year must be construed together, and when thus construed, the appropriation made for the payment of the assessors accords in amount with that prescribed as their compensation in the act creating the new board, and the legal inference is inevitable that the sums thus appropriated were intended for the new board. On the other hand, if it can be conceived that the relators were intended to be the recipients of the sums appropriated for compensation of assessors, the amount of the appropriation is wholly inadequate to the payment of salaries on the scale fixed by the act of 1875.

There is a better reason still why the intervenors should prevail as against the relators. They did the work. The law of 1877 provides that no compensation shall be allowed any assessor in any year until he shall have performed the duties of his office, and shall have completed

the rolls. p. 143. The relators were *functi officio* when the assessment of 1877 was made. The intervenors then constituted the board, and are alone entitled to the compensation awarded by the legislature for the assessment of that year. They do not appear however for the purpose of compelling the Auditor by mandamus to pay them, but for the purpose of opposing the claim of the relators.

The lower court denied the relief sought by the relators and refused the peremptory writ.

The judgment is affirmed.

No. 6820.

STATE EX REL. PIERRE LACAZE ET AL. VS. CHAS. CAVANAC, ADMINISTRATOR OF COMMERCE.

A mandamus will not issue to compel a public officer to perform a ministerial duty, when the evidence shows that the performance of that duty by him is a physical impossibility; or that his ability to carry out the mandate of the court depends on the co-operative action of a third person who is not before the court.

The prayer for a mandamus is too vague which merely asks that an officer shall be compelled to accomplish a certain result. The relator must designate the specific acts which he demands that the respondent shall do.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

R. King Cutler for plaintiffs and appellants.

B. F. Jonas, City Attorney, for respondent and appellee.

The opinion of the court was delivered by

SPENCER, J. The opinion of the judge of the Third District Court in this case so fully states the law and the facts thereof that we can not do better than to adopt it as our own. We simply add that whilst the legislative act certainly authorizes and directs the defendant to close, or cause to be closed the private markets, it has not provided *the means* by which he is to do so. There is no authority given him by that act or any other to summons a posse—there is no force put at his disposal to effect the purposes of the act. He is not directed or authorized to bring suits, further than to lay the subject before the grand jury; and if he were, no provision is made to meet the expenses thereof. He can not be compelled to do so at his personal expense.

We might, perhaps, add that the relators ask that respondent be compelled by mandamus—*not to do any specific act*, but *to achieve or accomplish a result*, without specification of the *modus operandi*. Mandamus will only issue to compel the performance of purely ministerial duties, into which there enters no element of discretion. The relator

should specify the *particular act or acts* which the officer is required to do—to the end that he may be punished if he do not do them.

For these reasons and those assigned by the judge *a quo*, it is ordered and decreed that the judgment appealed from be affirmed at the cost of relators.

THE OPINION RENDERED IN THIS CASE BY THE JUDGE OF THE LOWER COURT.

MONROE, J. This is a proceeding under act No. 31 of 1874, section one of which provides:

"That it shall (be) and it is hereby made unlawful for any person or persons to open, conduct, carry on, or to continue any private market for the sale of fresh meats, poultry, fresh fish, etc., in the city of New Orleans within the space of twelve squares of any public market under the jurisdiction and authority of the Administrator of Commerce of the said city of New Orleans."

Section 2 of said act provides that "The Administrator of Commerce shall be and is hereby authorized and directed to close or cause to be closed any private market that may hereafter be established for the sale of meats, poultry, etc., in violation of the provisions of section one of this act."

Relators aver that they are butchers, doing business in the various public markets in this city, that their business has been pecuniarily profitable to them, but that a large number of private markets have been established, opened and kept within twelve squares of the respective public markets in which relators do business, and that meat, fish, and poultry are sold in said private markets, to the great injury of relators and in violation of the act No. 31, above quoted. That said private markets pay no licenses and work great injury to the city treasury and to tax-payers and property holders thereby.

That Chas. Cavanac, Administrator of Commerce, has been requested to close said private markets or to cause them to be closed, but that he refuses to comply with said request, although it is his duty so to do, and that such refusal works irreparable loss and damage to relators for which the ordinary course of legal proceedings affords no remedy.

Relators pray that a writ of mandamus issue, directing said Cavanac, Administrator, to close or cause to be closed forthwith all the private markets within twelve squares of each of the public markets, viz.: the Magazine market, Claiborne market, Trémé and French markets.

The Administrator of Commerce comes into court and for answer says:

That there are a large number of private markets within the location described in relators' petition, the owners of which have obtained injunctions restraining respondent from interfering with them in their business, which injunctions are still pending.

Respondent further says, that he is and has ever been ready and willing to do all in his power to enforce the provisions of act No. 31, of 1874; that due notice has been given to all persons doing business in violation thereof to close their said business, but that he is without police or other power to enforce said law, which can only be enforced through the Mayor and Council of the city and the Board of Police Commissioners, and that no other means or remedy can be resorted to than those prescribed in said act, and these the relators do not demand in their petition.

Respondent further avers that he is without authority to stand in judgment for the city of New Orleans; and prays that relators' application be dismissed.

The allegations of fact contained in the petition of the relators are substantiated by uncontradicted evidence. There is no doubt that there are numerous private markets conducted within twelve squares of the public markets named in the petition, and that said private markets are so conducted in defiance of the law hereinbefore quoted, to the injury of the business conducted by relators in said public markets. It actually appears that the keepers of the private markets have the advantage of being exempt from certain expenses which are imposed upon the butchers in the public markets, for while the latter are required to pay licenses and a *bonus* for their stalls, no such exaction is made of the former, for the reason that it is considered that they can not be licensed or otherwise sanctioned in the pursuit of an unlawful occupation.

It thus appearing that a statute of the State is being violated to the injury of citizens who are pursuing their avocations in conformity to law, we are next to inquire whether the remedy here sought is the proper one. With the policy of this law the court has nothing to do, the Legislature have seen proper to enact it and their right to do so has not been called in question.

We have seen that the second section of the act in question authorizes and directs the Administrator of Commerce to close or cause to be closed any private market which "may hereafter be established," etc., in violation of the provisions of section one of said act.

The Administrator of Commerce answers, however, that whilst he is perfectly willing to do his duty in the premises, he has no police or other power at his command with which to enforce the closing of the private markets. Respondent further says that due notice has been given to all persons doing business in violation of the act No. 31, referred to, to close their said business, but that the enforcement of said law must be through the Mayor and Council and the Board of Police Commissioners, and that no other means can be resorted to than those prescribed in said law.

If this be true, it would be idle for this court to issue a mandamus

commanding the Administrator of Commerce to close the markets in question, since the court could have no power to enforce an order commanding a physical impossibility. In "High on Extraordinary Legal Remedies," § 14, we find this subject treated as follows:

"It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing and whenever it is apparent to the court that the object sought is impossible of attainment, either through want of power on the part of the persons against whom the extraordinary jurisdiction of the court is invoked, or for other sufficient causes, or that the granting of the writ must necessarily be fruitless, the court will refuse to interfere. So, if it is apparent that the writ, if granted, can not be enforced by the court, relief will be withheld, since the courts are averse to exercising their extraordinary jurisdiction in cases where their authority can not be vindicated by the enforcement of process. Nor will mandamus be allowed unless the act or duty whose enforcement is sought is legally possible at the time, and it is therefore a sufficient return to an alternative mandamus that the respondent has no power to do the act required."

See, also, 9 An. 513.

The act required of the respondent in this case is, that he shall close the private markets. He answers that he has no power to do it, and whilst the act No. 31 of 1874 authorizes and directs him to close said markets, an inspection of the act No. 7 of 1870, by which the present system of city government was established, discloses that the organization of the department of commerce is under the control of the council, who regulate the number of employees in each department. The power of the Administrator of Commerce to obey the mandate of the court would, therefore, depend upon the means furnished him by the council or the police commissioners, and his failure to obey such mandate for want of the necessary power would leave the court in the position of being unable to enforce its orders.

It is true that the act relied on by the relators makes it the specific duty of the Administrator of Commerce to give information to the grand jury of the parish of Orleans of any party or parties who have violated the provisions of said act, and it is to be remarked that there is no allegation on his part, either that he has discharged this duty, or that he is without the power to do so. The relators have, however, asked no order upon this subject, otherwise it may be that a more satisfactory response would have been made.

The order which has been asked the court is unable, for the reasons given, to grant. That the evil complained of exists there is no doubt; the law of the State is openly violated to the knowledge of those whose duty it would seem to be to see to its vindication; the remedy, however, is not to be found in this proceeding.

The rule is therefore dismissed.

No. 5399.

MARY JOHNS VS. HENRY J. BRINKER.

The commander of a steamboat has a right to use whatever reasonable and lawful force may be necessary to maintain a proper police of his vessel, and discipline among his employees.

Where an employee on board of a steamboat, by her own insolence, insubordination, and threats of personal violence, provokes the captain of the boat into an assault with his hands, resulting in but a trifling injury to her, she will not be entitled to recover in damages.

Where the issue involved in the verdict of a jury, and judgment of the lower court, is damages for an alleged assault and battery, this court will not disturb such verdict, and judgment, where they do not clearly appear to be unjust.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

Merrick, Race & Foster for plaintiff and appellant.

James D. Coleman and *H. E. Upton* for defendant.

The opinion of the court was delivered by

EGAN, J. This is an action to recover damages for an alleged malicious, wanton, and inhuman assaulting and beating the plaintiff, and for defaming and slandering her. The particulars of the alleged defamation are, however, not charged, and that branch of the case seems to have been practically abandoned. The argument of counsel, that the introduction in the trial of this cause of evidence of witnesses tending to affect the reputation of the plaintiff can form an element of damage and a basis of recovery in the present case, is wholly untenable. The case must be tried upon the state of facts alleged upon and existing at its inception. As to this we find no evidence in the record to support the charge of defamation. We have, therefore, to deal only with the alleged assault and battery.

The plaintiff was chambermaid upon the steamer Maria Louise, of which the defendant was captain. The occurrence out of which this suit arose took place while the boat was lying at the port of Shreveport, on Red River, in April, 1872, on her return trip from Jefferson, Texas, with a full list of passengers, among whom were a number of ladies. Just as the passengers were about sitting down to dinner in the cabin, it was reported to the captain that the plaintiff was causing some disturbance, to the annoyance of the lady passengers, growing immediately out of a quarrel between her and the colored nurse of the captain's children, between whom and the plaintiff it appears no good feeling existed. It is also charged by some of the witnesses, and denied by others, that the plaintiff was at the time intoxicated, or at least excited by liquor; we do not, however, consider this fact very material either way, and may disregard it in view of the

other facts proved. The captain on receiving this information went back to the laundry, back of the ladies' cabin, and spoke to the plaintiff, it seems with a view to putting an end to the disturbance and to the consequent annoyance of the passengers. This he had a perfect right, and it was his duty to do in policing his own boat. The preponderating evidence of the only witnesses who heard and saw what passed between them at that time seems to have satisfied the jury and the judge below that instead of yielding to the legitimate authority of the commanding officer, to whose orders and direction it was necessary, and she by accepting employment on the boat had consented, to submit herself, the plaintiff was insolent and insubordinate, and attempted or threatened to strike the captain with a large lump of coal; and that he thereupon either knocked or kicked the coal out of her hands and at the same time slapped her forcibly in the face, causing her nose to bleed and either contusion or fracture of the nasal bone, about which the testimony of two physicians on the record is not accordant, though both agree that there was not even an abrasion of the skin. The plaintiff then very naturally rushed out of the laundry and along the guards in the direction of the forward cabin or gangway, and the captain as naturally, to avoid disturbing the passengers and creating a commotion, followed her and forced her back into the laundry, and told her to stay there. Some of the witnesses say he struck her with his fist on the back of the head while on the guards, and others say he did not; at all events it does not appear from the testimony of her own witnesses that any injury resulted from the blows, if given. They could certainly not have been delivered with much force, or under the circumstances she would have been knocked down, and Dr. Kennedy, whom she consulted immediately on her return to New Orleans, says he neither heard of nor saw any other evidence of injury except to the nose. The plaintiff was then paid off and discharged, and left the boat the same day; and after remaining three or four days in Shreveport returned to New Orleans by way of Monroe and Vicksburg, accompanied by a lawyer, who it would appear had fired her with the ambition and belief that she could, under the then existing circumstances and state of public opinion in the country, realize a fortune in the way of damages out of the defendant. Acting under such advice she first had the defendant arrested and carried before a U. S. Commissioner at Shreveport, and afterward at New Orleans, and also attempted to have him indicted by the grand jury in the U. S. District Court for La. but without success. She also instituted this suit to recover ten thousand dollars damages for her wrongs and injuries, and two hundred and thirty dollars and 50-100 for her traveling expenses and doctor's bills.

The traveling expenses were simply a consequence of her discharge

from employment, and as we agree with the jury and court below that under the circumstances the defendant had a right to discharge her, this is no element of recovery in the case. The doctor's bill amounted to ten dollars for a single visit, and the professional services of Dr. Kennedy after her return to New Orleans.

The only other element of damage then is that growing out of the assault and battery, with the exception of such professional advice and services, if such they were, as were afforded her by the attorney who accompanied her to New Orleans, and to whose advice it would appear the plaintiff is indebted for this protracted and exaggerated litigation. Of them she says herself that she could not see or did not think this attorney did her any good; she could see nothing he did for her, and she therefore discharged him after paying him three hundred and ninety dollars, and employed the counsel who has since conducted this litigation. There is no evidence in the record to countervail the impressions of the plaintiff herself in regard to the character and value of the services in question. On the contrary, the record would rather make the impression that she had been badly advised and encouraged to embark in expensive and speculative litigation to no profit. The amounts paid her present attorneys for the prosecution of this suit are not recoverable in it even if so large a claim were established by other testimony than that of the plaintiff alone, as it is not. There is no evidence of malice or of wantonness in the defendant in the assault and battery complained of. The plaintiff herself swears that she and the defendant had never previously had the slightest disagreement, and had gotten along well. It is, however, proved to our satisfaction, as it seems to have been to that of the court and jury *a qua*, that the plaintiff had not properly performed the duties of chambermaid according to the rules of the boat and the orders of the captain, in violation of which and to the annoyance of lady passengers, who complained of it, she had, instead of attending to the berths and rooms in the ladies' cabin herself, frequently made a cabin-boy do so, and had sent the captain an insolent message in regard to it. At the time of the immediate difficulty, as before remarked, she appears to have been not only insolent and insubordinate to the commanding officer of the boat, whose orders it was her duty to obey, but to have attempted actual violence toward him. The court and jury below doubtless thought, as we think from the evidence, that she provoked the difficulty with the defendant by her own misconduct and insolent demeanor, without which nothing in the record leads us to believe it would have occurred. Not only does this impression result from the evidence of the immediate facts, but from the well-established character of the defendant as a peaceable and quiet officer and man who never had a difficulty with any one else, and according to the

plaintiff's testimony never prior to that even with her, together with his responsibility and duty as captain to preserve good order and suppress disturbances on his boat.

Whether we take the statement of Dr. Moore, who was consulted by plaintiff at Shreveport, immediately after the occurrence, and who testifies to her violent language and demeanor in regard to the defendant at that time, or that of Dr. Kennedy, who only saw her after her return to New Orleans, the injury which she received appears to have been rather the result of accident than design on the part of the defendant, even if it was not the necessary consequence of her own conduct, and to have been by no means sufficient to warrant so extravagant a demand as the present. The evidence of actual damage is inconsiderable, as we have seen. The defendant's legitimate authority was defied and his passengers annoyed by the plaintiff, and he was greatly provoked and threatened with actual violence by her. While there is evidence of several witnesses to the good conduct of the plaintiff on other occasions, there is none to support her own unaided testimony against the preponderating evidence of the defense that her own conduct, on this particular occasion, was the cause of the difficulty. Suits of this character were of somewhat frequent occurrence about the time this arose. Most of them were no doubt born of the false teachings and bad advice of the hour, and we trust the occasion and the disposition for them on the part of persons of the class of the plaintiff have passed away, and that instead of cultivating an offensive spirit of independence of just control by and insubordination toward those in authority over them, they will learn the necessity and benefits of civility to all and obedience to the authority to which they voluntarily submit themselves, and with which custom and the law from necessity clothe the commanders of ships and steamboats. But while officers like the defendant must necessarily police and control their own boats and those employed on board of them to a great extent, we by no means wish to be understood as justifying on their part the use of wanton or unnecessary force, or of violations of the law toward even their subordinates; were such a case before us we should unquestionably visit upon the offender the consequence of his act. There is a mass of evidence in this voluminous record much of which is irrelevant. The case was tried by a jury who heard and saw the witnesses, and under the eye and ear of an upright and intelligent judge. The former found a verdict for the defendant, and the latter refused to set aside that verdict and award a new trial. The evidence taken together has made no such impression upon us as would warrant or induce us to avoid that verdict and the judgment based upon it in a case so peculiarly within the province of that court and jury. If any other result could follow a new trial it would necessarily entail additional expense to all with little prospect of

profit to any party to the litigation. If the defendant was in fault he has, we think, been sufficiently mulcted and learned a sufficient lesson in the progress of the multifarious and expensive litigation which has followed, and we trust the plaintiff will also be wiser in future than to embark in such ventures.

The plaintiff excepted to the refusal of the judge *a quo* to receive the depositions of N. W. Smith and Peggy Matthews taken under affidavit. We do not think the court erred. The notice was insufficient and the evidence taken *ex parte*. Were the evidence, however, before us it would not in our opinion affect the conclusions to which we have arrived, nor do we think it sufficient to have countervailed the effect of the other evidence with the jury and court below, or to have been likely to affect the verdict and judgment.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be affirmed, with costs of both courts to be paid by the plaintiff.

No. 6692.

WIDOW SARAH GAINES VS. SUCCESSION OF MARTINEZ DEL CAMPO.

A general plea of "prescription," without indicating what specific prescription the party invokes, and relies on, is too vague for this court to take cognizance of.

The omission on the part of an employee to present a statement of account to the employer for services rendered to the employer, will not prevent the former from recovering the value of those services from the employer's succession.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Sambola & Ducros for plaintiff and appellee.

Geo. L. Bright for defendant.

The opinion of the court was delivered by

DEBLANC, J. Mrs. Sarah Gaines claims from the succession of Jose Martinez Del Campo the sum of $5400.

1st. For the use and rent of her household furniture, effects useful and ornamental, utensils, bed, beddings, etc., by the deceased and for attending and managing his domestic and household affairs (keeping house for him) from March 1st, 1873, to March 1st, 1876, at $100 per month..... $3,600

2d. To constant services rendered by nursing and taking care of the deceased in his old age and illness, say twelve months preceding his death, at $5 per day 1,800

Total $5,400

The defense is:

1st. A general denial.

2d. That the deceased occupied a furnished room in plaintiff's house, and the plaintiff being unable to maintain herself, he, in kindness paid her rent and maintained her family to an extent largely exceeding the benefits received by him, and were an account now taken, the plaintiff would be largely indebted to him.

3d. Prescription.

Defendant pleads, in general terms, "*the exception of prescription*"—but, of the many prescriptions known to our laws, which did he intend to invoke? We are not informed, and—in its form—that plea is so vague and so indefinite, that—to sustain the exception—we would have to supply the plea itself, and infer which prescription is relied on. This we can not do.

15 L. 550. 21 A. 396—671.

There remains to be determined but a question of facts, and—in this case—it is, by far, the most difficult one. It is in evidence that Del Campo lived like a man of means, but the extent of his means at and before his death is not shown. The inventory of his estate was—for that purpose—introduced in the lower court, but was not copied in the transcript. As however, neither the plaintiff, nor the representative of Del Campo's succession complains of that omission, they must both consider it as unnecessary to a proper decision of this controversy.

Del Campo lived in a house rented by himself, furnished and kept by Mrs. Gaines, who washed and cooked for him. He was an old man, but went regularly to his business from 9 o'clock in the morning until 4 in the afternoon. One of his intimate friends, Justo Garcia y Leon testified that Mrs. Gaines treated him like a child; she was near him day and night; he could not use his hands; she had to dress him in bed, put on his drawers, socks, pants and shoes, and to render other and fulsome services which—however calculated and interested they may have been—should be rewarded.

It is not improbable that—for that constant care, those indefatigable attentions, Mrs. Gaines expected to be compensated by a gift, a legacy proportionate to her important services and the presumed wealth of Del Campo; but that not unreasonable expectation, and—though not unselfish—her hesitation to present any account to the deceased, did not destroy her right to recover a just compensation from his succession.

7 A. 207.

Del Campo never gave a cent to Mrs. Gaines; he would not allow her to take and keep boarders. Of those she had when he came to the house occupied by her, only one remained; that one paid to her the price of his board. She told y Leone that the deceased gave her no money:

he answered that Martinez was a gentleman, that he would not forget her. She applied to himself, and he, as his friend, left her under the impression that she would be remembered and rewarded. His generous intention or deceitful promise is now in the grave.

Our attention was arrested by defendant's answer, and—for a moment—we could not refrain from suspecting Mrs. Gaines' *post mortem* demand, but the evidence preponderates in favor of the demand, and does not sustain the allegations of the answer. For rent of her furniture, washing, cooking, nursing and services of every description during the space of three years, the judge of the lower court, who heard and—it may be—knew the witnesses, has allowed plaintiff a fraction over two dollars and thirty cents a day. It is not too much.

The judgment appealed from is affirmed with costs.

DISSENTING OPINION.

MANNING, C. J. The plaintiff has not established her claim to my satisfaction. She kept furnished apartments for rent on Royal street when Del Campo first became her lodger, and he paid $25 per month. That was seven or eight years ago, the plaintiff said, speaking as a witness in 1876. He paid that rent for three months only. Then he rented the house, and plaintiff's furniture remained in use, other lodgers occupying rooms as before. Afterwards he rented a house on Liberty street and on Rampart, Barracks, and Bourbon streets successively, to all of which the plaintiff's furniture was removed. These rents were $75 at first, later $100 and $125 per month, which Del Campo paid. He used two rooms or three as stated by the plaintiff. The other rooms were at her disposal. She says her lodgers were sent away by her because Del Campo would not permit any of them to stay in the house, but Davis, one of plaintiff's witnesses, says he rented a room in these several houses from plaintiff during the whole time Del Campo was lodging in them, and paid the rent to the plaintiff. It is very clear to my mind that Del Campo paid the rent of his suite of furnished apartments by giving the money to the landlord instead of the plaintiff, and thus ensuring that he would not be disturbed by ejection for non-payment of house rent. The circumstances detailed by plaintiff as giving rise to his renting the different houses, instead of renting from her a suite of furnished rooms in them, confirm this view. He had not been renting her rooms three months before she asked him to become her security for the house rent. He wisely declined to do that, and instead rented the house himself. The sum he paid is about what the monthly rent of a suite of rooms would be, furnished as his were according to the witnesses' description. During the years of highest rent it

was more, and his liberality was no doubt occasioned by the plaintiff's care of him and attention to his wants.

The charge for nursing is no better supported. Del Campo went out to his business every day, and his sickness was short. Garcia y Leon, one of plaintiff's witnesses, says Del Campo was a pretty hearty old man up to the time he died. I can not approve a charge of $1800 for a year's nursing of a man who was on the streets every day through the business hours, even if he were over-exacting in his demands of the plaintiff's time and attention when in doors, and it is not an insignificant circumstance that during Del Campo's life no demand was made of him by plaintiff, and her services are said to have continued through seven years.

As I think plaintiff has failed to support her claim by satisfactory proof, it is unnecessary to consider whether the plea of prescription would bar it, but I can not understand why that plea should be held to be defective unless the pleader specifies the time or number of years that must have elapsed to sustain the plea. The plaintiff's counsel did not object to it for vagueness. If a party to a suit wishes to avail himself of a bar afforded by the statute of limitations, it seems to me sufficient for him to plead that the right to recover is thus barred—in our phraseology, that it is prescribed. And whether the particular period of prescription is one or thirty years, the court must know or ascertain from the Code or statutes whether the claim is prescribed by any period, and apply the law accordingly.

I think the case is with the defendant, and that he ought to have judgment.

CONCURRING OPINION.

MARR, J. The Code, article 3464 (3427) requires prescription to be pleaded "expressly and specially." I think this is but an amplification of the preceding article, which declares that "courts can not supply the plea of prescription."

The party who relies on the bar resulting from the lapse of time must set it up, must inform the court and the adverse party by his pleading that he makes that defense. It would be more convenient that the pleader should state what the prescription is which he considers applicable, and on which he relies; but the petition generally discloses the nature and particulars of the demand with sufficient certainty to enable the court and the adverse party to know, at once, to what prescription it is subject. I am not prepared to say that the statement in the answer that the action is prescribed, or the simple exception of prescription, without further specification, would not be sufficient, especially where no objection is made by the adverse party.

The demand for rent and use of the furniture would be subject to the prescription of three years; and that for personal services, to the prescription of one year; so that neither was prescribed when the suit was brought.

Plaintiff certainly rendered such services to Del Campo as entitled her to a liberal compensation; and although the whole of her furniture was not needed for the rooms and apartments occupied by Del Campo, his use of it was virtually exclusive, because he would not permit her to receive other boarders or lodgers, and she had but one, Davis.

I attach no importance to the fact that plaintiff did not present her account, and have a settlement with Del Campo during his life. The testimony shows that she expected, not without reason, that she would be remembered, and compensated in the testamentary dispositions of Del Campo; and as her expectations were not realized, she is entitled to demand proper compensation.

The amount allowed seems to me large; but it is not up to the estimation of plaintiff and her witnesses, and no contradictory proof was introduced or offered.

I concur in the decree pronounced by Mr. Justice DeBlanc.

No. 6469.

MARTIN IVENS, JR., vs. E. M. IVENS & CO. C. S. JOHNSON, GARNISHEE.

The validity of a garnishee's title to property in his possession, of which he claims the ownership, can not be passed on in a rule, taken to traverse the answers of the garnishee. Such an issue can only be passed on in a direct suit brought to test the sufficiency of the title.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

W. R. Mills for plaintiff and appellant.

W. B. Lancaster and *H. E. Lazarus* for garnishee and appellee.

The opinion of the court was delivered by

EGAN, J. This is a proceeding in garnishment under *fieri facias*. Interrogatories were propounded to the garnishee who directly negatived the possession of any property or effects of the defendant, or any indebtedness to them. In answer to further interrogatories, the garnishee set up title by purchase and ownership of the only property of the character inquired about, and appended to his answers a written conveyance from H. S. Benham to him of the property the possession and ownership of which he thus claimed. He also excepted to the right of the plaintiff to proceed by garnishment process as attempted, to try the question of title, and asked to be excused from answering further. The

court sustained the exception and rendered judgment in favor of the garnishee on a rule taken by the plaintiff to traverse his answers.

From that judgment the plaintiff has appealed and urges upon us his right to introduce evidence under his traverse to disprove the answers of the garnishee, and to show the title of the property in his possession to be in the defendants and not in the garnishee.

In support of his pretensions, we are referred to the provision of article 262 of the Code of Practice that the garnishee must declare fairly and truly "what property *belonging to the defendant* he has in his possession *by whatever title* he may possess the same." It is manifest that the "title" referred to in this article is the right by which the garnishee holds for or under the defendant as bailee, lessee, or otherwise, and not to title to property the ownership of which is claimed by the garnishee to be in himself. The moment that character of title is interposed as a real, actual title, its validity and sufficiency can only be attacked by a direct action. See 2d R. 99; 1st R. 435; 17 L. 555; 3 A. 651 and 183; 12 A. 814; 19 A. 16; 25 A. 365; 26 A. 74.

Nothing in the interrogatories or answers or otherwise in the record leads to the suggestion or belief that the matters proposed to be tried on the rule relate to any other property than that the ownership of which is claimed by the garnishee, with color of right, at least as set forth in his answers. We can not in this form of proceeding try the question of the validity or sufficiency of that title or whether all the property claimed by virtue of it is covered by its terms.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is affirmed with costs of both courts.

No. 6752.

MRS. J. B. DUCOING, ADMINISTRATRIX, VS. JOSEPH BILLGERY.

When the judgment appealed from only involves a claim for damages of four hundred and fifty dollars, and the possession of property, the value of which possession is neither proved, nor alleged, this court is without jurisdiction.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

G. Schmidt and *J. J. E. Planchard* for plaintiff and appellant.

Louque & Fernandez for defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

EGAN, J. The appellee moves to dismiss this appeal upon two grounds. First: Because the amount in dispute is less than five hundred dollars.

Second: Because of the insufficiency in amount of the bond for appeal. It is only necessary to notice the first ground.

This suit is by injunction to restrain the execution of a judgment of a justice of the peace under the landlord and tenants' act, and for four hundred and fifty dollars damages. The only issues presented are an amount of damages less than five hundred dollars, and the possession of real estate of the value of which possession there is no allegation, or other evidence, in the record. This appeal is from a judgment dissolving the injunction and nonsuiting the plaintiff. Taking the present record as a guide, this court is without jurisdiction.

It is therefore ordered that this appeal be dismissed at the cost of the appellant.

No. 5392.

NICHOLAS CONNELL VS. ALEXANDER HILL.

When one party submits a proposal for a contract to another, and the latter's acceptance of the proposal includes a material modification of the proposal, no contract will result until the modification has been acquiesced in by the party making the proposal.

When a party who is sued in virtue of a contract made by a municipal corporation, denies, in general terms, that the corporation has complied with the law authorizing it to make such a contract, the burden of proof is on him to show that the law has not been complied with. The presumption is that the corporation has acted legally.

When the work of constructing sidewalks on one of the streets in the city of New Orleans has been done under a contract made at the discretion of the Common Council, each owner of property fronting on such street can only be held for two thirds of the cost of the sidewalk in front of his property.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

T. Gilmore & Sons for plaintiff and appellee.

Ogden & Hill for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 9th of July, 1872, the council of the city of New Orleans passed the resolution which follows: "The proposal of Nicholas Connell for making brick banquettes, with wooden curbing, on Second street, from Apollo to Claiborne—where not made, at $2.93 per lineal foot complete, and offering security satisfactory to the mayor and administrator of improvements in the sum of $2500, be and the same is hereby accepted—and the mayor directed to enter into contract in behalf of the city, per notarial act before the city notary for the faithful performance of said contract; provided that, in the notarial act, the contractor shall distinctly disclaim and *relinquish* any recourse upon the

city, in case he shall fail to obtain from the property owners payment for said work."

In obedience to that resolution, Benjamin F. Flanders appeared before the designated notary, on the 15th of July, 1872, and—in the words of the act attested by said officer, "granted, bargained, sold and confirmed unto Nicholas Connell, his heirs and assigns, the contract for the construction of brick sidewalks, with wooden curbs and gutters on both sides of Second street, from Carondelet to Claiborne, wherever the same have not already been made by the property owners, or in course of construction at the date of THIS contract."

That act also provides "that the entire breadth of the sidewalk shall be *paved* with lake bricks—that, after the *pavement* is completed, a coat of at least half an inch of sharp sand shall be spread over its surface. That the contractor shall commence the work ten days after the approval of the adjudication by the city council. That, upon reception and completion of the work, payment shall be made by the property owners upon bills made by the city surveyor, in conformity with section 24 OF THE NEW CITY CHARTER. That the contractor, in case the appropriation in the annual budget or estimate of the expenses for the year in which the surveyor's certificate may be issued, etc., shall be exhausted when said certificate is delivered to said contractor or contractors, shall not apply to the administrator of public accounts for a warrant therefor, until a fund for the payment thereof shall be provided in the budget for the following year."

The last paragraph of the act is as follows: "And said Connell hereby releases and discharges the city from any and all liability connected with said work, and particularly for the payment of the same or any part thereof, in case said Connell should fail or be unable to collect from the property owners THEIR PROPORTION OR SHARE of said work."

On the 9th of July, 1872, a proposal made by plaintiff was accepted by the city council. Their acceptance is before us, and—from its tenor—the proposal then accepted was, exclusively, to construct—at the rate of $2.93 per lineal foot—sidewalks and curbs on Second street. Connell's offer was conditionally accepted by the council. Its resolution is partly in these words:

"In the notarial act, the contractor shall distinctly disclaim and relinquish any recourse upon the city, in case he shall fail to obtain from the property owners, payment for his work."

This was more than one of those unimportant modifications of a contract, the assent to which is necessarily implied. With that modification, the contract which would have resulted from Connell's proposition, and its unconditional acceptance by the council, would have been

widely different from that which resulted from the conditional proposition of the council, and its unconditional acceptance by Connell.

R. C. C. article

The last proposition was not the same which had been submitted by Connell, and—until the 15th of July, when that last one was accepted by him, there was no contract between him and the council. Two days before his acceptance, Alexander Hill had contracted with one William Murray to do the whole of the work which—on the 15th—Connell had agreed to perform. To do that work, to do it, according to the council's specifications, Murray's price was $2.50 per lineal foot—forty-three cents less than that demanded by and allowed to Connell. That fact was immediately brought to the knowledge of the city surveyor, who testified that "he thought he told Mr. Hill that it was impossible for him to give permission to any one to make a banquette, after the contract was sold."

It does not appear when the work was begun by Connell. He was to commence it, at the latest—in ten days after the council's approval of the adjudication. That approval was given on the 9th of July—the modified contract accepted on the 15th, and Connell's work on Second street was undoubtedly begun after defendant's contract with Murray and its notification to the city surveyor. It was completed on or before the 23d of November—for, at that date, the city surveyor delivered to Connell two certificates attesting that fact, and attesting too that, for work done in front of his property and the cost of publishing petitions, Alexander Hill was indebted to said Connell in the sum of $1674.10.

To recover that amount, plaintiff has brought this suit and relies on the council's ordinance, the notarial act of the 15th of July and the surveyor's certificates.

In his answer to plaintiff's demand, defendant denies the allegations on which it is based, and particularly that the city ever complied with the formalities prescribed by law to empower its authorities to improve the streets and make sidewalks, at the expense of the front proprietors. He also relies on the fact that he had employed Murray to do his work, and that said Murray was prevented by plaintiff from executing his agreement.

In support of one of the branches of the defence, Hill's counsel argue that—as they have denied a compliance by the city with the formalities prescribed by law to bind the front proprietors, it was incumbent on plaintiff—if those formalities were fulfilled, to have proven that fact, and that the council's resolution is not, by itself, sufficient to establish the legal existence of the denied authority of the council. We believe otherwise.

In a kindred case, the Supreme Court of the United States said: "It is claimed that the contract is for the borrowing of money and that

the complaint is bad, because it does not aver the sanction of two thirds of the electors of the city. If the fact were so, the consequence would not follow. If the city could make such a contract, with that sanction, the sanction will be presumed until the contrary is shown. The non-existence of the fact is a matter of defence which must be shown by the defendant." Gelpcke vs. City of Dubuque, 1st Wallace, p. 293.

We might have paused and considered a special denial, a denial that a specified formality had been omitted; for instance, that, as provided by the charter, no petition signed by the proprietors of the locality had been presented to the city council—or, if presented, had not been published in the official journal, etc.; but the indefinite allegation that the formalities required by law to authorize the council's ordinance, have not been complied with, is but the expression of an opinion, which—though it comes from eminent counsel—leaves unremoved an adverse presumption, the presumption that the ordinance was regularly adopted by the city officials.

21st Howard, p. 539.

Had defendant notified, not merely the city surveyor, but the mayor and Connell of the existence of his contract with Murray—had he established that Murray had commenced, or was about to commence the sidewalks, and that he had been prevented by Connell from executing his contract, there can be no doubt that—for said work—plaintiff could have recovered but at the rate of two dollars and fifty cents per lineal foot. He, however, did not establish those facts, and he is liable under the contract of the 15th of July.

He is liable, but for what amount? Is it for the whole of the price claimed by and due to Connell? Is it for the whole of the publication of the owners' petition to the council? We believe not. Under section No. 24 of act No. 7 of the Legislature of 1870, the whole cost of sidewalks constructed at the request of one fourth of the proprietors, was to be borne by them; but that act was amended in 1871, and the contract of the 15th of July contains expressions and clauses indicating the intention to relieve the city from the responsibility fixed by said amendment.

The 10th section of act No. 48 of 1871, provides "that, when made at the discretion of the council, or upon the petition—not of one fourth of the owners, but the owners of the majority of the property which fronts upon any street or streets, the paving, grading or improving of said streets, shall be assessed and paid as follows, to wit: one third of the cost of paving, grading and improvements in front of the property, and the whole cost of the intersections of other streets with the street or streets so paved, graded or improved, shall be paid by the city, and the remaining two thirds by the owners of the property which fronts upon said grading, paving or improvement."

It seems that the pleadings in this case were not prepared under the act of 1871, and—on that account—we have hesitated to construe the contract of the 15th of July 1872, as one which was entered into, and which can be enforced but in accordance with the sections of said act which amend that of 1870 on the same subject. We have carefully compared the apparently conflicting provisions of those statutes, and conclude that defendant is only liable for two thirds of the cost of the sidewalk constructed in front of his property.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed—and, proceeding to render such judgment as should have been rendered by the lower court,

It is further ordered, adjudged and decreed that Nicholas Connell recover of Alexander Hill the sum of eleven hundred and sixteen dollars and six cents, with legal interest thereon from the twenty-eighth day of March (1873) eighteen hundred and seventy-three, with privilege on the property described as follows, to wit: two hundred and ninety-three feet six inches, running feet front on south side of Second street, between Willow and Claiborne streets, by a depth of about two hundred and ninety feet on said lateral streets and two hundred and seventy-six feet six inches, running feet, on south side of Seccnd street, between Magnolia and Locust streets, by a depth of about two hundred and ninety feet on said lateral streets; the costs of the appeal to be paid by plaintiff, those of the lower court by defendant.

No. 5482.

E. H. MURRELL VS. MRS. SERENA LION AND HUSBAND.

Any doubt as to the intentions of the parties to a contract of lease, arising out of uncertain terms of the contract, will be construed in favor of the lessee. It is the business of the lessor to have the agreement expressed in clear and certain terms.

Where the contract of lease leaves it doubtful whether the lease is to terminate on the first or the thirty-first of a certain month, the lessee may elect which of the two dates it shall end on.

Where the condition of a contract of lease is that if either party desires to terminate the lease he must give notice of his intent *one month* before the first of the succeeding October, and it happens that the first of the succeeding September falls on Sunday, notice served tne second of September will satisfy the condition.

Where a lessee continues in possession after the expiration of the lease, without a renewal of the contract, there is a tacit reconduction of the lease by the month, terminable on fifteen days notice.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

Geo. L. Bright for plaintiff and appellee.

B. F. Jonas for defendant and appellant.

The opinion of the court was delivered by

MARR, J. Barrett, agent for Murrell, by writing, dated the twenty-seventh of October, 1871, leased to Mrs. Lion the store No. 31 Natchez street, "for and during the full space and term of twelve months, to commence on the first day of October, 1871, and to cease on the thirty-first day of October, 1872." The rent for the entire term was $1260, payable in installments of $105 at the end of each and every month, "any month of which not being punctually paid the balance of this lease thereby becomes due."

It was also stipulated in this writing that, "If neither party to this lease does not give written notice, at least one month previous to the first of October, 1872, of their intention not to renew the same, then this lease will be considered as continued as in full force, as if renewed yearly."

The first of September, 1872, fell on Sunday; and on Monday, the second, Mrs. Lion wrote to Barrett that she would vacate the premises, without saying at what time, "unless you lower the rent;" and she requested an answer.

On the first of October she wrote to Barrett again, giving him formal notice that "your store, No. 31 Natchez street, will be vacant on the first of November."

On the fourteenth of October Barrett acknowledged receipt of these two communications; and he added that the notice did not come in time, and, therefore, "you are bound for another year's rent."

On the thirtieth of October Mrs. Lion paid the rent for that month; and on the second of November Barrett received the keys from Lion and took them away with him. On the same day he brought this suit to recover, under the contract, $1260, rent for one year from the first of October, 1872; and he caused the furniture and effects, which had been removed from No. 31 to an adjoining store, to be provisionally seized.

By similar writing, dated twenty-sixth of December, 1872, Barrett leased the store No. 31 to Gauche, "for and during the full space and term of thirty-six months, to commence on the first day of October, 1872, and to cease on the thirty-first day of September, 1875." It is remarkable that this writing contains the same clause with respect to notice and renewal as the lease to Mrs. Lion, in the identical words, the only difference being that the date, 1875, is substituted for 1872.

Gauche testifies that he got the keys on the second of December, but that he did not pay rent "until the fifteenth of December."

Clarence Lion says he called on Barrett on the fourth of September and asked if he had received that note. Barrett said he had. Clarence

asked if he answered it. He said, "No! Tell your father to move whenever he likes."

There is nothing in the record to contradict this. Barrett, when asked by plaintiff's counsel, "Did you ever agree to renounce any of the conditions of the lease," answered: "Never, sir." Again, being asked, "Did you ever agree that Mrs. Lion might move out and that there would be no claim upon her?" he answered: "Never."

He did not state, and he was not asked to state, whether he had said to Clarence, "Tell your father to move whenever he likes." Clarence went to Barrett on the fourth of September for a purpose. It was to ascertain whether Barrett had received the note of the second of September, and whether he had answered it; and what Barrett said to him on that occasion no doubt fixed itself in his mind. It informed him of the material facts that Barrett had received the note; that he did not intend to lower the rent; and that he was willing that Mrs. Lion should terminate her relation to him as lessee if she chose to do so. The uncontradicted statement of Clarence must be taken as true, although it may also be true that Barrett never did agree, specifically, "to renounce any of the conditions of the lease;" or that Mrs. Lion might move out "and that there would be no claim against her."

We are inclined to consider the clause as to notice and renewal in the lease to Mrs. Lion void for want of certainty. Did the parties intend to require the notice to be given one month previous to the first of October, or did they really intend that it should be one month previous to the thirty-first of October? The lease was for twelve months; but it was to begin on the first of October and to end on the thirty-first of October. Was the thirty-first of October, in reference to the end of the term, written in error; or was the first of October, in reference to the notice, really intended to be the thirty-first of October?

The lease is to be considered as *continued:* Continued for what length of time? *Renewed yearly* implies more than a single renewal. It was the business of the lessor to explain himself fully; and to show precisely the meaning and extent of the contract which he is seeking to enforce. Does the clause mean, necessarily, that the lease shall be considered as continued for one year only, as if renewed once for a single term only; or is it not equally susceptible of the interpretation that it shall continue for an indefinite number of years, as if renewed at the end of each term of one year, until it shall be terminated in some manner?

The notice contemplated must have had reference to the end of the term, as it manifestly had in the similar clause in the lease to Gauche. The lease to Mrs. Lion was declared to be for twelve months; but in terms equally explicit, the commencement was declared to be the first

of October, 1871, and the end the thirty-first of October, 1872. Was it a lease for twelve months, or a lease for thirteen months?

The lessor might well desire to know a month before the termination of the lease whether the lessee intended to continue the lease for another year, so that he might secure another tenant; and that is what is stipulated in the lease to Gauche. On the hypothesis that both parties understood and intended that the lease to Mrs. Lion was to terminate on the first of October, and not on the thirty-first, the notice might have been given at any hour before midnight of Saturday, the thirty-first of August, 1872. As Sunday is a *dies non juridicus*, notice given Saturday night or Sunday would have accomplished no more than like notice given on Monday; and, in point of fact, the notice given on Monday, the second day of September, included all the *dies utiles* of the month previous to the first of October.

The verbal answer to Clarence was an acknowledgment of the receipt of the notice of the second of September; it was also the refusal of Barrett to lower the rent, and the unequivocal expression of his consent that Mrs. Lion should terminate her relations to him as lessee by vacating the premises as she informed him she would do.

Mrs. Lion might well have been in doubt as to whether she had the right to remove and to stop the rent before the thirty-first of October; and this may account for her failure to state, in the note of the second of September, at what time she intended to vacate the store. She and Barrett both understood, however, that she meant to vacate at the end of the term, whenever that might be, if Barrett would not consent to reduce the rent. It was not a forced construction of the lease to interpret it as continuing until the thirty-first of October; and Mrs. Lion chose to remain in possession and to pay the rent up to that date, as she might well have supposed she was bound to do; but she took care to give formal notice, on the first of October, that the store would be vacant on the first of November. On the hypothesis that the first notice was sufficient, and that the lease ceased on the first of October, the holding over for the month of October was simply a reconduction by the month, terminable on giving fifteen days notice. R. C. C. 2686.

In making the lease to Gauche for a term of thirty-six months, beginning on the first of October, 1872, and ending on the thirty-first of September, 1875, Barrett proceeded on the assumption that the lease to Mrs. Lion had terminated on the first of October, although she continued to occupy and paid the rent, at the rate stipulated, until the end of October.

Our conclusion is that the lease to Mrs. Lion was not renewed, and that she was not liable for rent after the thirty-first of October, 1872.

The judgment of the District Court from which defendants appealed,

was in favor of plaintiff, for $1260, with five per cent interest from judicial demand, second of November, 1872, that is for one year's rent, from the first of October, 1872. The check to Barrett's order, and his receipt of the thirtieth of October, 1872, for the rent for that month, offered in evidence, must have escaped the notice of the district judge, as well as the lease to Gauche for thirty-six months, at the rate of $1000 for the first year, and $1100 for each of the two succeeding years. We think the judgment should have been in favor of defendants.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and that there be judgment in favor of defendants, appellants, rejecting the demand of plaintiff, appellee, with costs in both courts.

No. 6508.

FIRST PRESBYTERIAN CHURCH VS. CITY OF NEW ORLEANS.

Until a definitive judgment, rendered by a court of competent jurisdiction, has been set aside, either on appeal or by an action of nullity, money paid under it can not be recovered back.

Property used for school purposes, and the lots appurtenant to and used therewith, are exempt from taxation.

Property belonging to a church, and used as a parsonage, or rectory, is not exempt from taxation.

APPEAL from the Superior District Court, parish of Orleans. *Lynch*, J.

Singleton & Browne and *John P. Smith* for plaintiff and appellant.

Samuel P. Blanc for defendant and appellee.

The opinion of the court on the original hearing was delivered by MANNING, C. J., and on the rehearing by SPENCER, J.

MANNING, C. J. The City of New Orleans obtained judgment against the First Presbyterian Church for taxes of 1874, on an assessment against two pieces of its property. This judgment became final and execution issued, under which was collected from the defendants in execution five hundred and eighty dollars and eighty cents for the amount of judgment and costs.

Afterwards, the City sued to recover five hundred and thirty-two dollars and fifty cents for taxes of 1876 assessed on several pieces of property. The present suit is to obtain the repayment to the plaintiff of the sum paid in satisfaction of the judgment for the taxes of 1874, and also to have established the exemption of all of its lots from taxes.

The money paid in satisfaction of the judgment for the taxes of 1874 can not be recovered back. It was rendered after a due observance of

all the forms for that kind of action. Its nullity is not alleged nor prayed, and until set aside for some legal cause, or reversed on appeal, it must stand good, and the money paid under it remains the property of the defendant.

A part of the property assessed for taxation in 1876 is a lot and improvements used as a school-house and grounds. The testimony is that the school is established by the Church, and is conducted under its supervision, and the lots adjacent to it are used for purposes of ingress and egress to the school building. This property is exempt under that clause of the Revised Statutes which exempts school-houses and the lots appurtenant.

But it is further claimed that a building and lot, used as a parsonage or rectory, is also exempt, and we do not think the law sanctions that exemption. The rule is that all property is liable to taxation. The Legislature, acting in subordination to the Constitution, has exempted certain classes or descriptions of property. Among the exemptions are "colleges, school-houses, and other buildings for the purpose of education, and their furniture, apparatus and equipments, and the lots thereto appurtenant and used therewith, so long as actually used for that purpose only." sec. 3233. Parties who claim exemption from taxation must shew that they belong to one of the favored classes, and we do not construe the terms of the above recited enactment as including a residence of the clergyman who officiates in the church. It is a matter of no consequence whether the rectory is on an adjacent lot to the church or whether it is separated from it by several streets or blocks of buildings, as this is. The residence of the clergyman is in no proper or legitimate sense appurtenant to the church, and is not exempt from taxation. It may be very convenient, as it certainly is very proper, that the church should own a lot and building, devoted or appropriated to the use of the rector as a residence, but it must be taxed until the Legislature shall enlarge or increase the classes of exempted property.

Judgment affirmed.

Mr. Justice Marr and Mr. Justice Egan took no part in the decision of this cause.

ON APPLICATION FOR REHEARING.

SPENCER, J. In the opinion of the court heretofore rendered, by inadvertency, paragraph No. 2 was referred to and copied instead of paragraph No. 4 of section 3233, of the Revised Statutes. The latter paragraph is as follows:

"Churches, chapels, convents, and *other public* buildings *for religious worship*, with the furniture and equipments and *lots of ground* thereto

appurtenant and used therewith, so long as the same shall be actually used *for that purpose*, only."

The counsel insists that not only the church, "but property actually used for the '*purposes*' of the church," is exempt. He argues that the parsonage is a property used *for the purposes* of the church, inasmuch as a church must have a parson, and the parson must have a house. We do not understand the words "for that purpose only" in the statute quoted as having any such meaning. They refer to, and are used to avoid repetition of the words "for religious worship." The substance and marrow of the law may be stated thus: churches, and other *public buildings for religious worship*, with their appurtenant grounds, are exempt from taxation so long as they are actually used "*for that purpose*," i. e. "*for religious worship*." A parsonage may be property used *for church purposes*, but it can not be said to be used "*for religious worship*." The dominant idea in the statute is that the exemption shall be limited to "*public* buildings" and appurtenant "lots of *grounds*," used "for religious worship."

Exceptions to general laws are always to be strictly construed—a party claiming exemption from their operation must bring himself clearly within some exception. These are elementary rules of interpretation.

Rehearing refused.

No. 6761.

STATE EX REL. N. O. CITY RAILROAD CO. VS. THE BOARD OF ASSESSORS.

The power of the arbitrators, to whom the law refers the complaints of taxpayers touching the over assessment of property made by the tax assessors, is limited to ascertaining the value of the property listed on the assessment rolls. They have no power to determine what is, and what is not exempt from taxation, but any award they may make reducing the valuation of property listed, is binding. "Over assessment" means *over valuation*.

A mandamus will issue to compel the Board of Assessors to enter on their assessment rolls, the value put by the arbitrators on any property listed on those rolls.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Louque & Fernandez and *Wm. H. Hunt* for plaintiffs and appellants.

B. F. Jonas and *Samuel P. Blanc* for defendants.

The opinion of the court was delivered by

SPENCER, J. Relators were assessed for $1,140,000, as follows:

On real estate	$126,500
On horses, mules, etc	52,000
On cars and vehicles	86,500
On capital stock (invested otherwise than above)	875,000

They complained to the Board of this last item of assessment as being excessive. The Board refused a reduction, and the matter was referred to arbitrators under sections 15, 16, 84, 87, and 88, of act No. 96, of 1877.

The arbitrators made the following report and decision:

"To the Administrator of Assessments, and Fred. Wintz, Esq., President City R. R. Company, N. O.:

"GENTLEMEN—On investigation of the question submitted, we find that the City Railroad Company, through its several contracts with the city, acquired vested rights of way, etc., covering in our opinion the question of franchise during the duration of their respective charters, and that each contract contains the following clause: 'The contractor or contractors shall pay into the city treasury, upon the assessed value of said roads and fixtures, the annual tax levied upon real estate, and the value of said roads and fixtures shall be assessed by the usual mode of assessment.' Which while completely silent regarding franchises, is very specific as to other objects of taxation. That, therefore, the capital of this corporation should be estimated for assessments—

First—Upon cost of construction as derived from the company's books	$667,278
Less a reasonable allowance for difference now existing in cost of material, labor, etc., than when built, say 33⅓ per cent.	222,426
	$444,852
Second—Bonds of the Mechanics' and Fair Association	2,000
Third—103 shares N. O. C. R. R. stock, taken by the company	10,390
Leaving an assessment on capital	$457,152

"We have based our ideas as to a proper reduction to be made from information derived from various and reliable sources, and assumed a percentage we believe to be rather below than above what has actually occurred.

"Understanding that we were only requested to arbitrate on the question of capital, we have given consideration alone to that subject.

"Yours, very respectfully,

[Signed] "LIONEL C. LEVY,
"ED. A. PALFRY."

The Board refused to abide by the award, and amended the assessment of that item as follows:

Construction, road, switches, etc., valued by arbitration	$457,152
Capital over and above other assessments	417,848
Making the total	$875,000

Just as it was before.

Thereupon, relators applied for mandamus to compel the Board to

reduce the assessment in conformity to the award. The Board answered that the arbitrators had exceeded their authority by undertaking to exclude from their estimate a part of relators' capital. The court *a qua* refused the writ, and relators appealed.

We are satisfied that under the provisions of the statute in question the power and duty of the arbitrators are limited to the *ascertainment of the value of the things listed on the assessment rolls.* They can not assume to decide that any part of the things there listed, whether real or personal, corporeal or incorporeal, are exempt from taxation.

Section 87 gives this right of arbitration whenever the taxpayer complains of an "over assessment;" and the same section provides the same remedy, when the Auditor or other proper officer complains of an "*under valuation.*" We think it fair and reasonable to interpret the words "over assessment" as meaning "over valuation."

As there has been no complaint of an "under valuation," we must presume that the sum of $875,000 represented the entire capital stock, outside of the property specifically named and listed.

If so, why should not relators at least have the benefit of the reduction of $222,426, which the award clearly fixes as over valuation of the material and costs of construction of relators' railroads? The property, the value of which the arbitrators thus reduce, undoubtedly entered into and formed part of the capital stock included in and estimated by the Board in the item $875,000. So that, admitting that the arbitrators had no power to exclude any part of the property from their valuation and estimate, yet their award as to the value of what they did take into consideration ought to have effect. Thus, if the assessment roll lists five pieces of property, while it is true that the arbitrators can not declare any one of them exempt, yet if they do exclude one or more, and value the others, the reduction awarded as to these last ought to be effective.

The award seems to proceed upon the assumption that this assessment of $875,000 was made up as follows:

Costs of material and construction	$667,278
Franchise purchased from the city	207,722
Making	$875,000

At least they claim to have valued every thing else of the capital stock except what was invested in the purchase of the franchise, and this they clearly exclude.

Whether the franchises of these roads are exempt from taxation or not, is not now before us. But it is evident the arbitrators intended to include in their estimate every thing else; and they say, in effect, excluding that, and the real and personal property specifically named and listed, the balance of the capital is *valued too high*, by the sum of $222,426.

We think to that extent the award is binding, and that the assessment should be reduced accordingly. Deducting this amount from $875,000, there remains $652,574, which is the proper amount of the assessment.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now ordered and decreed that a peremptory writ of mandamus issue to the defendants, directing them to enter upon said assessment roll under the head "capital stock" a deduction of $222,426 as awarded by said arbitrators. It is further ordered that respondents pay costs of this suit.

No. 6390.

ROBERT H. BARTLEY vs. CITY OF NEW ORLEANS.

Where in a contract to deliver a certain thing, no *time* for the delivery is fixed, the legal implication is that it shall be delivered within a reasonable time from the date of the contract.

If the party who has contracted to deliver a certain thing at a fixed price makes a tender of it at the proper time, and the party who has contracted to receive the thing refuses to receive it, the former may recover from the latter whatever damages are proved to have directly flowed from the latter's breach of contract.

Whoever claims damages, based on a deprivation of prospective profits, must establish such facts in evidence as will enable the court to fix with certainty, the amount of the deprived profits.

If the vendee in a contract of sale refuses to receive the article sold, the vendor may sell it at private sale; and on proving that he thus sold it at its full market price, he may recover from the vendee the difference between that price, and the price stipulated in the contract of sale.

APPEAL from the Superior District Court, parish of Orleans. *Lynch*, J.

Hornor & Benedict for plaintiff and appellee.

B. F. Jonas, City Attorney, for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues the city for breach of contract, and claims $11,583 30 as loss and damage sustained thereby.

He alleges that, as transferee of one W. W. Walker, he held a contract with the city to furnish 250,000 feet, running measure, of square timber, required for repairs to the city wharves; delivery to begin within five days after adjudication of contract, at the rate of 50,000 feet per month, if required, and to be delivered in front of the city at such localities as may be designated by the city surveyor, etc. The price to be paid in wharf improvement bonds, at the rate of ninety cents on the dollar, and eighteen cents per running foot. This contract was entered into on the sixteenth of June, 1874.

The city called for and received from time to time about 80,000 feet;

but in the spring of 1875 the city let out for a term of years the contract for repairing the wharves, requiring the contractor to furnish his own material therefor. Hence the city had no further use for the timber plaintiff was under contract to deliver. The plaintiff notified the city that he was prepared to deliver, according to contract, but received no response. On the seventeenth of June, 1875, he made, through a notary, a formal tender and offer to deliver, according to the contract, the remaining 170,000 feet; and notified the city that if his tender was not accepted on or before the twenty-second of June, that he would sell said timber for account and at the risk of the city, and hold her responsible for any balance due him under the contract. The city paid no attention to this offer, and on the twenty-third of June plaintiff made a public protest. In the meantime, however, the city ordered 6000 feet more, leaving 164,000 not called for. Thereupon plaintiff brings this suit, alleging the above facts, and claiming that he sold said timber at private sale, and lost thereon as follows:

On 127,453 feet he lost 5 9–10 cents per foot. On 2283 feet he lost 8 4–10 cents per foot, and on 14,468 feet he lost 11 4–10 cents per foot; making his aggregate loss $11,583 20. This amount he claims from the city.

The answer of the city of New Orleans (page 13, Record,) admits the contract, but denies that the city ever made default thereon, and alleges that no term was fixed for the delivery of the said timber, but that said timber was to be delivered as required by the city, and at such points as might be designated by her proper officers, and "Respondent alleges that she did not require said timber up to the time of the tender, protest, and sale pretended to have been made by plaintiff; and respondent denies that the said contract gave any right to plaintiff to tender the said lumber at an inconvenient time, or in an unnecessary quantity to this respondent."

"Further answering, respondent denies that plaintiff ever had the quantity of lumber on hand, as alleged, at the time of the pretended tender, or that he was ready to deliver the same, and denies that the lumber which he had on hand was of the quality and description required by the contract; and respondent further denies that plaintiff ever made sale of the lumber, as alleged, for the risk of respondent, or that he ever suffered a loss upon the same, as alleged; and respondent further denies that the said sale (if made at all) was made with her consent or knowledge, or in the mode and manner required by law, or that she is bound by it, or concerned in it, in any manner or form whatsoever."

There was judgment in plaintiff's favor for the full amount claimed, and the defendant appeals.

We think that under a fair interpretation of the contract the city was under obligation to take from plaintiff 250,000 feet of timber, and that plaintiff was bound to deliver at the rate of 50,000 feet per month, "if required." These words, "if required," qualified not the city's obligation to take, but that of the plaintiff to deliver. The contract does not, it is true, fix the time within which the city was to take the 250,000 feet, but where there is no term fixed for the performance of an obligation it should be within a reasonable time. C. C.

It is manifest, from the facts disclosed by this record, that after the city had let out or sold, as stated, the contract for wharf repairs for a term of years, it had no further use for plaintiff's timber and determined not to take it. We think, therefore, that plaintiff properly put her in default, as stated, on the twenty-second of June, and is entitled to recover such damages as he has proved to have been the direct and immediate consequence of her breach of contract. We do not find that in his formal tender he demanded cash instead of "wharf improvement" bonds. He did, in a previous communication to the mayor, suggest that, as the city was, by the constitutional amendment adopted in November, 1874, prohibited from issuing any more bonds, he was willing to take cash at the rate of seventy cents per dollar in lieu of bonds; but we repeat that in the tender and offer made on the twenty-second of June he does not demand cash, or in any wise designate the mode of his payment.

We now address ourselves to the inquiry, what amount of damage and loss has plaintiff proved himself to have suffered?

Under date October 12th, 1875, plaintiff furnished the city authorities the following "*statement*" of his claim, to wit:

"Sold to Gubernator and Terry, August 2nd, 1875, the following timber then on hand:

"First lot, 22,083 feet, on which there was an actual loss of five cents per running foot, amounting to $1104 15

Second lot, 14,464 feet, on which there has been an actual loss of eight cents per foot $1157 12

Third lot, losses on profits on 170,000 feet, amount undelivered on contract, of five cents per foot $8500 00

It will be noticed that he claims loss on the whole 170,000 feet at five cents per foot, and then claims losses on 22,083 feet of this same 170,000 feet. In other words he claims losses on 36,547 feet more than he pretended the city was obliged to take.

It will also be noticed that under the head "third lot" his claim is for "losses on profits." It is manifest from the face of this statement that the plaintiff did not then have or sell to Gubernator any timber except that described as "first lot" and "second lot," amounting to

36,547 feet. Indeed, plaintiff, when on the stand as a witness, was forced to admit that he did not have and did not sell to any one the 127,453 feet on which he claims in his petition 5 9–10 cents per foot loss. He says, to use his own words: "That timber was not sold, * * 22,083 feet was sold at a loss of 4 8–10 cents per foot * * and then 14,464 feet at a loss of 4 1–10 cents per foot." In his petition he claims a loss on this 14,464 feet of 11 4–10 cents per foot, and as we have seen in his "statement" to the city authorities he claims a loss on it of eight cents per foot. In another part of his testimony he admits in substance that this 127,453 feet on which he claims loss was never got out, but he claimed "what there would have been if the contract had been carried out," he says. In fine, the testimony of his own partner, Markey, as well as that of Gubernator and Wells, satisfies us that these 127,453 feet of timber were, like Falstaff's adversaries "in buckram."

In fixing his loss on this imaginary lot of timber, he assumes that the city was to pay him, say eighteen cents per foot in bonds, and then *imagines or supposes* himself to have sold it at a much less price. This mode of estimating damages is too speculative for courts of justice to adopt. There is nothing in this record showing what it would have cost plaintiff to get out, bring to, and deliver in this city the timber in question, and nothing, therefore, to show what are the profits of which he has been deprived by the city's failure to carry out its contract.

We think the evidence shows that plaintiff had on hand and ready for delivery on the twenty-second of June, the date of his tender, 36,547 feet of timber, timber hardly up to the specifications of his contract, but which was afterward bought by Gubernator and used, by the city's consent, in repairing the wharves. When on the stand as a witness, he states his loss on this timber as follows:

On 22,083 feet, 4 8–10 cents per foot, making	$1060 00
On 14,464 feet, 4 1–10 cents per foot, making	593 02
Making total loss	$1653 02

It is objected on the part of the city that plaintiff could not sell at private sale for her account and risk. This may be true; but it is shown that he got for the timber all he could in the then state of the market, and as the city would not take the timber, he had a right to sell it for his own account, and claim from the city as damages the losses sustained.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount thereof to the sum of sixteen hundred and fifty-three dollars and two cents, and as thus amended that it be affirmed. Costs of the court below to be paid by defendant, and those of appeal by plaintiff.

No. 6674.

SUCCESSION OF BAPTISTE DOUGART. OPPOSITION TO THE ACCOUNT OF THE EXECUTRIX.

The question whether an executrix has been legally appointed can not be raised collaterally, on an opposition to her account. It can only be considered in a direct action to revoke.

A general denial, in an opposition to the account of an executrix, puts at issue each and every item in the account, and puts on her the *onus* of proving each item.

The lapse of a legacy, caused by the legatee's death before that of the testator, will not give to the universal usufructuary created by the will, the usufruct of the property embraced in the lapsed legacy. Such property will fall to the legal heirs of the testator, if not otherwise specially disposed of in the will.

Accretion only takes place in favor of legatees, in cases where a legacy has been left to "several conjointly;" as specially provided for in articles 1707, and 1708 of the Civil Code.

A mere right of usufruct, no matter how general the usufruct, will not constitute the usufructuary a universal legatee, or even a legatee under a universal title; but only a legatee by a particular title.

It is only when a legatee by a particular title is charged with the payment of a special legacy, that he can profit by the lapse of the legacy.

When the property of a legacy left by a deceased husband devolves on his legal heirs, on account of a lapse of the legacy, his widow will be entitled to the usufruct of the property, and hence not liable for its revenues.

The usufructuary may at any moment renounce his usufruct.

Prescription does not begin to run against the claims of the usufructuary, on account of debts paid by him for which the property subject to the usufruct was liable, until the expiration of the usufruct.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Buck & Dinkelspiel for opponent and appellant.

Hornor & Benedict and *F. W. Baker* for executrix.

The opinion of the court was delivered by SPENCER, J., on the original hearing, and on the rehearing by EGAN, J.

SPENCER, J. Baptiste Dougart died June 7, 1868, leaving an estate in community with his wife, Elizabeth Bishop. He died without ascendants or descendants. He left a will by public act of date February 25, 1864, whereby he appointed "Theophile Gollain, and in case of his death my wife, the said Elizabeth Bishop, to be the executrix of this my last will, with full seizin, etc."

This will contains the following clauses:

"I give and bequeath unto Mrs. Catherine Fairbac, widow of the late Jacob Dougart, my mother, one third of the property of which I may die possessed, *such third being the portion reserved to her by law.*"

"I give and bequeath unto my wife, the said Elizabeth Bishop, the usufruct during her natural life of all the balance of *the property of which I may die possessed*, and at her death I give and bequeath the

whole of said property to the children of Catherine Dougart, the wife of Michael Burgard, my sister, residing in this city."

The mother, Mrs. Fairbac, as we have said, died some two years before the testator. The legacy to her thereby became caducious and without effect. R. C. C. 1697. Gollain qualified immediately after the testator's death as executor, and seems to have so continued till his own death, on July 12, 1876, without ever having rendered any account of his administration. The Widow Dougart, now wife of Edouard Lischey, thereupon applied to be appointed testamentary executrix, which the court granted, and she taking the oath and receiving letters as such. The executrix thereupon rendered an account of the debts of the estate, and prayed that after citation to the heirs and legatees the same be homologated and approved.

Her account consists of a statement of the debts due by the deceased at his death, his funeral expenses, expenses of last illness, attorneys' fees, and court costs, etc. She claims in substance, that being usufructuary of the entire property, she procured and advanced the money necessary to pay these debts and charges, and that the estate is therefore bound to her by way of re-imbursement of all said sums, to which she was legally subrogated, etc.

The heirs and legatees file opposition to the account, and allege in substance —

First—That the executrix was illegally appointed, that the will contemplated her appointment only in the event Gollain should die before the testator; that her appointment entailed useless expenses and was unnecessary, as the account showed upon its face that the debts of the estate had all been paid, etc.; that therefore her appointment should be annulled, and her account rejected.

Second—They oppose and deny each item of the account, as not being debts due by the deceased or his estate.

Third—They allege that the legacy of one third of the estate to the mother having lapsed by her predecease, the widow had no right of usufruct thereon; and that as she has had the possession and enjoyment of the entire property since her husband's death she must account for the fruits and revenues of the third so bequeathed to the mother.

Fourth—They allege that the executrix and usufructuary is seeking to renounce the usufruct, in order to enforce said debts against the estate and sacrifice its property. They deny her right to do so.

Fifth—They plead the prescriptions of one, three, five, and ten years against each item of the account.

We will consider these various grounds of opposition in their order.

First—As to illegality of the appointment of the executrix, it is only necessary to say that that question can not be raised in this indirect and

collateral way. Whether legally or illegally done, she was appointed and qualified, and must be treated as the lawful executrix until her appointment is revoked in a direct action.

Second — The denial of each item of the account was certainly equivalent to a general denial of its correctness. The accountant in this case occupies the status of plaintiff, and a general denial was sufficient to put her to the proof of the correctness of her account. Even when no opposition is filed, we hold it to be necessary to the homologation, that *prima facie* proof of the correctness of the account must be produced. In this case we have carefully examined the evidence, and we agree with the judge *a quo* that it fully establishes the correctness of the whole account, and shows that the debts specified were truly those of the deceased or of his estate.

Third—The question as to the effect of the lapsing or caducity of the legacy to the mother of one third of the testator's estate, has been extensively discussed. On the part of the executrix it is claimed that the terms of the will make her universal legatee of the usufruct, or legatee by universal title thereof; that it was the evident intention of the testator to bequeath her the usufruct of all the property of the estate of which he had by law the disposal; that therefore she profited by the caducity of said bequest, to the extent of the usufruct of the property embraced therein, and that the clause in her favor should now be read as follows:

"I give and bequeath unto my wife, the said Elizabeth Bishop, the usufruct, during her natural life of all * * * the property of which I may die possessed, and at her death I give and bequeath the whole of said property to the children of Catherine Burgard," etc.

The effect of this argument is to claim either that *accretion* took place in her favor, or that the legacy in her favor was *charged* with the payment of this legacy to the mother. One or the other of these hypotheses must be the basis of the widow's pretension, if she asserts it under the will. We can not assent to either proposition.

In the first place Art. 1706 C. C. declares: "The right of accretion relative to testamentary dispositions shall no longer subsist, except in the cases provided for in the two following articles."

Art. 1707 C. C. "Accretion shall take place for the benefit of the legatees, in case of the legacy being made to several *conjointly*. The legacy shall be reputed to be made conjointly when it is made by one and the same disposition, without the testator's having assigned the part of such co-legatee in the thing bequeathed."

Art. 1708 C. C. "It shall also be reputed to be made conjointly, when a thing not susceptible of being divided without deterioration has been given by the same act to several persons, even separately."

Art. 1709 C. C. "Except in the cases prescribed in the two preceding articles, every portion of the succession remaining undisposed of, either because the testator has not bequeathed it either to a legatee or to an instituted heir, or because the heir or the legatee has not been able or willing to accept it, shall devolve upon the legitimate heirs."

The right of accretion rests upon the *expressed* or "*reputed*" intention of the testator to call each legatee to *the whole* of one and the same thing. "L'accroissement est le droit de prendre, dans une succession ou dans un legs, une part à laquelle on est appelé, mais qu'on n'aurait pas eu si tous les co-intéressés étaient venus recueillir; il est établi pour l'héritier ou le légataire, non pas, disait, *cujas ut plus habeat*, mais bien *ne minus habeat*. Il est clair, en effet, que le prédécès, l'incapacité, ou la répudiation d'un co-héritier ou d'un colégataire ne peut pas créer pour ses co-intéressés un droit qu'il n'auraient pas eu primitivement: que, pour recueillir *le tout* il faut avoir vocation a *ce tout*, vocation qui n'aurait pas son entier effet si tous les appelés recueilaient, *quia concursu partes fierent*.

"Donc, pour savoir s'il y a lieu a l'accroissement au profit d'un successeur, il faut regarder si ce successeur était appelé *ad totum*." Marcade, v. 4 p. 144—5.

Among heirs *ab intestato*, accretion always takes place, for each heir is called to *the whole* succession. *Nemo pro parte haeres*. And the same would seem to be true as between *universal legatees*, since a universal legacy is the attribution, made by testament, of the right, at least eventual, to the universality of the goods of the testator—to the whole succession. But, be this as it may, it is clear that under the Code accretion can no longer take place in testamentary dispositions, except where the legatees are *conjointly* called to one and the same thing. And it is equally clear that even if made *conjointly* and by one and the same disposition or clause, accretion does not take place if the disposition contains an assignation of the parts of the respective legatees. Nor will accretion take place when a thing has been given by *separate* clauses of the same act to several persons, unless the thing be of a nature not susceptible of division without deterioration. Tested by these rules, it is manifest that the right of accretion does not exist in this case for the benefit of the widow; first, because the legacies to the mother and to her are not conjoint; second, because, if they were, there is an attribution of parts, "one third" to the mother, and "the balance" (two thirds) to the widow; third, because they are made by *separate clauses* or dispositions and the usufruct is not indivisible without deterioration.

Nor is it true that the widow is by said will a "universal legatee," or even a legatee "by universal title."

In the nature of things the legatee of an usufruct, however general

it may be, can not be a *universal legatee*, because a universal legatee must be called "to the whole of the property which the testator leaves at his decease." C. C. 1606. Can one, whose title only calls for the usufruct of an estate, one only of the elements of its ownership, ever pretend to have vocation "to the whole of the property" left by the deceased? Nor is she any more a legatee by universal title. To be such she must be called either, first, to an aliquot part of the whole estate; or, second, to *all its* immovables; or, third, *to all* its movables; or, fourth, to an aliquot part *of all its movables* or *all its immovables*. C. C. 1612. By the terms of this will she falls under neither of these classes, and is, therefore, only a legatee by particular title. C. C. 1625.

True, we speak of a universal usufructuary or of one by universal title, and so does the Code, Art. 580, but this is only *a manner of speaking*, and does not constitute the legatee of the usufruct either a universal legatee, or a legatee by universal title. This is made more evident by the fact that universal legatees, and those by universal title, are liable for the debts of the succession. C. C. 1611, 1614; whereas the legatee of the usufruct, however general, is never liable therefor.

Nor do we think it can be fairly inferred from the testament that it was the intention of the testator to give his wife any more than he did give her. There was nothing to prevent his giving her the usufruct of his whole estate, if he had so wished. There was living at the date of the testament but one forced heir, his mother, to whom the law reserved only one third of his estate. Surely the naked ownership of the whole estate would have been more than the *légitime* of the mother amounted to; so that he could, if he had desired, have given the usufruct of the entire estate to his wife, without trenching upon the reserve of his mother. Besides, the fact that his mother died two years and a half before the testator, and that he made no change in his will in favor of his wife, is not without significance.

We conclude, therefore, that neither by the law, nor by the language or intent of the testator, can accretion be held to have operated in favor of the widow.

But it is said that legatees by universal or particular title profit by the caducity of particular legacies with the payment of which they are charged. C. C. 1704. This is undoubted, but by what process of reasoning can we say the widow's legacy was charged with the payment of the mother's? The testament does not say so, and there is no rule of law that says, directly or by implication, that where one third in full property of an estate is willed to A, the forced heir, and two thirds to B, a stranger, in usufruct, that the former is a charge upon the latter. If we were to decide by the importance of the two bequests, or by the relationship of the parties, the converse would be the conclusion. Besides,

the legacy to the mother is one under universal title, and not a particular legacy.

We hold, therefore, that the widow can not under the will claim the usufruct of the third bequeathed to the mother. But here another question arises. The legacy to the mother having lapsed by her predecease, does the property embraced in it go to the heirs *ab intestato* of Baptiste Dougart, or to the children of his sister Catherine Dougart? This depends upon the further question whether these children are universal legatees, for if they are they profit by the caducity to the exclusion of the heirs at law. See Hoover's Heirs vs. York and Hoover, 24 An. 375, and authorities there cited.

Again, if the lapsed legacy goes to the heirs *ab intestato*, as not being disposed of by the testator, then the widow's legal usufruct would attach and continue during her natural life. R. C. C. 915. But if it goes to the children of Catherine Dougart, by virtue of their being universal legatees, then the widow's legal usufruct never attached, because her deceased spouse had disposed of the property by will. Hence the question as to whether the widow has or has not a legal usufruct on this third, and therefore her accountability for its revenues depends solely upon the nature of the legacy to the children of Catherine Dougart. We repeat that if that legacy is not universal, the widow has a legal usufruct and is not accountable for the revenues. If they are only legatees under universal title, i. e., if their rights under the will are confined and limited to the naked ownership of the two thirds subject to the widow's usufruct, then the caducity of the mother's legacy can not profit them because that legacy *was not a charge upon their legacy.* See C. C. 1704. As before said it is only where the caducious legacy is a charge upon the legatees under universal title, or under particular title, that the failure of it inures to their benefit.

By the second clause of the will above quoted, the testator bequeaths to his wife, during her natural life, the usufruct "of all the balance," (i. e. all less one third) of his property, "*and at her death,*" (i. e. of his wife) "I give and bequeath the whole of said property to the children of my sister," etc. Do the words "the whole of said property" refer to the property he had just given in usufruct to his wife, or to his entire estate? We think they refer only to the property covered by the usufruct, and for two reasons:

First—The words "at her death," show that he did not intend any property to go into their possession until the death of his wife, on whom he had conferred, and show that their rights were restricted to, a life interest.

Second—The bequest to his mother is absolute, and was not made

in contemplation of her predecease, and he could not, therefore, have had any intent to confer her rights upon said children. Besides, if we held the bequest to the children extended to the third bequeathed absolutely to the mother, it is clear their right would be suspended until the death of the wife, thereby creating a sort of vacuity in the title, during the widow's life, which is not permissible. We conclude, therefore, that the third part of the estate bequeathed to the mother did not pass by the will, and that, therefore, by virtue of article 1709 C. C. it devolved, at the death of the testator "upon his legitimate heirs." Hence, also, the widow's legal usufruct attached at same date and she is not therefore chargeable with its revenues.

The fourth ground of opposition relates to the right of the usufructuary to renounce the usufruct, and demand re-imbursement of the sums advanced. It seems to us that this discussion is premature, for we have examined the record in vain for any evidence of such renunciation. We do not see how the fact that the executrix is also usufructuary can prevent her rendering an account as executrix, showing the condition of the estate—and if she has the right to render an account she has the right to have it homologated if correct. This is all she seeks or asks, and this is the substance of the decree appealed from. It homologates and approves the account. But as both parties have, in argument, treated the proceeding as a tacit renunciation, we shall proceed to give our views upon the subject.

Article 575 C. C. declares that "The usufructuary can release himself from the repairs which he is bound to make, *and even from the other charges of the usufruct*, by abandoning it, even when the owner has instituted a suit against him to compel him to make them or bear the expense of them, and though the usufructuary be condemned in such suit."

Articles 617 and 624 impliedly recognize also this right of renunciation. The French Commentators recognize the right of renunciation under the Code Napoléon. See Marcadé, volume two, pages 528, 542, and note at bottom of page 543. See also Proudhon, "Traité des droits d'usufruit," etc., volume four, section 1905, page 313, where he announces the doctrine relative to advances by the usufructuary, that he "can always render them exigible by renouncing to his right of usufruct."

The fifth ground of opposition is prescription. Under our law the right of the usufructuary to demand re-imbursement of sums advanced to pay debts does not arise until the expiration of the usufruct. Until then he has no action, and it is elementary that it is only after the right of action accrues that prescription commences to run. It would be idle to cite authority in support of this proposition. An examination satisfies us that none of the claims shown by the account were barred at the

time the usufructuary paid them and there has been no prescription acquired since. The plea, therefore, can not prevail.

We see no error in the judgment appealed from, and it is therefore affirmed with costs.

ON APPLICATION FOR REHEARING.

EGAN, J. A rehearing of this cause is granted solely in regard to the sixteenth item of the account opposed, being "the Louis Mathé note and interest."

ON REHEARING.

The note charged in the account of the executrix as having been paid to Louis Mathé, amounting with interest to $309 50, and placed on the account as item sixteen, is not to be found in the record. The only evidence to sustain this item is that of the executrix herself, and is too uncertain and indefinite, both as to the existence and payment of the note, to warrant its allowance. These facts were overlooked at the time of our former decree in view of the grave and more important issues involved in this litigation.

It is therefore ordered, adjudged, and decreed that the decree of this court heretofore rendered in this case be and it is so far changed and amended as to reject as of nonsuit the sixteenth item of the account of the executrix, to wit: the Louis Mathé note and interest, and that the succession pay the costs of appeal and of the oppositions of the appellants, and that in all other respects our former decree remain undisturbed.

No. 5396.

MRS. ADA PIERCE DENÈGRE VS. MRS. SILVAINE DENÈGRE ET AL., EXECUTORS OF JOHN DENÈGRE.

All property found in the succession of a deceased husband, or wife, and in the possession of the surviving husband, or wife, is presumed by law to be community property, until the contrary be proved.

When separate funds of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband, or his succession, to the amount of such funds. But the evidence must establish with reasonable certainty, that the funds thus used were really the separate property of the husband; merely making that fact probable is not sufficient.

Money received by the executor of a deceased husband, arising from the liquidation of a former commercial firm of which the husband was a partner for several months after his marriage, can not be deducted from the community, until it is shown that such money was not a part of the husband's share of the profits earned by his firm during his marriage.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

W. O. Denègre and *E. D. White* for plaintiff and appellant.

W. H. Hunt and *Thomas J. Semmes* for defendants.

The opinion of the court was delivered by

EGAN, J. The sole question in this case is what is the extent and value of the community after the payment of its debts. Much of the argument of counsel was addressed to a discussion of the law regulating the community rights of the spouses in Louisiana and free reference has also been made to the laws of Spain and of France with a view to determine the exact nature and extent of the rights of the parties to this litigation. However interesting and instructive such discussion of foreign laws may be, the law of Louisiana is too positive and well settled in regard to the matter under consideration to render such reference necessary in the present case. The community of acquets and gains commences at the moment of marriage with *nothing* and includes at its dissolution presumptively *every thing* found in the succession of the deceased spouse and in the possession of the survivor, *unless it be satisfactorily proved* which of such effects either of the spouses brought into the marriage or which have been given them separately or been inherited by them separately. R. C. C. 2405; Bouligny vs. Justin, 16 An. 209. Any property or effects acquired by both or either otherwise during the marriage fall into the community and constitute part of it without reference to the name in which it is acquired, R. C. C. 2402, and without reference also to the amount brought by the respective spouses into the marriage, even though one of them may have brought nothing. R. C. C. 2406. Separate property is that which either party brings into the marriage or acquires during the marriage by inheritance or donation made to him or her particularly. R. C. C. 2334. If the title to such separate property be satisfactorily proved at the dissolution of the marriage it is retained by or restored to the party owning it or his heirs or succession separately and apart from the community or the property of the other spouse. The effects which compose the community as well as the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband or by the husband and wife conjointly, are divided after the payment of the community debts equally between the husband and wife or their heirs upon the dissolution of the marriage. R. C. C. 2406. If the separate property of either husband or wife has been increased or improved during the marriage by the common labor, expenses, or industry of both, the other spouse or his or her heirs shall be entitled to one half the value of the increase or amelioration. R. C. C. 2408. The converse of this proposition is equally true, that if the community has been

enriched by the separate funds of either spouse it is indebted *pro tanto* at the dissolution to the separate estate of the spouse whose funds have so enriched it, and this is as much a debt of the community as if it were due to a third person, and must be first deducted from the mass or paid to the spouse to whom it is due before a partition of the common effects. Like any other debt, its origin, character, and amount must however be satisfactorily shown, otherwise the partition and settlement of the community will take place without reference to such claim in accordance with the principles already announced. The difficulty in the present case seems not to be in relation to *property* found in the succession, in regard to which the presumption of its community character exists, but in regard to separate funds of the husband alleged to have been used to enrich the community and to be therefore due by the community to his separate estate. The discussion at bar as to money having no ear-marks and not being therefore traceable when mixed up with community or succession funds, is foreign to the present case, if indeed it has any practicality in any. *The question is solely one of debt or no debt from the community to the separate estate of the husband.* The sole source of the husband's wealth or revenue at the time of the marriage, and consequently the only source from which he could or did derive any funds alleged to have been used for the benefit of and to enrich the community, was his interest in a commercial firm which continued in existence and to do business for several months after the marriage, when it was dissolved, and the husband entered into a new commercial partnership which continued up to the time of his death, and it seems from the evidence for some months after, it is presumed, though the fact does not appear, owing to a stipulation in the articles of partnership. It appears from the evidence that at the time of the marriage the husband had upward of thirty-two thousand dollars to his credit on the books of his firm, and that he had actually put into it a cash capital of twenty-five thousand dollars. It also appears that he put into the new firm formed subsequent to his marriage a capital of thirty-five thousand dollars, of which only seven thousand dollars is traced to any other source than his interest in the firm of which he was a member at the time of the marriage. A sworn account or statement in the record also shows that various sums of money to a large amount were paid over by his former partner in that firm to him or to his executors since his death. The marriage took place in November, and the husband died a little over twelve months afterward. From these facts and the existence of considerable property and effects in the community at his death we are asked to infer that the community is indebted to the separate estate of the husband in the sum of twenty-eight thousand four hundred and twenty-one dollars and ninety-seven cents, an amount

exceeding the total value of the community after deducting from it debts due to other persons and law charges by more than $13,000.

We have examined the evidence with care and with the desire to end this litigation, but while it is sufficient to render it probable that the community is in debt to the separate estate of the husband, we are unable to agree with the executors or their counsel that either the fact or the amount of that indebtedness is satisfactorily shown. It is correctly argued by plaintiff's counsel that because the husband had put a certain amount of capital into a commercial firm of which he was a member some years before the marriage, and had a certain amount to his credit upon the books of the firm at the date of the marriage, it by no means follows that he was actually worth that amount or either amount at the marriage. Nor does it follow necessarily that because that firm continued in existence for several months after the marriage in a large commercial city and the husband derived from it on a settlement during the marriage a large amount of money which was put by him into another commercial firm or otherwise paid over to him or his executors that he was therefore worth the amount so received at the time of the marriage and entitled to take it out of the community before partition with the wife of the common funds or property. The short duration of the marriage and the evidence of the existence of such a source from which he might have derived funds which went to enrich the community are circumstances entitled to consideration, and to which we attach the weight of simple probability and nothing more. They would not be sufficient to establish a debt against a stranger, nor, in our opinion, are they sufficient to do so against the community or to rebut the presumption in its favor created by the law. In order to do so it was necessary to show not only that the husband had a certain amount of money to his credit with his firm or co-partners at the date of the marriage, but that if the debts of the partnership had been then paid and the partnership then settled that his individual interest was actually and really worth a certain amount at the time, or that he afterward actually received during the marriage from that source without reference to profits and exclusive of profits made subsequently an amount of money equal to that with which it is sought to charge the community, and that it was used to enrich the community. Any portion received by the executors from that source subsequent to the death of the husband would form no proper charge against the community, and could not be properly deducted from it under the facts of this case, unless it be first shown affirmatively that the sums so received were not the result of profits made subsequent to the marriage by the firm of which the husband was a member. It is too well settled to require the production of authority, and results necessarily from the very nature of partnership,

that no partner can at his option withdraw from the firm with his original capital or any specific sum of money at any time without reference to debts due by the firm or to the sufficiency of the assets of the firm to pay not only him but his co-partners also any amounts which may be due them. Hence it results that he can neither be said to be worth any specific sum until all these facts are first ascertained, nor can he even maintain an action against his co-partners for any specific sum, but only for a settlement and ascertainment through such settlement of the actual amount to which he may be entitled, and upon such settlement it may actually turn out that whatever amount he may have put into the common venture, and in whatever proportion he may be entitled to share in the profits, he may actually realize nothing. His entire capital and interests may be absorbed either through the chances of trade or the mismanagement or unfaithfulness of his partners. And this is especially true of a business conducted in a large commercial city like New Orleans where, as very properly stated by plaintiff's counsel fortunes are often made or lost in a day or in a few months. It is then impossible from the evidence before us to determine how much if any of the separate funds of the husband were used for the benefit of the community, and how much of the funds derived by him subsequent to the marriage from the commercial partnership of which he was a member at the time of the marriage and for several months after were derived from profits made subsequent to the marriage, his share of which if so made, which the law presumes in the absence of proof to the contrary, were of right a part of the community and must be treated and held as such.

In order that no injustice may be done and to give to the parties an opportunity to make fuller and more certain proof both as to facts and amounts—

It is therefore ordered, adjudged, and decreed that the decree heretofore rendered by this court be avoided and annulled; that the judgment appealed from be and it is avoided and set aside, and this case remanded to the court below to be further proceeded in in accordance with the principles of this opinion. It is further ordered that the costs of this appeal be paid by the succession of John Denègre, deceased, and that all other costs await the final determination of the cause.

No. 6861.

STATE EX REL. SAM LISSO VS. W. P. PECK.

The mere failure of a party who has been elected to a constitutional office to qualify within thirty days from the date of his commission, can not be construed into an abandonment of the office.

A compact with his deputy made by a clerk of court, which stipulates that the deputy shall perform the duties of the office, and the clerk shall receive a proportion of the official fees, or a fixed monthly sum, is not such a transaction as will forfeit the clerk's right to his office, and thus create a vacancy in it.

APPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson*, J. Jury trial.

W. Pike Hall, District Attorney, *L. B. Wathins, Elam & Sutherlin*, and *J. F. Pierson* for plaintiff and appellant.

John B. Roberson and *John L. Scales* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The relator brings this suit under the Intrusion Act, being joined by the district attorney, for the office of clerk of the District court for Red River parish, alleging that he is entitled thereto by virtue of an appointment by the Governor made to fill a vacancy.

The respondent denies there was a vacancy, and claims that he was and is the clerk by virtue of an election in November 1876, and that he has been commissioned and has qualified, and has acted as clerk ever since his qualification.

The case was tried by a jury, who returned a verdict for the defendant, and judgment being entered accordingly, the relator prosecutes this appeal.

It is conceded that the defendant was elected clerk in November 1876. He was commissioned December 21, 1876 by the then acting Governor. He was again commissioned by Governor Nichols on 16 January 1877. On the 19th of that month he appears to have taken an oath as clerk before one Honoré, styling himself Secretary of State, which was not a qualification because of want of official status of the person thus styling himself, since we take judicial cognisance of the fact that W. A. Strong was Secretary of State at that time. He did not attempt to qualify further until later—indeed his commission from Governor Nichols was not delivered manually to him until between the 1st. and 10th. of March, although he knew it had been brought up from New Orleans shortly after its date, and was in the possession of Wœssor who brought it. His qualification was accomplished on May 7. 1877, but he had presented his official bond to the District Judge for approval a week or ten days before that day.

Meantime the old incumbent Wester held over and discharged the duties of clerk, but he had been elected sheriff at the election of the

previous November, and qualified to that office April 30, 1877. On that day he vacated the clerk's office. Peck was already endeavoring to qualify as clerk. About that time, or within the three preceding days, he had presented his bond for approval to the judge at his residence in a neighboring parish and it was rejected. The seventh of May was the opening day of the term of the District court for Red River parish. No one had qualified as clerk, at the usual hour for opening court, and it was adjourned until the following morning.

Peck gave a satisfactory bond and took the oath of office on the 7th. after court had been adjourned—a few minutes before 12 o'clock as some witnesses say, two or three hours later, according to others. He took possession of the office on same day, and has been clerk ever since.

On the morning of the 7th. of May several lawyers in attendance on the court telegraphed the Governor there was no clerk. He appointed Lisso, the relator, immediately, who having received the commission on the 14th, qualified on the 18th. and instituted this suit on the following day.

We think his appointment bad. There was no vacancy to fill.

The grounds upon which the relator relies are, that Peck vacated his office of clerk by failing to give bond within thirty days from the date of his commission, to support which sec. 351 of the Revised Statutes of 1870 is cited, and that he had sold the office to D. H. Hayes which is contrary to good morals and public order.

We may remark here the inconsistency between the two pleas, for if the office was vacant after the expiration of thirty days from the date of Peck's commission, and his right to it had lapsed from that time, then he had no office to sell in May following. But it can scarcely be seriously contended that the right to a constitutional office is *ipso facto* lost by failure to comply with a directory provision of a statute upon bonds, the object and purpose of which is to designate the persons who shall approve official bonds, to prescribe their formalities, where the sureties must reside, and other cognate matters.

The legislature has not declared that failure to execute a bond within thirty days shall operate *ipso facto* a divestiture of a constitutional office, though such failure may well be considered as a presumption of abandonment, and until it does declare what acts or omissions of the officer elect shall constitute a conclusive presumption of abandonment, if indeed it has that power, it is not for us to do so. Under the facts of this case, the presumption is against an abandonment by the defendant. He had twice attempted to qualify before Wester vacated, and his bonds were rejected. So far from abandoning his right to the office, his third bond was tendered and accepted before the qualification of the relator.

Nor do we think the arrangement made by Peck for performing, or having performed the duties of his office properly, is to be denominated a sale of its functions and franchises, or if a sale, however reprehensible, that it operates *ipso facto* a loss of the office and a consequent vacancy. The recital of the arrangement, as fully disclosed by the evidence, will rather shew that the parties do not merit the harshness with which the relator's counsel have characterized their conduct.

Peck agreed with Hayes that the latter, whom he appointed his deputy, should perform all the duties of the office, and that himself should receive either a proportionate part of the fees, or a stated sum each month. What was the motive for this agreement does not very clearly appear. It is in one place either stated or hinted that Peck could not give bond unless he made that agreement. There were persons who were willing to become his bondmen, provided he would place a responsible and competent deputy in the office, who should actively discharge its functions, while himself would be delegated to the more congenial occupations of his 'retail saloon' in another quarter of the village. Certain it is, that the arrangement contributed to the dispatch of business, and it does not want parallel cases either in the past or present to justify it. The frequency with which such arrangements are made redeems this from the reproach of singularity, and relieves it from the suspicion of bad intent.

The relator has failed to convince us that his appointment was made under circumstances justifying it, and he has therefore no right to the office he demanded.

Judgment affirmed.

No. 6869.

STATE EX REL. C. C. DURAND ET AL. VS. PARISH JUDGE OF ST. MARTIN PARISH.

The object of the rule *nisi* in a mandamus proceeding is not to ascertain whether the court erred in granting the rule, but whether the mandamus should be made peremptory. And hence it is to the latter inquiry alone that the respondent should address himself.

A party having occasion to apply for mandamus in two suits, before the same judge, may state his causes of complaint, with respect to both, in a single petition.

The bond for a suspensive appeal from a judgment which does not decree the payment of a certain sum of money, or the delivery of a movable, or an immovable, need only be for an amount sufficient to pay costs.

The bond for a suspensive appeal from a judgment which orders the sheriff to put a party in possession of certain real estate, should be for a sum exceeding by one half the estimated value of the revenues of the property pending the appeal, and for whatever additional sum may seem necessary to cover injury or deterioration which may be caused to the property by the appellants during the time they may continue in possession.

State ex rel. Durand et al. vs. Parish Judge of St. Martin Parish.

APPLICATION for a mandamus.

F. M. Voorhies for relator.

Jos. A. Breaux, L. J. Gary, and *W. F. Schwing* for respondent.

The opinion of the court was delivered by

MARR, J. Charles C. Durand, administrator of the succession of Charles Durand, Jr., obtained an order from the parish court, under which he caused to be offered for sale by the sheriff certain real property, which was adjudicated to Alphonse Tertrou at the price of $10,134. Tertrou refused to pay the cash which was demanded of him; and the sheriff proceeded to offer the property again, when it was adjudicated to C. C. and John L. Durand, at the price of $2235.

The administrator filed a tableau or statement of the property of the succession, and of the debts and charges to be paid, and the taxes and funeral expenses paid. Tertrou filed an opposition in which he claimed to be a creditor for an amount exceeding $16,000, secured by mortgage on the property adjudicated to him; and he asserted the right to retain the amount of his bid, $10,134, on account of the larger sum due to him.

The parish judge ordered the tableau to be amended in several particulars which it is not necessary to state now. His decree is as follows:

"Let the claim of Alphonse Tertrou as mortgage creditor be recognized and placed upon the tableau. Let the bid of Alphonse Tertrou upon the succession property sold on the thirtieth of August, 1876, be recognized as valid. Let the tableau be amended as above set forth; and, as so amended, let the same be homologated."

This suit is number 2249 of the docket of the parish court.

In his capacity as administrator, C. C. Durand caused a writ of *fieri facias* to issue on a judgment against Alphonse Tertrou, which Tertrou enjoined; and he claimed the right to have the judgment compensated by the mortgage debt due him. The parish judge decreed that Tertrou be recognized as a mortgage creditor of the succession of Charles Durand, Jr., for the sum of $16,879, with interest, less the sum of $10,134, a credit allowed in his petition. The decree proceeds:

"Let the injunction be made perpetual, the plea of compensation be admitted, and let the adjudication to Alphonse Tertrou be recognized. The sheriff of the parish of St. Martin is, therefore, ordered to execute a deed of sale in favor of Alphonse Tertrou, and to place him in possession of the premises upon his complying with the requisites of the law.

"It is further decreed that the pretended adjudication to C. C. Durand and John Durand be declared null and void, and that the deed of the sheriff to those parties be annulled and canceled."

This suit is entitled Alphonse Tertrou vs. C. C. Durand and others, number 8166 of the docket of the parish court.

In the succession suit, number 2249, C. C. Durand as administrator, and personally, and John L. Durand applied for a suspensive, and, in the alternative, for a devolutive appeal, which the parish judge granted on their giving bond in the sum of $500 for a devolutive, and $15,000 for a suspensive, appeal. Four other appeals were applied for by creditors of the succession; and on each appeal the bonds were fixed at $500 and $15,000 for the devolutive and suspensive appeals respectively. Among the appellants were Alphonse Tertrou and Mrs. Euphémie Broussard, widow of Charles Durand, Jr., the latter claiming to be a mortgage creditor for some $3000 for her dotal and paraphernal rights.

In the injunction suit, number 8166, C. C. Durand as administrator, and personally, and John L. Durand moved for an appeal, and so did Mrs. Euphémie Broussard separately. On each of these motions the parish judge fixed the amount of the bonds at $500 for a devolutive, and $15,000 for a suspensive, appeal.

The Durands in one petition, and Mrs. Broussard in another, applied to this court for writs of mandamus to compel the parish judge to grant the appeals prayed for by them in the two suits respectively, on their giving bonds in conformity with article 577 of the Code of Practice.

The parish judge excepted in both cases. We shall notice but one ground of exception, which is, that two writs of mandamus can not be applied for in one petition; and as separate appeals were applied for in the court below in the two suits, numbers 2249, 8166, the same distinction should be observed in the application for mandamus.

He also answered to the merits, in the event that this court should decide that the issues can be passed upon in the manner in which they are presented. It is not necessary to set out these answers in full. They state no fact in support of his rulings in fixing the amount of the bonds; and we refer to them only to notice his statement that this court has recently decided that the administration as a creditor can not appeal without giving bond in an amount equal to one half more than the assets of the succession. He refers to no case, and we do not recollect any case, in which any such decision was ever made. If any such decision has been made it should be at once overruled; and we take occasion now to say that no such decision can be maintained either on principle or authority.

So far as the exceptions are concerned, if that form of pleading is admissible in such a proceeding as this, which we are not disposed to concede, they would tend to show merely that the rule *nisi* should not

have been granted by this court. When such a showing is made by the relator, in his *ex parte* application for the writ of mandamus, as satisfies the court, *prima facie*, that he is entitled to the remedy which he seeks, it is the business of the judge, or other person to whom the rule to show cause is addressed, not to set up technical or other objections which merely tend to show that the rule *nisi* should not have been granted, and that this court erred in that respect, but to state any fact, appearing of record, which may have been omitted by the relator, or to refer to any law which would show that the peremptory mandamus, which is not granted until both parties have been heard, should be refused.

The object of the rule *nisi* is to obtain all the information necessary to a correct decision. The relator makes his statement under oath. The rule to show cause is intended to enable the respondent to make his statement; and it does not concern the one or the other of them that this court has chosen to permit the party having occasion to apply for mandamus in two suits, before the same judge, to state his causes of complaint in respect to both in a single petition.

The right of appeal is a precious one, and it should be favored and aided by the courts. There should be no difficulty in fixing the amount of the bond for an appeal in any case. Where the judgment is for a specific sum the party cast must give bond, for a suspensive appeal, for a sum exceeding by one half the amount for which the judgment was given. C. P. Art. 575.

If the judgment decree the delivery of a movable of perishable nature, the security for a suspensive appeal must be for an amount exceeding by one half the estimated value of such movable. C. P. Art. 576.

If the judgment decree the delivery of real estate not of a perishable nature, security shall only be required to an amount exceeding by one half the estimative value of the revenue to be derived from such real estate, pending the suit; and for such further amount as the judge may determine as surety for an injury or deterioration which may be caused to the estate by the appellant while in possession of the same. C. P. Art. 577.

In all cases not falling within the terms and provisions of these articles, no other security is necessary than such as will suffice to cover the costs.

In the succession suit, number 2249, the judgment does not condemn any one to pay any sum of money, nor to deliver any movable or immovable. It amends the tableau so as to place Tertrou on it as a mortgage creditor; it rejects the claims of certain persons claiming to be creditors; it recognizes the bid of Tertrou, and settles the rank of

the creditors. The administrator, or any creditor whose interests are affected by that judgment, has the right of appeal; and no security can be required of them beyond such as will suffice to pay the costs.

All this has been fully explained and laid down clearly in Millaudon vs. Percy, 7 N. S. 352; Blanchin vs. Fashion, 10 An. 345; State *ex rel.* Hicky vs. Judge Fourth District Court, 20 An. 108; State *ex rel.* Gaussin vs. Judge of Second District Court, 21 An. 43; Succession of Cloney, 29 An. 328; State *ex rel.* Smith, 29 An. 838.

The other case, number 8166, is somewhat peculiar. Tertrou bid $10,134 for the property, but he has not paid, nor does he intend to pay, any part of this sum into the hands of the administrator. He simply proposes to credit it on the mortgage debt which he claims of the succession. The judgment requires the sheriff to make him a title to the property, and to put him in possession. The appeal will suspend the execution of this order; but the case will probably be heard and determined at the June term, 1878, or within some seven or eight months after the date of the judgment. The appellants should be required to give bond for a sum exceeding by one half the value of the revenues which the property ought fairly to yield during the time for which this appeal will probably be pending; and an additional sum might also be required, to cover injury or deterioration which may be caused to the property by the appellants during the time they may continue in possession under the suspensive effect of their appeals. Without proof that the party in possession was so managing and dealing with the property as to abuse and injure it, or to diminish its value by waste, there would be no occasion to require any large amount, if any thing, on this score.

We have no idea what revenue this property yields, nor whether it is productive or not; nor have we any information which would enable us to indicate the amount of security which should be required in this case more definitely than we have done. It is not our province to fix the amount of appeal bonds; and we can only say, when a bond is presented for our consideration and brought within our cognizance, whether or not it is sufficient in the given case. We have endeavored to express our views of the law in such a manner as will make them serve as a guide to the parish judge, and enable him so to use the discretion vested in him as to protect and secure the rights of the appellees, and to permit the appellants to exercise their right of appeal on the terms and conditions prescribed by law.

It is therefore ordered, adjudged, and decreed that the mandamus herein prayed for be made peremptory; and, accordingly, that Carter Basset, parish judge of the parish of St. Martin, be ordered and required to grant unto Charles C. Durand, as administrator of the succession of

Charles Durand, Jr., and in his own right, and John L. Durand, and unto Mrs. Euphémie Broussard, widow of Charles Durand, Jr., the suspensive appeals demanded by them in the suit number 2249 of the docket of the parish court of St. Martin, on their giving bond and security in such sum, to be fixed by the said judge, as will be sufficient to cover and secure the costs which they may be condemned to pay by the judgment and decree to be rendered by this court on their said appeals respectively; and that the said parish judge be also ordered and required to grant to the said Charles C. Durand, in his said capacity as administrator, and personally, and John L. Durand, and unto Mrs. Euphémie Broussard, widow of Charles Durand, Jr., the suspensive appeals by them demanded in the suit number 8166 of the docket of said parish court, on their giving bond and security in a sum to be fixed by the said parish judge, in accordance with the terms and provisions of Art. 577 of the Code of Practice, and the views and opinions herein expressed; and that the said parish judge pay all the costs of this proceeding.

Mr. Justice DeBlanc recused himself in this cause.

No. 6914.

STATE EX REL. E. RABASSE VS. POLICE JURY OF TERREBONNE PARISH.

Where an act of the Legislature authorizes a parish to issue its bonds for a certain purpose, in such form and denomination as the police jury of the parish shall prescribe, the police jury must specially authorize the issue of the bonds, and the bonds must be signed by the persons designated by the Legislature; and in default of this action of the police jury and this signature of the bonds, all bonds issued under color of said legislative act are invalid.

When a law directs that certain bonds of a parish shall be signed by a majority of the members of its police jury, it means a majority of the members designated by the jury. It does not mean any majority of its members, not selected for the purpose by the jury.

APPEAL from the Thirteenth Judicial District Court, parish of Terrebonne. *Beattie*, J.

Thomas L. Winder for relator and appellant.

L. F. Suthron for respondents and appellees.

The opinion of the court was delivered by

MANNING, C. J. The relator is the holder of certain instruments, denominated Bonds of the parish of Terrebonne, amounting to four thousand seven hundred and seventy-five dollars, with interest coupons attached. Having demanded payment of the over-due coupons from the parish Treasurer, and having been refused, he obtained this mandamus to the tax collector of that parish to collect forthwith a tax suffi-

cient to pay the past due interest and that next falling due, and also one tenth of the principal, in accordance with the provisions of the Act of March 23, 1874, and of an ordinance of the police jury of May 6, 1876. He prayed further that the police jury be commanded to enforce that ordinance, which he alleges is amendatory of one of July 31, 1874 and another of March 9, 1875.

The tax collector and the police jury answer, that the proceeding by mandamus is not permissible for the purpose of the relator because the power conferred upon them by the Act of the General Assembly is to be exercised only at their discretion, and that they have not yet issued the bonds provided for in the Act—that the bonds sued on are null and void and are not valid obligations of the parish for these reasons; 1. They were not issued by authority of the police jury and a commissioner, 2. No ordinance was passed by the jury authorizing their issuance, nor prescribing the quantity of them or fixing their denomination, nor prescribing the rate of taxation for their redemption and the payment of interest, 3. there was no ordinance prescribing the form of the bonds, nor when they should mature.

There was judgment for the defendant below and the relator appeals.

An act was passed by the legislature creating a board of commissioners to examine and ascertain the valid outstanding indebtedness of the parish of Terrebonne, and authorizing the police jury of that parish to issue bonds to take up and fund the same. Acts 1874, p. 124. The commissioners are named in the act, and full power is conferred upon them to determine upon the validity of all outstanding claims against the parish, and to call on holders for their presentation. It is then provided that the police jury, in conjunction with one commissioner, is empowered to issue bonds of the parish not exceeding twenty thousand dollars, interest to be paid semi-annually, for the sole purpose of taking up this debt. Directions are given that these bonds must be signed by a majority of the police jurors and one commissioner, and their denomination is fixed. The police jury is required to levy a tax sufficient to redeem one tenth of the bonds annually, and the yearly interest, and the ordinance of that body, passed for that purpose, is to remain in force until the redemption of all the bonds and the payment of all the interest. The closing proviso of the act is, that it is not to be so construed as to deprive courts of the power of adjudicating upon any claim which may be rejected by the commissioners.

On the first of May following the passage of this Act the police jury passed a resolution that a committee of two be appointed to obtain blank bonds for the purpose of bonding the parish debt under it, and later $250 was appropriated to enable this committee to buy the blanks. On July 31, 1874 that body resolved there should be levied a tax of $665

to pay the semi-annual interest accruing on the bonds *which have been issued* under the act of the legislature. No ordinance had been passed directing the issuance of the bonds, but only resolutions providing ways and means for getting the blanks which would be needed when the bonds were directed to be issued.

On March 9, 1875 the jury resolved that a tax of one mill be levied for the purpose of meeting the interest, and redeeming one tenth of the principal annually of the parish bonds, and on May 6, 1876 an ordinance was adopted, amendatory of this resolution, authorizing the levy of a tax of one mill on the dollar upon all taxable property to redeem annually one tenth of the bonds issued under the Act of the legislature and a tax of one and a half mills to pay the interest annually accruing.

The commissioners named in the Act met on June 22 1874, and elected one of their number to sign the bonds issued under its provisions. They had formally organized in April, and had published a notification to all holders of parish warrants, scrip, or other claims to present them to the board for inspection. They received the scrip, issued bonds to the amount of over fifteen thousand dollars, and destroyed the scrip. The relator's bonds are a part of those thus issued.

They were issued illegally. At no time did the police jury pass an ordinance directing, authorizing, or empowering the issuing of any bonds. The Act of March 23, 1874 empowered the police jury to issue bonds of the parish, and directed that a majority of the jurors and a commissioner should sign them, and required the jury to levy a tax to pay them and the annual interest. The jury levied the tax, but did not authorize the bonds. It did not designate which of them should sign the bonds. The police jury is a political entity, and acts as one being. When written instruments are to be signed by it, the president or some members selected by it, act for the body. The legislature had required that a majority should sign these bonds. A majority was three. The jury should have designated the three. To hold that any three members of a police jury can bind the parish by signing bonds in its name would be dangerous, to say nothing of its being illegal.

It is perfectly manifest that the board of commissioners usurped the functions of the police jury. The bonds are dated July 1. 1874 and are all payable ten years after date. The attempt to prove a meeting of the police jury on that day was abortive. Marie, the commissioner who signed the bonds, knew of no meeting on that day. Kennedy, a member of the jury, says there was, and he attended it on a summons from the president, and then recites what took place touching the bonds with a minute circumstantiality that exhibits an extraordinary memory for details. He was testifying more than three years after the meeting. We do not believe him. The clerk of the police jury is not certain

there was a meeting. Yet his records contain no account of it. He does not even remember whether he was at it or not, and on cross-examination says, he supposes the police jury was in session because a majority of them were there. That was the day they were signing the bonds. Condon, Keys, and Cage were the three that signed the bonds, and of course were there, but there is nothing to indicate Kennedy's presence, who remembered every thing that was proposed and passed while the clerk says that he remembers no motions or resolutions, and certainly did not record any. The president of the jury thinks there was a meeting of that body on 1st. July, but says a record was kept if there was a meeting—that he always appointed a deputy or pro tem. clerk when that officer was absent, and he required him to note the proceedings in the same way the clerk did—and that if there was a meeting on that day, the minutes will shew it. The minutes contain no mention of it.

The commissioners appear to have read the act as conferring upon them the power of bonding what is called the indebtedness of the parish. The sequence of events shews this. The police jury obtained the blanks, and did nothing else until after the bonds were issued. On June 22d the commissioners selected one of their number to sign the bonds. On July 1st. he did sign them and three members of the jury signed also. On July 31st the jury levied a tax to pay the interest accruing upon bonds already issued, as the resolution has it, and although minutes of every step taken by the jury in its frequent meetings about that time relative to these bonds were preserved, nowhere do we find any trace of an ordinance authorizing and directing the issuance of any bonds, but on the contrary the phraseology of all the resolutions shews that the members supposed that nothing was to be done but buy blanks for signature, and after they were signed and issued, to levy a tax to pay the interest and one tenth of the principal. The bonds shew this. They were all payable at one time viz ten years after date. The jury were required to levy a tax to pay one tenth each year, and they did it, and if they had had any thing to do with ordering the bonds, they would have made one tenth payable at the end of each of the ten years.

The duty of the commissioners under the legislative Act was confined to the examination of claims and determination of their validity. They had nothing else to do except select one of their number to sign the bonds. But they appear to have received scrip, warrants, etc. and of their own motion exchanged bonds for them, which had been signed ready for their use. They did more. They destroyed the scrip. They had no right to destroy it. They should have examined it, and have passed upon its validity, and laid their report before the police jury who alone had authority to exchange bonds for it.

We may remark here that it is unnecessary to say in this case

whether the legislature can confer upon such a board the power so to 'determine the validity' of alleged claims against a parish as to create a binding and unassailable obligation upon it. Judicial power can be exercised only by the courts mentioned in the constituton. It is true the Act provides that any person whose claim is rejected may invoke the adjudication of a court. But the police jury and the tax payers have rights also, and it would appear that where a claim was approved, it was intended that the determination of the board of commissioners was in that case to be final. A tribunal that is clothed with such extraordinary power as to conclude one party absolutely by its decision, while the other is alone left free to demand a judicial investigation, may well provoke scrutiny of its origin, and the source of its authority.

Several decisions of the Supreme Court of the United States are cited by relator's counsel, and among them is Commissioners of Knox Co. vs. Aspinwall, 21 Howard, 540. In these cases, the bonds were issued by the proper authority, and in accordance with the act of the legislature. We have seen the bonds of the relator were issued without the authorization of the police jury, the body specially designated by the legislature to issue them. Lisso v. Parish of Red River, 29 Annual, 590.

It is unnecessary to consider the bills of exception to the admission or rejection of testimony, as without the testimony objected to by either side, the case is clearly with the respondent.

Judgment affirmed.

No. 6749.

JEAN CLAVERIE VS. L. A. GERODIAS AND HER HUSBAND.

Where an application for a writ of injunction, filed in conjunction with an opposition to a seizure and sale, is referred to the merits, and no restraining order was issued until after a hearing on the merits, it is immaterial whether the affidavit for the injunction was legally sufficient, or not.

The mortgage note of a wife knowingly received by a creditor of the husband, in satisfaction, or security of the husband's debt, is, in the hands of such a creditor, utterly null and void.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

W. E. Murphy for plaintiff and appellant.

F. Michinard for defendants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff holding a note of Mrs. Gerodias for $2000, secured by mortgage on her paraphernal property, executed by authority

of the Judge of the Third District Court of Orleans, took executory process thereon.

The defendant filed an opposition thereto, alleging that the note was obtained from her by fraud and misrepresentation—that the recitals of the act of mortgage to the effect that Claverie had loaned her the amount of the note were false to his knowledge—that in truth said Claverie never gave her any consideration for said note—nor did she ever at any time owe him any thing. That her husband and his partner, in the butcher business, were in debt to said Claverie, and that the husband and Claverie arranged this plan to secure said indebtedness. She prayed for an injunction, and by way of reconvention, demanded the nullity of the mortgage, the erasure of its inscription, and the surrender to her of the note. The court granted an order on plaintiff to show cause why an injunction should not be granted. This rule was cumulated with the merits, and there was final judgment for opponent as prayed for by her. Plaintiff appeals. Our attention is called to exceptions filed by plaintiff to opponent's proceeding in the court below. The exceptions are—

First—That defendant can not intervene in a suit against herself.

Second—That an intervention is not permissible in a seizure and sale case.

Third—That defendant's petition or opposition is too vague; and

Fourth—That the affidavit is insufficient.

There is no force in any of these exceptions. She does not intervene, but files an opposition and petition for injunction under articles C. P. 738 and 739. The petition or opposition is unusually particular and specific, and ample, if true, to serve as a basis for the relief sought. The sufficiency of the affidavit for injunction is matter of no moment, as no injunction was granted until the case was heard on its merits, and only in the final judgment.

There is no dispute about the essential facts of this case. Indeed, the answer of Claverie contains this admission: "That the said note was executed by the said Mrs. Gerodias for the purpose of being delivered to respondent for the purpose of enabling her husband, V. Gerodias, to obtain the means of carrying on his trade as butcher, and was given by him to respondent for that purpose to the knowledge of his wife, and that your respondent has given said Gerodias and wife merchandise for the full value thereof."

The question presented, therefore, for our decision is, whether a creditor of the husband, can knowingly, etc., validly take from his debtor's wife her note and mortgage to secure the husband's debt to him?

It is hardly necessary to do more than ask the question. The law

(C. C. 2398), *forbids* the wife to become security of her husband, or to bind herself or property for his debts. Her note, for such a purpose, in the hands of the husband's creditor, who takes it knowingly, is utterly null and void. The act of 1855 (now articles 126, 127 and 128 C. C.) has no application to such a case as is here presented. Claverie, the plaintiff, is the creditor of the husband, and knowingly takes the wife's note for the amount thus due him, in contempt of the prohibitions of the Code, and without the the slightest pretense that he was ignorant of the true facts; on the contrary, judicially avowing that he took the note from her to secure the debt of the husband.

It is unnecessary to decide what would be the rights of an innocent holder of the note in a case like this, nor the effect of the judge's authorization *quoad* the rights of such holder. The question is not here presented. The only question is whether a creditor of the husband, with full knowledge that the wife is becoming surety for the husband's debt, can himself enforce against her such suretyship. He can not. To hold otherwise would be to expunge from the Code principles which are fundamental, and to permit and enforce a fraud upon the law as well as upon the wife.

The judgment appealed from is affirmed with costs of both courts.

No. 6488.

CHARLES MARIN ET AL. VS. SHERIFF AND CITY OF NEW ORLEANS.

Property can not be seized under a *fi. fa.* and sold to satisfy a judgment for taxes, when the property indicated in the judgment, writ of execution, and advertisement, is merely described as a certain number of lots, in a certain square, between certain streets. Such a description is too vague to identify the property.

Writs of *fieri facias*, issued under a judgment for taxes, are not returnable within the delay prescribed for ordinary writs of *fi. fa.*, but remain in force until satisfied, or ordered to be returned by competent authority.

The purchaser of property against which no debt for taxes is registered, buys it free from all liens for taxes. Such property is not liable to be seized to satisfy a judgment against its former owner, for taxes which had accrued before he sold it.

APPEAL from the Superior District Court, parish of Orleans. *Lynch*, J.

Charles Louque for plaintiffs and appellants.

Sam P. Blanc for defendants and appellees.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by DEBLANC, J.

EGAN, J. The sheriff of the parish of Orleans being about to sell

for the payment of taxes, alleged to be due to the city of New Orleans, certain lots of ground, the property of the plaintiffs, they enjoined the sale upon various grounds, among which are that the taxes were assessed and judgments rendered against one M. A. Peyroux, claimed by the city but denied by the plaintiffs to have been a former owner of the property, and that there was no registry of any tax or other lien affecting the property at the time of their purchase and that of their vendors; that the city can not seize their property under *fieri facias* issued upon a judgment against a third person; that the description of the property is *insufficient and not such as to determine its location*, and that no notice of seizure was ever served either upon the plaintiffs or the debtor in execution, M. A. Peyroux. The several judgments were all obtained in the usual manner for the enforcement of the collection of city taxes, upon filing the tax lists, which also appear in the record, and were with a single exception all rendered as well as the property assessed against M. A. Peyroux. That exception was an assessment and judgment against Jules Casnard, one of the plaintiffs in injunction. As the seizure in this case is of the property of the judgment and tax debtor, and is not therefore liable to the most important objections raised to those in the other cases, we will consider it first.

The judgment recognizes a "lien and privilege" upon the property described in the tax rolls and bills or claims on file." That description which is identical with that in the seizure and advertisement is as follows: "Assessment district 7, square 373, between St. Ann, Main, White, Dupré—2 corners, 9 lots 28.2 x100, 132x141, 4 126x141, 6 188x100, under the head of description of real estate. It will be at once apparent that this description is too loose and unsatisfactory for the purpose of assessment, recognition of lien and privilege, seizure, advertisement, or sale; and that the property could not be located or identified by it. So many lots in such a square between certain streets, without giving their respective numbers, is really no description. This objection would have been fatal to recovery had it been urged before judgment. As it was not we can only consider it as affecting the tax lien and the proceedings to enforce the judgment, as to which it is well taken. The plaintiff Casnard also alleges as one of the grounds of injunction that the writ had expired and was not in force when the seizure was made, and none of the forms of law had been observed in making the seizure. The writ issued on the twenty-fifth of November, 1873. The sheriff's return shows it was "received December 1, 1873, and levied," but does not state when the levy took place. The return further shows that on the twenty-first of May, 1875, the property was advertised to be sold on the twenty-third day of June, 1875, and that on the twenty-third of June, 1875, further proceedings under the writ were stopped by injunction. Nothing

is said in the return of the sheriff having returned the original writ and retained a copy, nor does any copy or other subsequent writ appear in the record. We think the injunction must be sustained on these grounds also, and that there was no valid subsisting seizure, and could be no valid sale of the property of Jules Casnard under the judgment against him. All the other assessments and judgments, as before stated, were against M. A. Peyroux, claimed by the city to have been a former owner of the property seized. Equal or very nearly equal looseness and insufficiency in the description of property pervades them also, and the proceeding under them; but without reference to this and other grounds of objection and injunction, it suffices to say that the record fails to disclose any registry of the tax list or other registry to preserve the tax lien or even of the judgments against Peyroux, and that the city can not proceed under execution against him to seize the property of the plaintiffs.

It is therefore ordered, adjudged, and decreed that the judgment of the court *a qua* be annulled, avoided, and reversed, and that the injunction sued out in this case be perpetuated in favor of all the plaintiffs, except Jules Casnard, and that it be also perpetuated in his favor so far as affects the particular seizure complained of. It is further ordered that the defendants pay the costs of both courts.

ON REHEARING.

DEBLANC, J. Our attention has been called to sec. 8 of act No. 85 of 1858, which provides: "that no *alias* or *pluries* writs of *fieri facias* shall be issued in any case of judgment and execution for taxes, but the first writ shall continue in force until finally satisfied, unless ordered to be returned by competent authority."

The counsel representing the city contends that the terms of that law are plain, and that the first writ remains in force until satisfied or properly returned. In this he is right, and our former opinion, based on the general law regulating the return of such writs, is hereby amended, and—in this respect—made to conform with the 8th section of the act of 1858.

"Registry, it is said, is the only notice of title the assessors must heed." Reference to the public archives is one of the means of ascertaining the title to and description of immovables subject to assessment, but it is not the only one. The law is imperative: the assessor must—by diligent inquiry—ascertain the names of all the inhabitants of their respective parishes, whether taxable for licenses or for property, or on both, and also all the taxable property within the same.

Rev. Statutes, sec. 24.

In this case, the property seized for taxes was not seized from the real owners, nor for taxes due by them, but under a judgment obtained against another party, and without notice to those who—at the date of and before any attempt to execute that unrecorded judgment—held a clear and valid title to the property levied upon.

Nor is this all: in its assessment, the description of the property is so loose, incomplete and defective, that—under a sale based on that assessment—no title could have been divested, no purchaser placed in possession of the property now owned and possessed by plaintiffs.

The counsel for the city contends that the conveyance from the former to the present owners of the property so assessed was made before and without payment of the taxes due on the transferred property, and that no one should be allowed to ask relief from taxes by virtue of a conveyance made contrary to the provisions of a prohibitory law. The answer to this is that the record does not disclose any registry of the tax-list or other registry to preserve the tax lien.

It is, therefore, ordered that our first decree remain undisturbed.

No. 6890.

THE STATE VS. ALFRED SIMIEN.

The facts set forth in the affidavit of a party accused of a crime, in support of his motion for a continuance, are, for the purposes of the motion, to be taken as true. They can not be traversed, or contradicted by counter affidavits, or other evidence.

When the confessions of a prisoner to the committing magistrate have been reduced to writing, but on being offered in evidence on the trial of the accused, are, on his motion, rejected on account of defects of form in the writing, his voluntary declarations to the magistrate may be proved by parol.

To warrant a conviction on circumstantial evidence, it is necessary that the circumstances should be of such a nature, and so related, as to leave no reasonable doubt that the accused is guilty of the offense with which he is charged. It is not necessary that the circumstances should produce that positive conviction which would flow from the testimony of a reliable witness.

APPEAL from the Eighth Judicial District Court, St. Landry parish. *Hudspeth*, J. Trial by jury.

H. N. Ogden, Attorney General, for the State.

Lewis & Bro. for the defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for stealing a cow. He applied for a continuance, and made affidavit that "Madame J. B. Simien, a competent and material witness in his behalf, is absent without his consent or procurement, and that he will not be able to procure her

attendance at the present term of the court; but he expects to procure her attendance at the next ensuing term. He represents that a short time previous to the institution of this prosecution he had purchased from Madam Simien a two-year-old heifer. He further represents that he can not sufficiently establish the same fact by the witnesses in attendance upon the trial, or by other witnesses known to petitioner." He then states that this witness is old and sick, that the application is not made for delay, but to obtain substantial justice, and further that he has used due diligence to procure the attendance of the witness, and that she has been in attendance upon the session of the court until attacked by illness.

The State prayed leave of the court to traverse this affidavit, alleging that the witness, who is the mother of the accused, was not sick, and the application for a continuance was a mere subterfuge to avoid a trial, and that the witness was absent by connivance with the accused. The defendant objected to hearing this on the ground that the statements made in the affidavit must be taken as true for the purpose of trying the motion, and the court overruled his objection for the reason that an affidavit for a continuance can be traversed when the judge suspects that the object is delay merely, and that the facts sworn to are not true. The first bill reserved is as to this point.

The rule is, that the affidavit of the accused, upon which is grounded his motion for a continuance, is for the purposes of the motion to be taken as true, and no counter affidavit can be received, nor can the statements or facts it contains be contradicted by a cross-examination or *aliunde* proof, and this rule is of such universal acceptance that we are not inclined to modify it. Archbold's Crim. Prac. 1 vol. 569 *et seq.* The case of Allen v. the State, 10 Georgia, 85, cited by the judge *a quo* in support of his ruling, does not go so far, and if it does, it is opposed to the whole current of authority.

The State offered in evidence what purported to be a voluntary declaration of the accused before the justice of the peace who held the preliminary examination, which on objection by the accused that such declaration was defective in form, was ruled out by the court. The State then offered the justice of the peace as a witness to prove by parol that a declaration had been made before him by the accused, and what that declaration was. The objection of the defendant to the admission of this testimony was overruled, and he reserved a bill to the ruling.

The declaration had been taken down in writing by the committing magistrate, but had not been properly attested or authenticated. Our law requires that such declaration shall be reduced to writing and signed by the prisoner in the presence of the magistrate and of two witnesses, or if the prisoner can not sign, that that circumstance shall be men-

tioned, and the declaration shall be certified with the signature of the magistrate and the same number of witnesses. Rev. Stats. 1870 sec. 1010.

The point is not decided in State v. Rodriguez, 2 Martin, 254, to which the counsel for the defendant refers us, but the court say, it may well be doubted whether, while the law so carefully provides for the safety of the accused against the great facility with which words may be misrepresented, and his declaration colored, it is not much more consonant with justice that the testimony of the committing magistrate should be refused when he had neglected to reduce to writing the declaration of the prisoner.

In the present case, he had not neglected to reduce the examination to writing, but the writing was not properly attested or authenticated. The principle approved in Rodriguez's case is there stated to have been decided in State v. Grove in North Carolina as preserved in Martin's Notes. More recently the court of that State has held that though the examining magistrate, before whom a prisoner charged with felony is brought, does not reduce the examination to writing, as it is his duty to do, yet evidence may be given of such prisoner's confessions at the time, but to render such evidence admissible, it must appear that the committing magistrate did not take down the examination in writing, or that the same is lost. State v. Parish, Busbee Rep. 239. So also in Mississippi, where a justice of the peace took the confessions of an accused in writing at the time they were made, it is erroneous to allow the justice to testify of these confessions from recollection when the non-production of the writing is not accounted for. Peter v. the State, 4 Smedes & Marsh. 31.

Neither of these cases is like the present, for the magistrate did take the declaration in writing, and it is not lost, but was produced and rejected on objection by the accused. Our statute providing for the declarations of an accused person to be taken down in writing is similar to those of other States, and they are all either copied from or assimilated to the statute of Philip and Mary, which first broke down the rule of the common law in England, until then inexorable, that no examination of the prisoner himself was permissible. But before the passage of that statute, the confessions of a prisoner, when made under circumstances defined by the law, were admissible. We hold that when declarations of a prisoner to the committing magistrate have been reduced to writing by the magistrate, and the written examination is offered by the State, and upon objection by the prisoner of its informality, it is held inadmissible by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. 1 Greenleaf's Ev. § 227.

The third bill reserved was to the refusal of the court to charge that

before the jury can find a verdict of guilty, the meat found in his possession must be identified as the meat of the cow described in the indictment, and the State must prove that it was stolen by the accused—that he can not be called on or required to account for the meat found in his possession until the State proves that the meat so found was a part of the cow described in the bill of indictment, and that it had been stolen—that if the meat found in his possession was stolen property, the accused is not bound to account satisfactorily for his possession of it, but is only required to raise a reasonable doubt whether he had come by it honestly.

The judge properly refused to charge in this sweeping language, which was calculated to mislead the jury. He did charge that the jury may convict upon circumstantial as well as direct evidence, but if the former, great caution should be used, and that if, assuming all to be proved that the evidence tends to prove, any other hypothesis than the guilt of the accused is consistent with that proof, then it is insufficient to convict—that the State must prove all the facts necessary to establish the guilt of the prisoner, and it was for the jury to say, taking all the circumstances proved together, whether the accused had or had not raised a reasonable doubt of his guilt—that the true test is, not whether the circumstances proved produce as full conviction as the positive testimony of a single credible witness, but whether they produce moral conviction to the exclusion of every reasonable doubt. He read the passages in Archbold to the jury where this test, and the manner of its application, is explained and elucidated. Crim. Prac. 1 vol. p. 434 marg. p. 134 Waterman's note.

No more correct exposition of the law could have been given, and it was especially appropriate to elaborate it by putting the proposition in different forms as enunciated in different cases, because of the ease with which jurors are misled upon the matter of a conviction upon circumstantial evidence alone.

The first point having been ruled adversely to the accused, and improperly thus ruled, it becomes necessary to reverse the judgment, and remand the cause. Therefore

It is ordered and decreed that the verdict of the jury is set aside and the judgment rendered thereon is reversed and annulled, and the cause is remanded to the lower court for a new trial.

DISSENTING OPINION.

DEBLANC, J. There are circumstances under which the sworn application of a prisoner for a continuance may and should be traversed, on motion of the State Attorney and with the leave of the court. Otherwise, and particularly in the country parishes, where the jury sessions

are held at long intervals, the administration of justice in criminal matters, shall be—if not entirely defeated—at least indefinitely checked and suspended by an unbroken succession of unassailable affidavits.

If though manifestly false, the sworn statement of a murderer, a thief or a perjurer must be taken as true, at what term of any court could they or either of them be tried, unless by their consent? Would they not, at every term, unhesitatingly swear to any fact necessary to postpone and avoid a dreaded trial—to the materiality of the evidence of a parent, a brother, a friend, an accomplice—the cause of whose absence, on the day fixed for the trial, ceases to be a secret to any one, as soon as the affidavit is read.

Which of the prisoner's rights could be either curtailed or impaired by allowing the prosecutor to traverse his suspected declaration? Would it deprive him of compulsory process for obtaining witnesses in his favor, or of the privilege of meeting those witnesses face to face? If, to entitle him to the craved continuance, there is a just, a reasonable, a real cause, the traverse would establish the existence of that cause: if not, the course of justice would not be impeded by a mere technicality, destructive of the interest of the State and of society, useless to those who swear to what is true, useful to those alone who add a perjury to the crime, for the alleged commission of which they are prosecuted.

To test the propriety and justice of a rule which has so long been adhered to, let us suppose an extreme case—for instance, that a prisoner has sworn that Frank is one of his material witnesses—that he was cited, but could not be found—that he is absent from the parish, &c.—and that, on hearing the affidavit read, the clerk and the sheriff were to rise in front of the bench, and inform the court, the first—that no witness of that name was cited—the other, that the unnotified and desired witness is in court, leaning on the prisoner's box; would the judge answer I am bound, by an inflexible rule, to believe the affidavit, and to disbelieve the clerk, the sheriff, the record and my own eyes? Assuredly not.

In regard to applications for a continuance, far from being restricted, the discretion of the judge should be as enlarged as it can properly be, without affecting the constitutional privileges of the prisoner, or reducing those liberal guarantees which should surround his trial. Unless the too rigid rule which prevails in the other States of the Union be slightly bent, in so far only as it impedes the legitimate action of our courts, and so modified as not to embarrass the execution of our laws, the inevitable affidavit shall ever be held up as a shield between the criminal and the sentence, the crime and the penalty, and—beyond the limits of this city—our courts shall be almost powerless to even try, much less to check or punish any violation of our laws.

For this reason, I respectfully dissent from the opinion of my associates.

No. 6843.

THE STATE VS. JACOB THOMAS.

The words "against the peace and dignity of the same" need only conclude those averments in an indictment which are necessary to perfect it as an indictment. The words need not conclude a recital of facts following the essential averments, inserted merely to provide against an apprehended plea of prescription.

Where a party has been indicted and convicted of shooting with intent to murder, and on appeal this court sets the verdict aside, and orders the custody of the accused until the finding of a new bill, the plea of prescription of one year, on the ground that the new bill was not found until after a year from the commission of the offense, will not be maintained.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea*, J.

H. N. Ogden, Attorney General, for the State.

W. F. Kernan for the defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was convicted of the offence of shooting with intent to murder, and sentenced to three years hard labor, from which he appeals. Two errors are assigned in this court; 1. That the indictment does not conclude, 'against the peace and dignity of the same.' 2. The plea of prescription should have been sustained.

The indictment after charging the commission of the offence in the usual formal manner concludes, 'contrary to the form of the statute of the State of Louisiana, in contempt of the authority of said State and against the peace and dignity of the same.' Then follows the statement that a bill of indictment had been previously found, and a trial had under it resulting in a verdict of guilty, which was set aside on appeal, with instructions from this court to hold the defendant in custody to await the finding of a new bill, all of which recitals were made to shew that a bill had been found against the defendant within the year.

The objection of the defendant's counsel is that these recitals vitiate the indictments because they are its concluding words instead of the phrase, 'against the peace' etc. This is not correct. The indictment not only contained the sacramental phrase, but really that phrase concluded it, that is to say, that phrase concluded all the necessary averments to make the indictment complete. What followed was not the indictment proper, but a recital of what had previously taken place and which was made to take the offence out of the statute of limitations. The prosecuting officer had to repel the plea of prescription in that way. Bishop's Crim. Proc. 1. vol. sec. 405.

2. An indictment for this offence was found against the defendant and tried within one year after its commission. On appeal the verdict was set aside. The accused was held in custody as ordered by the appellate court for the purpose of awaiting the finding a new bill, and the new bill, being that under which he was convicted and prayed this

appeal, was not found until a year had elapsed from the commission of the offence. The defendant's counsel urges that the plea of prescription should prevail, and cites authority to shew that where the State has entered a *nolle prosequi* and the new prosecution commences beyond the year, or other time of prescription, the plea must prevail.

The State did not enter a *nol. pros.* in this case. There was not a voluntary discontinuance of the prosecution. There was a trial and the verdict and sentence of that first trial were set aside by this court, and very shortly thereafter the new prosecution was commenced. While fully admitting the correctness of the rule invoked by the defendant, that a plea of prescription will prevail against a new prosecution instituted after the lapse of the time fixed by law for its commencement, when the former prosecution has been terminated by a *nolle prosequi* on the part of the State, the same consequences do not follow when the State did not fail to prosecute, but on the contrary proceeded to trial and obtained a conviction of the defendant. The lower court properly overruled the plea of prescription. State v. Walters, 16 Annual, 400.

Judgment affirmed.

No. 6426.

PAULINE BEAUREGARD VS. THEODORE LEVEAU.

The general mortgage on the property of a tutrix, in favor of her minor child, may, on the advice of a legally constituted family meeting duly homologated, be legally postponed in favor of a special mortgage on the property, executed by the tutrix in order to obtain means to make repairs, and pay taxes on the property, and provide for the proper maintenance, and education of the minor. And where the minor has enjoyed the benefit of the money borrowed by the tutrix on such special mortgage, the minor will be thereafter estopped from interfering with any rights of property acquired under said special mortgage, or derived from its foreclosure.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

Julien A. Seghers and *F. D. Seghers* for plaintiff and appellant.

Charles Louque for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. In February 1873 Madame Marie Beauregard, the widow of Paul Beauregard and mother of plaintiff, presented her petition to the Second Court of this City, alleging that she was under the necessity of borrowing about two thousand dollars to pay the taxes upon her property, to defray the cost of urgent repairs of it, and to pay the expenses of educating and maintaining her only child, but that she could not obtain any loan of money because the only security she had to offer was a mortgage upon her property, and it already stood affected by the general mortgage in favor of her child (the plaintiff) resulting

from her tutrixship. She prayed the convocation of a family meeting to advise upon the propriety of granting a priority of mortgage over the child's general mortgage to any one who would lend her the required sum. The meeting was held—the result of the deliberations was that she was authorized to postpone the general mortgage of her child to the special one in contemplation—the advice of the family meeting was approved by the judge and a decree entered accordingly—and the defendant loaned her the money and she executed the mortgage.

When the child became fifteen years old, she was partially emancipated. Her mother then filed an account of the succession of her deceased husband, shewing an inventory of $9342.00 of which $4300 was the estimated value of the slaves, and the residue notes of different parties and an inconsiderable quantity of furniture. There were some charges on the other side of the account, and a balance struck, admitting an indebtedness to the plaintiff, the only heir, which was increased on her opposition to the account to $3806.50, for which she had judgment. This was in August 1874.

Leveau had already, on the maturity of the note, obtained an order of seizure and sale, and the mortgagor had appealed, but on motion of the plaintiff in the order, her appeal was set aside. The under tutor of the minor then injoined the execution of the order, and his injunction was dissolved. The sale took place and Leveau bought. In Oct. 1874 this suit was instituted. Trial was delayed until the plaintiff became fully emancipated, when she became a party, adopting all the allegations made for her in the original petition.

She alleges that she is a creditor of her mother for the sum and in the manner already set forth, and has a general mortgage upon all of her mother's property to secure the payment of her debt—that the defendant is the possessor of the property upon which her mortgage rests, under his purchase in foreclosure of his own mortgage, and she demands that he pay the judgment against her mother, or surrender the property.

The answer of the defendant is a general denial, and a special plea of all the matters recited already which postponed the mortgage of plaintiff to that of defendant—a denial that these proceedings were otherwise than regular, and if irregular, that they can be treated as absolute nullities, but must be attacked directly—and an allegation that the plaintiff's mortgage was never properly recorded. There was also pleaded *res adjudicata* in the injunction suit of the under tutor, and a charge that the judgment of plaintiff against her mother was collusive and fraudulent.

The case is stronger for defendant than Hickman v. Thompson, 24 Annual, 264 and 26 Annual, 260, cited by his counsel with the wrong volumes and the wrong pages, for in that, there were no proceedings to

postpone the minors' mortgage, nor was the money borrowed for their maintenance, or to keep the property in repair, or to prevent its sale for non-payment of taxes.

In Fontenette v. Veazey, 1 Annual, 236 where the mother and natural tutrix convoked a family meeting for the same purpose as in this case viz to postpone the minors' mortgage, to enable her to borrow money to repair her dwelling which was falling into decay and ruin, it was objected that the legal mortgage of the minors could only be removed in the mode pointed out by the Act of 1830, the Court say;—The act of 1830 presents no obstacle to the release of the tacit mortgage in favor of minors in cases like the present, nor has it reference to such cases. Among the duties which devolve upon tutors are those of providing for the maintenance, health, and personal safety of their wards, in the execution of which the property of the minor himself may be sold, and if necessary, the capital may be used. In the present instance property subject to the minors' mortgage has been sold for purposes for which their own might have been validly alienated.

The property of the paintiff's mother and tutrix in the present case, like that of Fontenette, was in need of repair, and in addition to that need unpaid taxes were hanging over it. The money borrowed was in part wanted for the conservation of the property. Without it, a sale for taxes might have accomplished its alienation, or the further progress of decay would have rendered it uninhabitable, and destroyed or decreased its value by the dilapidation of the houses. Another part of the money borrowed was needed for the education and maintenance of the child whom the mother naturally and laudably desired to fit for the active duties of life. She has received the benefit of the defendant's money, and does not propose either to return it to him, or to pay back or allow to her mother that part of it which was expended exclusively for her benefit. In the account filed by the mother there was no mention of these charges, and it was opposed by the daughter, not because it failed to charge her with her education and maintenance, but because the mother had not charged herself with one half of the price received for a slave sold after the father's death.

The formalities of law were complied with in the proceedings of the family meeting. The relatives and friends of the plaintiff advised the borrowing of the money for needful purposes. There is no pretence that it was applied wrongfully, and it is against law, and yet more against equity and good conscience, that the plaintiff should enjoy the benefits derived from the defendant's loan, and wrest from him the security specially hypothecated to secure its return, without making that return herself.

It is said by plaintiff's counsel that Fontenette's case has been overruled by Fleetwood v. Bordis, 19 Annual, 55. If so it is itself overruled.

Judgment affirmed.

No. 6892.

THE STATE VS. JIM JOHNSON.

A verdict of conviction in a criminal case will not be set aside, and a new trial granted, on the ground that one of the witnesses for the State has made unsworn statements since the trial, which contradict his testimony on the trial; especially when it appears that in the opinion of the judge below the testimony given by other witnesses on the trial fully warranted the conviction.

When an indictment for the larceny of an animal charges the crime of larceny with all the fullness, and precision required by law, the addition of the words "and kill," will be treated as mere surplusage. They will not change the character, or lower the grade of the crime charged.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J. Trial by jury.

H. N. Ogden, Attorney General, for the State.

Kenneth Baillio and *John N. Ogden* for defendant.

The opinion of the court was delivered by

MARR, J. The accused, Jim Johnson, was tried and convicted under an indictment which charges that he "feloniously did take, steal, and carry away and kill, one beef ox, etc., of the value of thirty dollars, of the goods and chattels," etc.

He moved for a new trial on the ground that since the trial he had discovered new and material evidence: "That, since the trial, one Valery Guidry, the principal State witness, told George Reeder and Martin Parks, competent and credible witnesses residing in St. Landry parish, that he knew of his own knowledge that your petitioner did not kill the ox he was charged with killing in the indictment filed against him in this suit, but that he (Valery Guidry) himself had killed the ox which your petitioner was charged with killing as aforesaid; and further that said Guidry told them that he had testified against your petitioner for the purpose of clearing himself."

The bill of exceptions informs us that the motion was overruled on the grounds—

"First—Because the affidavits of the newly-discovered witnesses, alleged in the application to be residents of the parish of St. Landry, were not produced or their absence accounted for.

"Second—Because the newly-discovered evidence went to impeach the character and credit of the witness, Valery Guidry.

"Third—Because, even granting that the witnesses had testified as set forth in the application, and thereby impeached the witness Guidry, the State could still have rested its case on the testimony of other witnesses testifying in the case, and whose names appear upon the reverse of the indictment."

The accused was sentenced to the Penitentiary for two years, and he has appealed.

As a general rule, we think new trials should not be granted on the unsupported affidavit of the party convicted that he could prove statements made by one of the witnesses, after the conviction, which would tend to show a state of facts different from that to which he had testified as a witness on the trial. Much more importance is due to the testimony of a witness given in open court, under the solemnity and sanction of an oath, on the trial of a cause, than to any statements which he may have made on some other occasion, either before or after the trial.

The newly-discovered evidence would simply have shown that Guidry had made, not under oath, statements contradicting those which he made as a witness, on the trial; but this would not prove that he had testified falsely on the trial.

The names of five witnesses are on the reverse of the indictment, one of whom is the person stated in the indictment to have been the owner of the ox; and, while we are not informed as to what facts they proved or testified to, we may fairly infer, and we must presume from the statements of the judge, as set forth in the bill of exceptions, that the proof by the other witnesses, without the testimony of Guidry, sufficed to warrant the verdict. It would be quite improper for a judge to grant a new trial on the ground of newly-discovered evidence which, at best, would show that one of the witnesses was unworthy of belief, when there were four other witnesses, whose testimony is not impeached, and who, in the opinion of the judge who heard them, sufficiently proved the guilt of the accused.

The offense charged in the indictment is petty larceny, the punishment of which is imprisonment in the parish prison, or in the Penitentiary, at the discretion of the court, for not more than two years. Acts of 1874, p. 223, sec. 8.

There is an offense of a lower grade, that is, the wanton or malicious killing of certain domestic animals, punishable by fine not exceeding $200, or imprisonment not exceeding six months, and the payment to the owner of the value of the animal killed. But that is not the offense charged in the indictment, which is petty larceny, set out in the most precise legal terms, "feloniously did take, steal, and carry away," etc. The addition of the words "and kill" does not change the character of the offense. These two words might be stricken out, for they are mere surplusage. No matter what became of the ox, the offense was complete by the felonious taking, stealing, and carrying away. It may be that Guidry testified falsely; and that he alone, of all the witnesses, swore to the killing of the ox. The accused does not state in his affidavit that he expects to prove by any witness that he did not feloniously take, steal, and carry "away" the ox; and if it were true, and had been proven on the trial, that he did not kill the ox, but that Guidry did, it might still be

true, and it might have been proven by the other witnesses, that the accused did "feloniously take, steal, and carry away" the ox, which Guidry killed. The killing of the animal stolen is not an ingredient in the crime of larceny; and the punishment imposed upon the accused by the sentence of the court is that prescribed by the statute for the offense charged in the indictment, petty larceny.

The district court did not err in refusing the new trial; and the judgment is therefore affirmed with costs.

No. 6865.

STATE EX REL. JULIA A. VENTRISS VS. THE PARISH JUDGE OF IBERVILLE PARISH.

A mandamus will issue to compel the judge of a lower court to grant an appeal from any interlocutory decree of the court which works an irreparable injury to the party praying for the appeal.

APPLICATION for a mandamus.

Barrow & Pope for the relator.

Respondent for himself.

The opinion of the court was delivered by

MANNING, C. J. A partition had been ordered in a suit in the parish court of Iberville, wherein the relator is plaintiff and the heirs of J. N. Brown are defendants, and the parties were referred to a notary to proceed therewith. After forming the active and passive masses of the succession, and stating the manner of partition by shewing the sums due to and from each, Isaac D. Brown, one of the parties, presented written objections and asked that they be referred to the court for decision, which the notary refused to do, considering them not material. Thereupon the objector obtained from the judge an order directing the notary to suspend further proceedings in the partition until his objections could be heard and determined by the court, and the relator then demanded that the notary should proceed with the partition, but the notary refused to proceed further, and returned his proces verbal in obedience to the mandate of the judge.

The plaintiff in the partition suit (relator here) then moved the court to homologate the partition as set forth in the proces verbal of the notary. The judge refused to permit her to file the motion, and ordered that the filing which had been made of the proces verbal be stricken therefrom, and the proces verbal be returned to the notary. The relator then prayed an appeal from the orders then made,

one of which was a refusal of the prayer for citation to the heirs defendants to shew cause why the partition should not be homologated. It was refused. The relator then applied for a mandamus, which being granted, the judge filed his answer, and it is now before us.

The cause is in this anomalous condition. The notary can not proceed to the completion of the partition, because the judge has ordered him to stop until he can hear and pass on certain objections made thereto. The judge can not hear and pass upon these objections, because he has ordered the proces verbal and the objections to be taken out of his court and returned to the notary.

Obviously there is a dead lock in the partition suit, and if the proceedings remain in *statu quo*, there never can be any thing more done towards effecting the purpose for which the suit was brought. Herein lies the irreparable injury to the relator.

The judge grounded his order to send back the proces verbal on the assumption that the notary had acted in contempt of his order not to proceed further in the partition until the objections could be heard. He acted on a misconception which would have been corrected by reading the proces verbal of the notary. That officer desisted when he was ordered to desist, but it appears the plaintiff thought he had gone far enough in the partition, before the order to desist was made, to make it sufficiently complete for homologation, since she did move for such homologation.

The only way to disentangle the suit is to grant the appeal. Therefore

It is ordered and decreed that the mandamus heretofore granted be made peremptory, and the prohibition be maintained at the respondent's costs.

No. 6767.

STATE EX REL. J. B. MARTIN ET AL. VS. THE N. O. & CARROLLTON R. R. CO.

A legal by-law of a corporation which provides that no shares of its stock shall be transferred on its books, until the certificate thereof has been surrendered to its president, or shown to be lost, is binding on all its stockholders, and their heirs. Before the heirs of a deceased stockholder can compel the corporation to transfer shares, or pay accrued dividends to them, they must comply with the requirements of the by-laws.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Louque & Fernandez for relators and appellants.

Sam. P. Blanc and *L. E. Simonds* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. Relators allege themselves to be the pure and simple

heirs of Dr. E. Martin, duly recognized as such by the Second District Court of Orleans, which ordered them, as such, to be put in possession of all the effects of said deceased. They further allege that E. Martin was at his death the owner of six shares of the capital stock of the New Orleans and Carrollton Railroad Company, and that there were accrued and unpaid dividends due upon said stock to the amount of $460. They allege that they have demanded of said company the payment of said dividends, and the transfer of said shares on the books of the company from the name of E. Martin to that of relators; that said company, in violation of its charter and relators' rights, refuses to pay said dividends, transfer said stock, or issue them certificate therefor. Wherefore they pray for a mandamus to compel compliance with their demands.

Respondent excepted to relators' right to proceed by mandamus, and filed a sworn answer, setting forth the facts that there did stand on the books six shares of stock in the name of E. Martin, with $462 accrued dividends thereon, but averring that said E. Martin had pledged his certificate therefor to one Victor Ronmage, of which pledge the respondents had been notified. That by the thirteenth section of respondent's by-laws it is expressly provided that "no transfer of stock can be made, except on the books of the company, by the surrender of the certificate thereof to the president, who shall see that the same be canceled by writing 'canceled' prominently across the face thereof and the erasure of the president's signature therefrom before issuing a new one," etc. If this by-law is not in conflict with the charter or otherwise illegal, it is binding on all the stockholders *and their heirs*. In other words, it is *for them the law*. There is no pretense that the by-law is contrary to the charter or otherwise illegal. There is no pretense that the certificate issued to E. Martin is lost; so that it would fall under the provision made for such case. What attitude then do plaintiffs occupy? They claim as heirs of E. Martin, a stockholder, and seek by mandamus not only to recover a sum of money, but to compel the officers of the company to violate the law prescribing their duties. The law which governs them says *no transfer of stock shall be made, no new certificate shall be issued* (except in case of loss) until the original certificate is surrendered and canceled. The Code of Practice, article 835, says a writ of mandamus may be directed to corporations "to compel them * * * to perform the * * * duties required by their charters." It would be a strange abuse of the writ to use it to compel them "to violate the duties required by their charters." It is manifest relators have mistaken their remedy.

The judgment below rejected their application, and it is affirmed, with costs of both courts to be paid by relators.

No. 6917.

R. R. BARROW VS. JULES LAPENE. JOHN B. PITMAN, INTERVENOR.

A defendant who pleads certain exceptions to the suit against him, is, so far as the exceptions are concerned, a plaintiff, and hence must prove the exceptions.

Thus, when the purchaser of property at a tax-sale, who is sued by the former owner for the recovery of the property, excepts, that the plaintiff must re-imburse him what he has paid for the property, and which inured to the benefit of the plaintiff, before the latter can demand the recovery of the property, such a purchaser must in order to maintain his exception show the precise amount that he is entitled to be re-imbursed.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie*, J.

Goode & Winder and *Illsley & Son* for plaintiff and appellant.

L. F. Suthron for defendant.

J. S. Whitaker for intervenor.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues to annul a tax sale to defendant of two sugar plantations in Terrebonne, alleged to be worth $150,000. The nullities and illegalities alleged are numerous and formidable. Among them, it is charged, that there were no taxes due on said property at the time of its sale for taxes—the same having been paid by plaintiff, who held the collector's receipt therefor. Pitman, a mortgaged creditor of Barrow, intervened and claims right to redeem.

The defendant filed numerous exceptions to plaintiff's action, only two of which are insisted upon, to wit:

First—That plaintiff could not institute this suit until he had made a tender to respondent of the full amount of taxes paid by him.

Second—That plaintiff's petition discloses no cause of action.

We are utterly unable to appreciate the argument of defendant in support of this second ground of exception. If a tithe of the illegalities and nullities charged by plaintiff exists (and for the purposes of this exception his allegations must be taken as true), defendant's title is hopelessly bad. There are abundant causes of action *alleged*.

On the trial of these exceptions, no proof was offered or administered by either party. It was the duty of the defendant excepting to tender proof of the grounds of his exception, if they were not apparent from the record. Defendant was plaintiff in exception. He did not even allege, much less prove, what (if any) amount of taxes due by plaintiff, and privileged, on said property had been paid by him. Plaintiff charged that there were none.

We think it to be well settled that a party to a judicial or tax sale, seeking to annul it, must first tender to the purchaser re-imbursement of the sums paid by him in discharge of his bid, and which inured to the

benefit of the attacking party. To allow the seized debtor to take back his property without this re-imbursement would be to violate elementary principles of law and equity. And if this want of tender is pleaded *in limine*, and the amount is apparent or made to appear, plaintiff should not be allowed to sue until it is tendered. See Brown vs. Bouny et al., lately decided. Also 24 An. 324. But before such an exception can be sustained it must surely be made to appear to the court that there is re-imbursement due. There is no proof in this record from which it can be properly inferred. The exception should have been overruled—leaving the defendant to set up in his answers a claim for re-imbursement of the taxes paid (if any), and to be maintained in possession until re-imbursed. It is manifest that at this stage no judgment can be rendered on intervenor's demand.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered that defendant's exceptions be overruled, without prejudice to his rights to demand re-imbursement, in case of eviction, of such sums as he may have lawfully paid as the price of the adjudication to him, and that this cause be remanded, as to all parties, to be proceeded with according to law, defendant and appellee paying costs of appeal.

No. 6911.

THE STATE VS. ALFRED FORD.

It is so absolutely necessary to the validity of criminal proceedings and the verdict found thereon that a plea on his behalf should be filed to the indictment found against the accused, that the failure to file such a plea will vitiate the proceedings, and justify the setting aside of the verdict.

The presence of the accused, at the time the verdict against him for a felonious offense is received, is essential to the validity of the verdict.

Under an indictment for one offense a legal conviction can only be had for another offense of less magnitude, when the latter offense is of the same nature, or kind, as the one charged. Thus, under an indictment for burglary, a verdict convicting the accused of petit larceny is invalid.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie*, J.

H. N. Ogden, Attorney General, for the State.

Thos. L. Winder for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indicted for burglary—for burglary and grand larceny as he alleges—was convicted of petty larceny—and was sentenced to two years' confinement in the Penitentiary, and appeals from that judgment.

The assignment of errors in this court states two grounds for setting aside the verdict. The first is, that no plea was ever entered by the accused, and the second, that he was not in court from the time of his arraignment until he was sentenced, and therefore was not present during the trial.

The record informs us that the accused appeared at the bar, and was arraigned, and through counsel asked permission of the court to withhold plea, which was granted. The trial was on Oct. 6, if the transcript of appeal be correct, when the jury was empanelled, the case tried, and the verdict rendered. On the 18th., "the accused per counsel appeared in court, and after leave, filed a motion for a new trial." We do not find among the grounds then set forth, that the accused was not present at the trial, nor is there any explanation of the cause of this extraordinary departure from the well-settled rules governing criminal procedure. The counsel for the prisoner does not appear to have demanded his presence, and to have been refused by the judge, nor does the judge appear to have ordered that he be produced in court.

It is so essential that a plea should be made to the indictment that its absence, of itself, vitiates the trial. It can not be dispensed with by request of the prisoner. It can not be omitted even if he refuses to make it. Our law provides that if he stands mute, and will not answer to the indictment, the plea of not guilty shall be entered for him. Rev. Stats. 1870 sec. 996.

The absence of the prisoner during the whole of the trial, and particularly his absence at the rendition of the verdict is more than an irregularity. It is fatal to the legality of the trial. It is of universal requirement that a person who is tried for a felony must be present when the verdict is received. People v. Perkins, 1. Wend. 91.

The mode of conducting the formal parts of a judicial public prosecution for crime has been greatly changed, more because of an unwise contempt of ancient forms than through alterations of the law. Where these changes have been ordained of law, observance of them is of necessity. But a loose practice has latterly prevailed of omitting all those formalities which, until very modern times, were thought becoming in a court to observe when about to proceed in an inquisition, the effect of which may be the deprivation of the life or liberty of the party accused. The solemnity of an arraignment after the ancient mode has its uses. The propriety of requiring the accused to deliver his plea *ore tenus*, with uplifted hand, is demonstrated by its omission in this case. Evidently it was forgotten that he had not pleaded, and it would not have been forgotten, had the time honoured ceremony been duly gone through with in all its parts. Curiously enough, the only part of the ancient ritual, which in actual practice is retained, is the

question, 'how will you be tried,' which, since the abolition of all the common law methods of trial but that of jury, has lost its significance.

The prisoner moved in arrest of judgment, that it could not be rendered against him on a conviction of petty larceny under this indictment, because he had not been prosecuted for that offence, and the verdict is not responsive to the charge as laid in the indictment.

The indictment contains but one count, and it is well settled that only one substantive charge can be laid in each count. Thus it has been held, where an indictment, containing one count, charges the defendant with rude behavior in a meeting-house, and with disturbing public worship, these two distinct offences, joined in the same count, was fatal to the indictment. Commonwealth v. Symond, 2 Mass. 163. Two distinct offences, requiring different punishments, can not be charged in the same count. Such an indictment is defective for duplicity, and a conviction upon it will be reversed for error. Reed v. the People 1. Parker's Crim. Rep. 481. Burglary and grand larceny therefore can not be included in the same count, but this indictment charges but one offence. Of course it is no objection to an indictment that two or more offences, upon which the same or a similar judgment may be given, are contained in different counts.

Where one has been indicted for an offence, he may be convicted of one of less magnitude, provided the offences be of the same nature or class; for example, upon an indictment for murder, the prisoner may be convicted of manslaughter—upon an indictment for an assault with a dangerous weapon, or with intent to kill, there may be a conviction for an assault. The reason is, that these offences belong to the same class —the same kind of evidence is applicable to the one as to the other. They differ in degree, and not in kind. If the evidence is insufficient to warrant a conviction for the offence of greater magnitude, it may support a conviction for that of lesser magnitude, and judgment upon such a verdict has long been allowed under the modern criminal law.

The offence of burglary is quite distinct from that of larceny. They belong to different families of crime, and it would be an enlargement of the rule, not warranted by authority or precedent, to hold good a conviction for one of them upon an indictment for the other. The test is that the two offences—the one charged in the indictment, and the other contained in the verdict—must be of the same generic class, where the indictment for the greater contains all the necessary substantive allegations necessary to let in proof of the lesser, so that if the proof fails to establish all the allegations of the indictment sufficiently to warrant a conviction for the offence therein described, but at the same time shews that the accused is guilty of a substantial offence, necessarily contained in the terms of the indictment, the jury may convict of the minor offence.

The judge who tried the cause was of opinion that the conviction for petty larceny under this indictment for burglary was not good, but as the State had no appeal, conceived it to be his duty to reject the motion in arrest of judgment, and grant the appeal to the prisoner.

There has been no lawful trial of the accused. Therefore

It is ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment rendered thereon be annulled and reversed, and that this cause be remanded to the lower court for a new trial of the prisoner, who is ordered to be held in custody to await the same.

No. 6867.

STATE EX REL. W. C. WILLIAMSON VS. THE JUDGE OF THE FOURTEENTH JUDICIAL DISTRICT.

Where the defendant in an executory proceeding enjoins the seizure and sale, on the ground that the mortgage debt is prescribed, he is dispensed from the necessity of giving a bond.

In a suspensive appeal from a judgment dissolving an injunction without damages, the amount of the appeal bond need only exceed by one half the *costs*, which the appellant was condemned by the judgment to pay.

APPLICATION for a mandamus.

Cobb & Gunby for relator.

R. W. & R. Richardson for respondent.

The opinion of the court was delivered by

DEBLANC, J. The executors of J. P. Crosby applied for and obtained an order of seizure and sale of property mortgaged to secure a note of $4013 subscribed by R. C. Williamson and J. C. Hutson.

The execution of that order was enjoined by said Williamson, on the ground that the action for the recovery of the debt evidenced by said note is barred by prescription.

The injunction having been granted for one of the causes specified in art. 739 of the C. P. no security was required from the defendant in the proceeding for a seizure and sale.

The injunction so taken was dissolved without damages, and—on motion of Williamson's counsel—a suspensive or devolutive appeal was allowed him in the alternative—the bond to carry up the latter to be for one hundred dollars, and the former of a sum one half over and above the amount of the note hereinbefore mentioned.

He refused to give either of said bonds, and—for the suspensive appeal—tendered one of five hundred dollars. The bond so tendered

was refused, and relator seeks, by mandamus, to compel the judge to reduce to five hundred dollars the amount of the bond to be furnished by him for a suspensive appeal.

In answer to the mandamus, the judge said:

1st. That, in his opinion, when an injunction has been obtained, under article 739, C. P., restraining the execution of a writ of seizure and sale, and has been dissolved without damages, no discretionary power is vested in the judge to fix the amount of a suspensive appeal bond, but that it is to be governed by article 575 C. P.

2d. That such a judgment is in the nature of a *nonsuit*, and in effect decides that the order of seizure was properly granted, and that the sheriff should proceed to collect the debt by a sale of the mortgaged property. The injunction is merely an accessory remedy. There is no other judgment to be executed except that ordering the sale of the property enjoined, and it is to prevent this that a suspensive appeal is asked for.

Two distinct decrees now stand against Williamson—an order of seizure and sale, and that dissolving the injunction arresting the execution of said order: both of said decrees are appealable—the last alone has been appealed from and that one is only for costs—which, considering the amount of the bond fixed for a devolutive appeal, could not have exceeded the sum of one hundred dollars. The bond tendered by relator is for five times that amount.

The Code of Practice leaves—it seems—no doubt on this subject: it provides that "the appeal taken within ten days after the judgment &c. shall stay execution, if the appellant gives his obligation for a sum exceeding by one half the amount of the judgment. In this case, Williamson has appealed from a decree condemning him to pay the costs of the suit, and the bond required to suspend the execution of that decree can neither be measured nor fixed by the amount of the mortgage note, or by reference to the order of seizure and sale from which no appeal has been taken.

As to the parties' right to an appeal, and as to the form, the conditions, the effects of an appeal, the constitution and the law make no distinction between those taken from judgments maintaining or dissolving injunctions granted with or without bond, and we can make none. The reasons relied upon by a majority of the court, for discriminating between such appeals in "State ex rel. Mrs. Sarah Richardson vs. the Judge of the 14th District," do not remove our conviction that the decision of said court in "State ex rel. W. & H. Stackhouse vs. the Judge of the 5th District," contains a correct interpretation of the law on this subject.

21 A. 152. 25 A. 653. 19 L. R. 171. 29 A. 793.

The law is so clear, so free from doubt, that its letter can not be disregarded, under the pretext of pursuing its spirit. It may be that it ought to be amended or changed, that—as it is—it leaves the door too wide opened to groundless defences, to the litigation often resorted to to gain delay; but—until changed or amended, it must be enforced as enacted.

It is, therefore, ordered that the mandamus issued in this case be and is hereby made peremptory at defendant's costs.

No. 5453.

MIGUEL AVENDANO VS. I. W. ARTHUR & CO.

Where the evidence shows that the parties intended, originally, that the contract of lease should be reduced to writing, neither will be bound until it is signed by both.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

George L. Bright for plaintiff and appellee.

Singleton & Browne for defendants and appellants.

The opinion of the court was delivered by

MARR, J. This suit was brought on the sixteenth May, 1873, with the usual provisional seizure, to recover the balance of rent alleged to be due, and to become due, on a three-years' lease, beginning first October, 1871, ending thirtieth September, 1874, at $266.66 2-3 per month, payable on the first of each and every month.

The defendants denied that they had made a lease for three years as alleged. They also answered that:

"These defendants specially deny that they ever took a lease of the premises for the time alleged in the petition. Such a lease was spoken of between the parties in interest, and these defendants would have made such a lease had the conditions agreed on been complied with. These defendants stated that they would make a lease for the time specified in the petition provided the premises were put in good, genteel, and tenantable condition. That the plaintiff neglected and refused to put the premises in such condition, and these defendants refused to sign the lease and monthly notes for the rent thereof presented by the plaintiff to the defendants to be signed by these defendants for the purpose of consummating and completing said contemplated lease. That these defendants specially deny that said contemplated lease (as alleged in the petition) was ever in fact entered into, but these defendants have continued

to occupy said leased premises by operation of law; viz., by the month only."

The judgment of the district court was in favor of plaintiff, with landlord's lien and privilege on the property provisionally seized for arrearages, and for rent to become due for eighteen months; that is, for one month, due first of October, 1872: for seven months, due on the first day of each month from June to December, 1873, inclusive; and for ten months, due on the first day of each month from January to October, 1874, inclusive, subject to a credit for rent for one month paid after the institution of the suit. From this judgment defendants appealed.

The term commenced on the first of October, 1871; but the premises were vacant, and defendants, with the permission of plaintiff, went into possession in September. Defendants did not sign either a lease, or notes for the monthly rent. Up to May, 1873, when the rent would have amounted to $5066 66⅔, payments had been made amounting to $4800, leaving $266 66⅔, or the rent for one month, unpaid at the time suit was brought. A receipt was introduced showing that a payment on the sixteenth November, 1872, was imputed to the rent due first of October, 1872; so that the defendants at the time the suit was brought owed for the month of April, due first of May, 1873.

On the thirty-first of August, 1872, defendants wrote to plaintiff that they did not want the property at the rate they had been paying; and that an entire new ground floor and a new covering to the shed were necessary to their continued occupancy on any terms. Plaintiff answered that defendants had rented for three years from first of October, 1871; and that they would be required to comply with their contract; that he would make any repairs the law required him to make; and that he was then having a new slate roof put on, "although you never made any request to repair it, and we have never refused to make any necessary repairs."

Arthur says the slate roof had been put on "previous to my writing this letter. I had called Mr. Avendano's attention to the shed roof repeatedly, but I never wrote to him and made a special statement until that time."

The day after the suit was brought, which interfered with the compromise which Arthur & Co. were making with their creditors, defendants, through their attorneys, offered to pay the rent due, and to secure that to become due, up to first of October, 1873: and they added that defendants would not recognize the lease beyond that date, and would go into bankruptcy first. We find in the record no answer to this.

On the tenth of July, 1873, defendants gave plaintiff formal notice in writing that they would vacate the store on the last day of that month; and that they would be ready to deliver possession on the first

day of August. Plaintiff answered that when defendants tendered the leased property he would rent it for their account, and credit them with the proceeds, if any; and that he would go on with the suit.

On the thirty-first July defendants wrote to plaintiff, surrendering the property and tendering the keys; and plaintiff answered that he would, if possible, rent the store, and credit defendants with the proceeds, without prejudice to the pending suit.

The theory of plaintiff is, that defendants owe the rent for seventeen months, up to first October, 1874. On the theory of defendants they would owe for three months only, due first of June, first of July, first of August, 1873, respectively.

Theodore Avendano, who was the agent of Miguel Avendano in all this business, was a witness in behalf of plaintiff. Being asked: "State to the court all you know relative to making the lease to I. W. Arthur & Co," he answered:

"It was in the month of July, 1871. Mr. Arthur wanted to rent the store corner of Common and Front streets. I went to his office and asked him a price for the same. He offered me $3200 per annum for three years. I agreed to that, and then wrote the lease and notes, and sent them to his office to be signed. He promised to sign them. I notified him afterward the lease had not been signed, nor the notes. I sent for them several times by my clerk. He always answered he had no time, but would sign the lease. After he occupied the store, and after many repeated calls for the lease and notes, he came to my office and said he did not want to sign the notes for the whole term of the lease, only wanted to sign them by the year. I told him he could do so for one year, and then the other notes at the end of every year. That is the principal thing about the lease."

Being asked if he had made any written memorandum of the fact, he answered that he had written, the next day, to his brother, Miguel Avendano, who was in Europe. A press copy of this letter, dated July 17, 1871, was produced. It states the renting of this and another store, and the rates, and that the terms would begin the first of October. After speaking of the good credit of the parties, the writer adds: "The leases will be signed hereafter."

On cross-examination this witness says Mr. Arthur went into the store about one month or two before the beginning of the lease.

Question: "The lease was to be reduced to writing?" "Yes."

Arthur states why he refused to sign the lease and notes. "The lease and notes were brought into the office, I think, in the month of October, early. I was not present when they were brought in. When the young man called I told him I should have to see Mr. Avendano; I had complaints to make. I soon discovered the leakiness of the roofs.

I had not at first, and I found after I moved in that Mr. Avendano would do nothing toward fixing the house that was not most specially required. He agreed to put the house in first-rate condition for a store. I felt that he had not done his duty as a landlord. On the fourth day of November I had then resolved that I was not properly dealt with, and I never would sign the lease, and I took them to Mr. Avendano, and so told him that he did not do his duty as a landlord, and I should not and would not sign them, and I laid them down before him on his own desk at his own office; when I laid them on his own desk at his office this (one of the unsigned rent notes) was among the other notes with the lease. * * * * * * * * I told Mr. Avendano I was in the house and had spent nearly a thousand dollars in fitting it up, and saw no means of vacating it then, and would probably have to remain for the season, the first year. He would agree to no specific time, and I would sign no lease, and gave no notes; and I left the lease and notes on his desk in his office, and have not seen them since."

And again, he says: "I don't remember ever telling him about agreeing to sign notes at all other than I was to give a written lease of three years: and after I went in and found the manner in which he had acted, I resolved not to sign the lease at all, or give any notes. I told him I should probably have to stay for one year, as I spent about a thousand dollars in fitting it up, but that I would agree to no specific time or give no notes."

Xiques, clerk of Avendano, who seems to have collected all the rent paid before the suit was brought, except that for the first month, says he wrote the lease and thirty-six notes for the monthly rent, and he took them to Mr. Arthur to be signed. "The first time I saw his book-keeper, or clerk, and left the lease and notes there, and I came back after, and the clerk told me that Mr. Arthur wanted to see Mr. Avendano, and would only sign notes for one year at a time. I came down and saw Mr. Arthur, who told me the same thing."

He says he went again to collect and get the lease and rent notes, "and he answered me that he had seen Mr. Avendano. That's the last time I asked him about the lease or the notes."

Again he says that he asked Mr. Arthur for the lease and the notes, "and sometimes he told me he would sign it, before he told me he had seen Mr. Avendano. The last time I asked him he told me he had seen Mr. Avendano, and I never asked him any more."

Avendano never went to collect the rent. The first payment was on the fourth November, 1871, by check of that date. The receipt for this is in the handwriting of Avendano; and he says he wrote it at his office, and handed it to Mr. Arthur. It is written on the back of that one of the thirty-six notes which would have represented the rent for the

month of October, and would have been payable first of November if it had been signed. The notes, therefore, must have been in the possession of Avendano at his office, at that date, when the rent for the first month was exigible and was paid.

The testimony of Arthur conflicts with that of Avendano as to the leaving of the lease and notes with Avendano. This may well be, and it should be attributed to the degree of importance which they respectively attached to what actually occurred: to the difference in the impression made upon the mind of the one and of the other at the time, and to natural disparity in the power of recollection. The testimony of Arthur and of Xiques satisfies us that on the fourth of November, 1871, Arthur had finally determined that he would not sign the lease or the notes: that he so informed Avendano: that he left the lease and the notes at the office of Avendano at that time: and that he was not afterward asked to sign either lease or notes, except, perhaps, once by Xiques when Arthur told him he had seen Mr. Avendano.

The proof shows that the store and shed were not in good condition. The shed leaked so that whenever it rained goods that had been sold and put out marked for shipment had to be put back into the store. The roof of the store leaked so that it was necessary to put buckets to catch the water; and one leak was over the office. The ground floor was patched in several places, and in rolling out goods it broke in other places. The office had been taken down, and Arthur had part of it put up himself. Avendano had the roof of the store patched, but it leaked the first hard rain afterward. The testimony of Avendano shows that the store and shed were covered with a composition roofing, and that they leaked. He was asked: "Was it not a leaky, worthless shed?" and he answered: "I can only say of that kind, they are always leaky."

Arthur says: "In the summer of 1871 Mr. Avendano and myself had several conversations in relation to the store, and I think it was the last of July or August that we talked over the terms, when the understanding was that I was to take the store for three years, which I was to give a WRITTEN LEASE at the rate of $3200 per annum."

On cross-examination being asked, "You did rent it (the store) for three years?" he answered, "That was our agreement. It was to be rented and a regular lease signed."

Whatever discrepancies there may be in the testimony in other respects, there is none as to this: that both parties understood, at the time they were negotiating, and intended originally, that a lease in writing should be executed. Arthur and Avendano concur in this; and it is manifest from Avendano's contemporaneous letter to his brother Miguel, and his repeated efforts, up to the fourth of November, 1871, to have the lease and notes signed by Arthur. The business was of such

importance to both, that one would naturally suppose that two business men, merchants, would not have been willing to leave it to the uncertainties of a mere verbal agreement; and that they would both understand, without any express stipulation to that effect, that a lease for three years, at a rental aggregating $9600, should be reduced to writing.

Arthur says when he went into the store in September, before the commencement of the term, Avendano was having repairs made. Of course he could not know then what repairs would actually be made. It may be that Avendano had all the repairs made that he considered necessary, and yet Arthur may have expected that more would be done. He expended a considerable sum in fitting up an office, and put a large stock of groceries in the store, so that he could not have moved out without serious inconvenience and loss. The condition of the ground floor, and of the roof of the main building and of the shed, was not such as the business for which Arthur rented the premises required, and it is not strange that he withheld his final consent to the contract so long as they remained in that condition.

However this may have been, the fact remains that the lease and the notes were not signed; and this fact brings the case within the rule, coeval with our jurisprudence, and recognized by us in Fredericks vs. Fasnacht, decided on the seventeenth of December, 1877, that, "Where it has been agreed that the contract shall be reduced to writing, until it is actually written and signed by all parties either may retract." Villeré vs. Brognier, 3 Mart. 349; Des Boulets vs. Gravier, 1 N. S. 422; Wells vs. Dill, 1 N. S. 592; Blocker vs. Tillman, 4 La. 80.

The true distinction is plainly laid down in Carlin vs. Harding, 10 La. 225. Where there is a complete verbal contract, and the parties afterward agree that it shall be reduced to writing, the verbal contract is valid and obligatory, although the subsequent, independent agreement to have it reduced to writing should not be carried into effect.

In Des Boulets vs. Gravier the principal question was, as stated by Judge Porter, "whether the vendee of a movable, where the contract is to be reduced to writing, can retract before the act is signed, and that although he should be in possession of the thing purchased." The court said:

"The authorities are express that if the parties agree that the contract is to be reduced to writing, it is not complete until the writing is made and signed. * * * The fact of possession is one of the circumstances which, coupled with others, would have made the sale complete, if there had been no agreement to put it in writing. When that agreement exists, the necessity of complying with it arises from the parties having added that condition to the other things required to make a legal contract."

In Blocker vs. Tillman Judge Martin stated the case thus: "The defendant, having taken a warehouse, proposed to the plaintiff to take charge of it for which it was agreed he should have one third of the net profits. The offer being accepted, the contract was reduced to writing by a third person, subscribed by the plaintiff, and delivered to the defendant, who agreed thereto and promised to sign and deliver it to a third person to keep. Depending on this the plaintiff entered into his duties, and faithfully attended to the affairs of the concern till he was dismissed by the defendant, who placed the warehouse in charge of another."

Delivering the opinion of the court, Judge Martin said:

"The parties contemplated a written contract, to be deposited with a third person, for their common security. Nothing shows in either of them an intention to be bound by a parol contract. The plaintiff himself subscribed the agreement, and gave time to the defendant to do the like. Till the writing was perfected by the signature of all the parties, it was but an inchoate one, and either had the right of recanting. The defendant, in doing so, availed himself of a legal right."

Plaintiff and defendant understood, contemplated, and intended, originally, that there should be a contract of lease in writing. Their final consent was in suspense until that writing was signed. As it never was signed there never was a complete contract of lease for three years between them, nor was there any agreement fixing a lease for a specific term. Arthur & Co. were lessees for an uncertain term; and either party had the right to put an end to it at any time, by giving the other notice in writing, fifteen days before the expiration of the current month. R. C. C. 2686. By the notice of the tenth of July Arthur & Co. did effectually put an end to it on the thirty-first of July, 1873. The evidence shows that they had the legal right to do this; and their liability for the rent can not be extended beyond that date. The numerous payments at the rate of $266 66⅔ per month sufficiently fixed that as the monthly rent; and by the dealing of the parties that rate became obligatory on both, so long as the lease continued.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be so amended as to reject the demand of the plaintiff for all the rent anterior to that due and payable on the first day of June, 1873, and for all subsequent to that due and payable on the first August, 1873. That in lieu of the several sums by said judgment awarded to plaintiff, there be substituted and allowed to him the rent for three months only. That is to say, that plaintiff, appellee, have and recover of defendants, appellants, two hundred and sixty-six dollars sixty-six and two thirds cents ($266 66⅔), with interest at the rate of five per cent per annum from the first day of June, 1873, until final payment; the

like sum, with like interest, from the first day of July, 1873; and the like sum, with like interest, from the first day of August, 1873. That thus amended the judgment appealed from be affirmed, and that plaintiff, appellee, pay the costs of this appeal.

CONCURRING OPINION.

EGAN, J. I concur in the decree in this case, but prefer to put my concurrence upon the ground that the property leased was not in a condition, nor put in a condition within a reasonable time, to serve the uses for which it was leased; that the lessor was in fault in this respect, and the lessees had, therefore, and under the law, the right to withdraw from the contract and to refuse to sign the written lease and notes for the lease price, and did so refuse, and returned the lease and notes to the plaintiff unsigned within a very short time, so soon as they discovered the defects in the roof and other parts of the building; and at the same time informed the lessor that they would not take the leased premises under the terms and for the time of the original contract; but, being in the building with their stock of goods, and the business season being upon them, they would be compelled to keep the property for the remainder of the season; and the plaintiff thereupon acquiesced in their refusal to sign the lease and notes for three years and received monthly rent from them without requiring them to sign the lease or notes, or to agree to a lease for any other or longer time than that for which they said they would take it, thus in effect and law abrogating the old and substituting a new contract.

CONCURRING OPINION.

MANNING, C. J. I also prefer to rest my concurrence on the grounds stated by Mr. Justice Egan.

No. 6927.

HYPOLITE GALLY VS. MICHAEL DOWLING, CURATOR.

A mortgage creditor has the legal right to proceed by executory process, in a court of ordinary jurisdiction, against any property of a succession to which his mortgage attaches, and subject the proceeds of the property to the satisfaction of his debt.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie*, J.

E. W. Blake and *T. A. Flanagan* for defendant and appellant.

F. S. Goode for plaintiff and appellee.

The opinion of the court was delivered by

MARR, J. Hypolite Gally sold a certain property on the Bayou La-

fourche to Villiers and Ewing; and for the credit part of the price they gave him their joint and several promissory notes, payable to their own order and by them indorsed in blank, secured by vendor's mortgage.

Ewing died; and at succession sale Gally purchased and became the owner of his undivided half of the property. Subsequently Villiers died, and Michael Dowling was appointed curator of his succession. A large portion of the price remaining unpaid, Gally, on the sixteenth of December, 1876, obtained an order of seizure and sale, and the proper notices were served on Dowling, the curator.

The sheriff advertised the property for sale on the seventeenth of February, and on the sixteenth of February Jules A. Blanc, claiming to be a mortgage creditor, filed a petition of intervention and third opposition, in which he alleged that there was not more than five hundred dollars due Gally on his mortgage; and he procured an order directing the sheriff to retain in his hands, subject to the further order of the court, the proceeds of the sale about to be made, except the costs, taxes, and five hundred dollars, with ten per cent attorney's fees, to be paid to Gally.

Michael Dowling, by his attorney, protested against the sale on several grounds, which it is not necessary to notice, and the sheriff proceeded with the sale; and the property was adjudicated to Edward Thorn for $10,500 cash, which he paid to the sheriff. After paying costs, taxes, and charges, and five hundred dollars to Gally, there remained in the hands of the sheriff $9558 32, which he retained under the order of the court at the instance of Blanc.

On the fourth of June Gally excepted to the intervention and third opposition of Blanc, on the grounds:

First—That all the creditors of Villiers by mortgage and privilege were not parties to the proceeding.

Second—That opponent has no cause of action, because if Gally's debt were paid in full the balance of the proceeds would not be paid to opponent, but would be given to the curator of the succession of Villiers, to be distributed according to law.

Third—That the court is without jurisdiction to distribute funds belonging to a succession. Such distribution could be made only by the probate court.

These exceptions were maintained, "the law and the evidence being in favor of Gally," and specially for want of jurisdiction in the district court to distribute funds belonging to a succession; and the sheriff was ordered to pay to Gally, the seizing creditor, the entire proceeds of sale of the mortgaged property. This judgment was rendered and signed on the fifth of June; and it has been in no manner attacked, by appeal or otherwise.

On the eighth of June, Michael Dowling took a rule on Gally, Blanc, and the sheriff, to show cause why the funds arising from the sale should not be paid to him, as the legal representative of the succession of Villiers, to be accounted for in due course of administration, on the ground that he had qualified and given bond as curator, and was accountable for, and therefore legally entitled to, the possession of the property and assets of the succession.

Blanc answered that he had no objection to the rule, which he considered a very proper proceeding; the sheriff answered that he was a mere stockholder, without interest; and Gally excepted on the grounds:

First—That this is not a proceeding in which a rule to show cause is allowable.

Second—That no cause of action is shown, because neither the validity of the debt nor the legality of the proceeding under which the property was sold is attacked or called in question; and by law the proceeds of the sale are given to the seizing creditor.

Third—That no intervention is allowable in a matter which has already been finally adjudicated, there being no pending litigation.

Fourth—That the rights of the mover have already been passed upon by the court in the suit No. 1510 of the docket, in which the issue was identically the same, and that his only remedy is by appeal.

The exceptions were maintained, and the rule was dismissed; and, after an ineffectual motion for a new trial, which was dismissed on the eighteenth of June, the curator appealed.

It is too well settled now to admit of doubt or question, that the mortgagee has the right to proceed *via executiva* notwithstanding the death of the mortgagor, and that his succession is in course of administration. In Boguille vs. Faille, 1 An. 204, the mortgagee, after the death of the mortgagor, obtained an order of seizure and sale, and was about to sell the mortgaged property, when he was enjoined by the administrator, on the ground that the succession of the mortgagor being under administration, the property composing it could be disposed of only under the authority of the probate court. This court decided that the mortgagee had the right to proceed *via executiva;* and this decision was recognized and followed in Dupuy vs. Bemiss, 2 An. 513; McCalop vs. Fluker, 12 An. 551; and Succession of Wilson, 12 An. 591.

It is not alleged in the rule that there are any debts or claims against the succession which prime the vendor's mortgage under which the property was sold. There is no allegation that the debt as claimed by the mortgagee was not really due and owing; and the amount claimed by him exceeds the proceeds of the sale. The curator claims the proceeds in the hands of the sheriff simply because of his legal relation to the succession, as its representative head, which, as he alleges, entitles

him to the custody and administration of all the property and effects of the succession. This is not true of the proceeds of mortgaged property sold *via executiva*, at the instance of the mortgage creditor. If the sale was valid, the mortgagee, the seizing creditor, would be entitled to the proceeds; if the sale was void, the price would be returned to the adjudicatee. In neither case would the money belong to the succession: the curator would not be responsible for it; nor would it fall under his control or administration.

It is not necessary to consider the other questions raised by the exceptions. There is no allegation in the rule which entitles the curator to any part of the proceeds of sale in this case; and the settled jurisprudence of this court demonstrates that his claim is without legal warrant or foundation.

The district judge did not err in dismissing the rule; and the judgment appealed from is therefore affirmed with costs.

No. 6891.

THE STATE VS. ANDREW BRADLEY ET AL.

The absence of a witness is not ground for continuance in a criminal case, unless the defendant, in his application for a continuance, makes oath that he can not prove by any other witness, the facts he seeks to prove by the absent witness.

Where three persons have been jointly indicted for the same crime, the condemnation and sentence of two of them will not be disturbed, because the verdict against the two was rendered in the absence of the third.

Where the defendant in a criminal proceeding, pending the argument on his motion for a new trial, moves to amend his motion, on new and different grounds that alter its substance, it is within the reasonable discretion of the court to allow, or refuse the amended motion.

Except in cases of conviction for felonies, it is not necessary to ask the accused if he has anything to say why the sentence of the law should not be pronounced on him, when it appears that no prejudice to the accused resulted from not putting the question.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth*, J.

H. N. Ogden, Attorney General, for the State.

Lewis & Brother and *Henry L. Garland* for defendants.

The opinion of the court was delivered by

EGAN, J. The defendants were indicted, tried, and found guilty of petty larceny. Ben Brown, one of the defendants, failed to appear after verdict to receive sentence; his co-defendants were sentenced: Andrew Bradley to twelve months imprisonment in the Penitentiary and Jack Bradley to nine months. They have appealed. Three errors are assigned:

First—That the court improperly overruled an application for continuance on account of the absence of a material witness, for the reason that the defendants did not swear that they could not prove the same facts by any other witness or witnesses known to affiants.

This point was expressly ruled in the same way in the State vs. Mollie Robinson, 29 An. 364. See, also, 6 An. 556. The court did not err.

Second—That the indictment and trial being joint, the court erred in allowing a verdict to be rendered against two of the defendants in the absence of the other without ordering a severance. When a joint offense is laid and can be proved, it is considered in law as a several indictment against each. And if only one of two defendants, so indicted as principals, be in custody at the time of the assizes or sessions when the indictment ought to be tried, he may be tried alone upon it; and whether he be convicted or acquitted the other when apprehended may afterward be tried upon it and convicted. Archbold's Crim. Prac. and Pleadings, 7th ed., p. 318. Such, also, is the express provision of our own law. If the trial may be separate we have been referred to no authority, and we see no reason why if these defendants were present at the rendering of the joint verdict they were deprived of any right or advantage which they might otherwise have exercised. The absence of their co-defendant could not prevent their moving for or obtaining a new trial or in arrest of judgment; nor could or did it increase or aggravate the sentence to be pronounced upon them.

Third—The court is charged to have erred in overruling defendant's amendment to his motion for a new trial upon the ground of newly discovered evidence. The bill of exceptions discloses that the defendants had not only filed one motion for new trial, but that its consideration was taken up by the court and argument heard upon it, when motion hour having ended for that day further argument on the motion was adjourned till the following day, when just as the argument was about to be resumed defendant's counsel offered the amended motion for filing, which was objected to by the District Attorney and the objection sustained by the court. It seems that this was not the indictment nor even the appearance term; that the defendants had already applied for a continuance, which was overruled as we have seen, and that four or five days had elapsed between the filing of the original motion for new trial and the proposition to amend, which was upon entirely different grounds and altered the substance of the application. All this appears from the opinion of the court in the record, who cites 2d H. D., p. 1184, e. No. 2, and authorities cited. He further states that reasonable time to apply for and obtain a new trial had already been allowed, and "that to establish the principle that a defendant could file an application for a new trial, and then offer amendments thereto from day to day would be to

interpose an insuperable barrier to the rendition of judgment and passing of sentence in a criminal case." He quotes the language of this court, 29 An. 365, that courts are established to try causes, and of necessity must have some discretion and control in the manner of conducting them. We are not prepared to say that with a knowledge of the parties, the facts, and standing of the case this discretion was improperly exercised in the present case, notwithstanding that we can conceive of cases in which a court might consider favorably such an application.

The defendant's counsel assigns as error in this court that the record as evidenced by the minutes fails to show that defendants were asked "if they had any thing to say why the sentence of the law should not be pronounced on them." Were this a capital case, the objection would be good, and while we deem it well to observe this ancient form in all felonies at least, the absence of its observance where no injury or privation of opportunity to the accused to take any steps or interpose any objections is not fatal, especially where as in this case the defendants appeared personally in court to receive their sentence without any objection of record. See 1st Archbold's Criminal Practice and Pleadings, 7th ed. p. 676, citing 1st Chitty's Crim. Law, 700, and other authorities.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are affirmed with costs.

No. 6928.

MICHAEL DOWLING, CURATOR, VS. HYPOLITE GALLY.

One who sues for the nullity of a judicial sale, can not ask for the proceeds of the sale. The two demands are inconsistent, and mutually exclusive. In such a case the suit to annul will be dismissed.

The purchaser of property at a judicial sale, is a necessary party to a suit brought to annul the sale.

The only legal methods of arresting a sale under executory process, or the proceeds of such a sale, are by appeal, by injunction and bond, and, (in certain cases enumerated in articles 738-739 Code of Practice) by opposition and injunction *without* bond.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie*, J.

T. A. Flanagan and *E. W. Blake* for plaintiff and appellant.

F. S. Goode for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Hypolite Gally having caused to be sold, under executory process, certain mortgaged property belonging to the succession of Villiers, Michael Dowling, curator of that succession, brought this suit to have the order of seizure and sale rescinded and annulled.

He alleges in his petition that a part of the mortgage debt had been extinguished by prescription; that Gally and Villiers were agricultural partners; that Gally was a factor and commission merchant, and as such is accountable to the succession for one half of the proceeds of sugar and molasses sold in 1874, 1875, 1876, aggregating $54,647 76, subject to deductions for advances and commissions; and that this accountability entitled the curator to set up a reconventional demand; that he was not able to arrest the sale by injunction; but he solemnly protested against it; that as curator he is entitled to the price of the adjudication, $10,500, to be accounted for in due course of administration; that Gally is not entitled, or if entitled not by privilege and preference over other creditors; and that the proceeds of sale are in the hands of the sheriff, retained by order of court on the intervention and third opposition of Blanc, in the suit of Gally, by executory process, the proceedings in which he makes part of his petition. He prays that similar order be repeated in this case; and that "he recover judgment to the effect that the order, fiat, decree, and judgment in the executory suit No. 1504 be annulled, avoided, and rescinded."

This petition seems to have been filed on the twenty-eighth of February, 1877; at any rate, the judge's order to the sheriff to retain the funds in his hands subject to the further order of the court, was granted on that day.

On the fourth of June, Gally excepted on the grounds:

First—That Thorn, the adjudicatee at the sheriff's sale, is a necessary party to a proceeding to annul the sale.

Second—That plaintiff has no cause of action; that he can not attack the proceedings which eventuated in the sale, and at the same time claim the proceeds of that sale.

The district judge maintained the exception, and by judgment of sixth June dismissed the suit. Plaintiff moved for a new trial, which was refused on the fifteenth June, and he took this appeal.

We do not find in the petition any special prayer for the proceeds of the sale; but the curator distinctly sets out and claims the right to receive and administer the fund; and his prayer for general relief would cover that claim. If he did not intend to claim the money, and to have it paid to him, he had no interest in it, and no right to interfere with the disposal of it. In no event was there any occasion for his prayer for an order requiring the sheriff to retain a fund which he did not claim; and the sheriff was actually retaining the money at that time, under the order of the court, at the instance of Blanc, who did claim it.

When the exception was taken, or at latest when it came up for trial, the curator should have declared that he did not claim the proceeds in that suit, and that he limited his demand to the annulling and

rescinding of the order of seizure and sale. On the seventh of June, the day after the judgment of the court dismissing his suit on the exceptions, he moved for a new trial; but he wholly failed to set up as a ground that the court had erred in construing his petition as a suit to annul the sale and at the same time to recover the proceeds. He simply alleged that "the judgment of this honorable court is contrary to law and evidence," without specification.

On the eighth of June, the day after this motion for a new trial was made, the curator took the rule in the suit by executory process, which we have just disposed of, in which he claimed the proceeds of sale in the hands of the sheriff. As he had not before taken any steps to connect himself in any way with that proceeding, we think this subsequent proceeding was a necessary abandonment of the demand for the annulling of the order of seizure and sale. The judge had dismissed the suit in nullity; and it pended simply on the motion for a new trial. The demand for the proceeds of the sale was wholly inconsistent with the demand in nullity; and as this inconsistent demand was set up two days after the judgment dismissing the suit in nullity, the only reasonable interpretation that can be put upon it is, that it expresses the final choice and election of the curator to claim the proceeds under his asserted legal right as curator and representative of the succession.

It seems too clear for question, that the adjudicatee at the sheriff's sale was a necessary party to the proceeding to annul the sale; and it is equally clear that the demand of nullity, and the claiming of the proceeds are wholly inconsistent, and can not be maintained, as we had occasion to decide in Boubede vs. Aymes, 29 An. 274, as our predecessors decided in 3 An. 454; 22 An. 135; 23 An. 245. If the petition in this case was really limited to the demand in nullity, that demand was completely antagonized, in the same court, in a judicial proceeding, in reference to the same subject matter, by the rule of eighth June; and the court would have done a vain thing in granting a new trial in the suit in nullity, which would necessarily have been dismissed on exception setting out the subsequent inconsistent demand for the proceeds.

Where the creditor proceeds *via executiva*, if the debtor have no other defense or objection than the want of sufficient authentic evidence the remedy is by appeal. If other causes exist, constituting grounds of defense which an appeal from the order of seizure and sale would not reach, the debtor must resort either to an ordinary injunction, and give bond and security; or to opposition and injunction without security, in the cases provided in the Code of Practice, articles 738, 739. One of the causes for which injunction without security may be granted is the extinction of the mortgage debt by novation, or in some other legal manner; another is that the debtor has a liquidated account to plead in compensation; and another is that the debt is barred by prescription.

No defect in the evidence on which the order was granted has been suggested; and the curator had no other remedy than either by ordinary injunction for causes not specified in article 739 of the Code of Practice, or by opposition and injunction as provided in articles 738, 739, for any of the causes specified in article 739. If he had any serious defense, either because the debt or any part of it was prescribed, or because the whole or any part of it was extinguished by compensation, or in some other legal manner, as by payment for example, it was his duty to have set up these defenses, and to have arrested the sale by injunction, which would have been granted without security, and would have been tried summarily. If he had other good causes of objection and defense, which would authorize an injunction against a judgment or the execution of a judgment rendered *via ordinaria*, it was equally his duty to have set them up, and to have arrested the sale by injunction, which would have been granted on proper bond. Surely there was ample time between the granting of the order of seizure and sale, on the sixteenth of December, and the actual sale, seventeenth February, for the curator to have ascertained whether there existed any just causes of defense, and to have set them up in the appropriate form. The protest of the curator at the sale was more than useless, since it could have had no other effect than to deter bidders, and thus prevent competition, to the prejudice of the succession.

A casual glance at the notes and mortgage shows that interest had been paid, and the payments extended, so that, apparently, not one of them was presented, at the time the proceeding *via executiva* commenced. This is wholly immaterial; but it is agreeable to us to feel assured that no wrong will be done to the curator or to the succession by the decree which we are about to render.

A judgment is not null, nor can it be avoided or annulled, simply because the debtor may have had good defenses, which he had ample opportunity to urge, and which he has failed to set up. The most careful perusal of the petition in this case has failed to disclose any cause of action, or right in the curator to demand the annulling and rescinding of the order of seizure and sale; and if all the allegations of the petition were true, they would simply constitute defenses, which ought to have been set up, which there was ample time and opportunity for the curator to have set up, either by opposition and injunction under articles 738, 739 of the Code of Practice, or by ordinary injunction, as the nature of the defense might have required.

Under the pleadings in this case the dismissing of the suit was inevitable, without regard to the truth and reality of the alleged causes of complaint; and the curator has no one to blame but himself if he has failed to make good defenses which might have been available.

The judgment appealed from is therefore affirmed with costs.

No. 6518.

AMELIA SMITH VS. T. J. KINNEY.

A power of attorney authorizing an agent to sell real estate need not be by authentic act. It is only necessary that it be in writing, and properly attested.

If the purchaser of property at a succession sale wrongfully refuses to comply with the terms of the sale, the administrator of the succession may, after putting the purchaser in default by the tender of an act of sale, cause a second sale at the expense of the purchaser; and the purchaser will be liable for the costs of this second sale, and any loss to the succession caused by the property's selling for a smaller price at the second sale.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Braughn, Buck & Dinkelspiel for plaintiff and appellee.

McGloin & Nixon for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. At a succession sale of Bridget Gannon's property an improved lot in this City was adjudicated to the plaintiff on her bid of $2225. The terms of sale were one third cash, and the residue on a credit of one and two years, and the adjudicatee made the cash payment to Hodgson, the auctioneer, on the spot. She afterwards refused to comply further with the terms, and the defendant Kinney, who is the executor of the deceased, provoked a sale *à la folle enchère*, at which eighteen hundred dollars only was bid, at which price the property was adjudicated to the second purchaser.

The plaintiff then instituted this suit, alleging that she purchased in good faith, and with the intention to comply fully with the terms of sale, but she discovered and was advised that the title of the deceased to the property was defective, and the proceedings in her succession under which the sale took place were invalid, and insufficient to convey a title to the whole property. She alleges that she gave notice to the defendant of the specific defects complained of, and demanded the return of the sum she had paid, and notified the auctioneer not to pay it over to the defendant, and she judicially sequestrated it in his hands. She avers that the defendant, by his own act in provoking the second sale, has put out of his power to make her a valid title, and she prays that the adjudication to her be annulled and rescinded, and the auctioneer be ordered to return the sum deposited with him, but if the court should determine that the adjudication to her conveyed a valid title, she prays that the executor be ordered to complete it within a reasonable time, or in default, that she be released from all obligation, and the cash payment be returned to her.

The defendant denies that either the title of the deceased to the property, or that tendered by her executor to the plaintiff, is defective

or invalid—admits the sale *à la folle enchère*—and avers that if the plaintiff can recover any sum in this action, it is only the excess of her cash payment over the loss sustained by the succession in the second sale.

The alleged defects are—1. that the property belonged to the community of acquets between the deceased and her husband, and the undivided interest of the latter, or of his heirs, if he be dead, could not be divested by a sale under the mortuary proceedings of his wife's succession, 2. that the deed to Mrs. Gannon was executed by an agent or mandatory of Legros, her vendor, and that the power of attorney, under which the mandatory acted, was an act under private signature, and the adjudicatee can not be compelled to accept title to real estate unless the vendor's title is evidenced by an authentic act. The third ground of non-qualification by the executor has been abandoned.

The answer, responding to the first allegation of defect, avers that "the property was sold under a valid order of court to pay debts and liquidate the succession, and to pay the debts of and liquidate the community between the deceased and her husband, if any existed," and in the concluding sentences the "respondent further denies that said Gannon, husband of deceased, has or can have any claim to or upon said property, having long abandoned her, absented himself, and permitted her to acquire said property in her name, and to control and administer the same."

The insertion of these sentences in the answer occasions the only difficulty in the case, which otherwise is very clearly with the defendant.

Bridget Gannon, the testatrix, acquired the property in question from one Legros, who lived in Texas, under a power of attorney from him to his agent here, giving full authority to sell and convey title. The power was made with reference to this identical property, which is described in it, and it was attested by witnesses, acknowledged before the proper officer, and had passed through the various certificates of the clerk and judge of the court which were deemed necessary to verify it. The sale is by notarial act, and the procuration of the vendor is annexed to it, and is fully set forth in the body of the act besides. The vendee is described in the act as "Mrs. Bridget Cooney widow of the late Thomas Gannon." The date of the act is Dec. 2, 1873. She died in 1875. On March 8th. of that year, her will was presented for probate, and in the petition then filed, she is described as "Bridget Cooney, formerly wife of Thomas Gannon."

No evidence whatever was offered by either party to prove the important fact, whether the deceased was wife or widow at the time the property was acquired, and in the absence of such evidence, we must take the recital in the deed as conclusive of her status. The only

doubt that can arise upon that matter is occasioned by the two paragraphs, quoted from the answer of the executor, the first of which, in stating that the sale was had to pay her debts and those of the community, is qualified by the words, 'if any existed,' and the second, in alleging as a reason why the husband can have no claim upon the property, that he had abandoned his wife and absented himself, must be construed in harmony with the recital of the deed, so that while there was an abandonment, his death occurred during the abandonment and before hers.

So far then as the public records shewed any thing on the subject, the deceased was a widow when she bought the property, and there is no evidence *aliunde* to the contrary. The purchase price had not been wholly paid when she died. In her will she mentioned her debts, of which the principal was the unpaid note, secured by mortgage upon the property. She had no other property that was available for the payment of debts. Her movables were appraised at twenty-seven dollars. She bequeathed three hundred dollars to her priest, and the residue to her nephew. The will having been probated, and the executor qualified, application was made to sell the property for the payment of debts and legacies, and costs of administration, and it was ordered. It was at this sale that the plaintiff bought. The debts of the deceased, and of her succession, were about two thirds of the inventoried assets. The sale was validly made, and the title acquired by the purchaser was good.

The second objection to the title was that the power of attorney was not an authentic act. Neither a power of attorney to sell real estate, nor the sale itself, need be by authentic act. A transfer of immovable property must be in writing, but if it is under private signature, acknowledged or legally held to be acknowledged, and duly recorded, it is as perfect a conveyance as if by authentic act. The proof of one is different from that of the other, and convenience is promoted by an act that proves itself. And as that is true of the sale, *a fortiori* is it true of the authority to sell. Civil Code, arts 2239, 2255, new nos. 2242, 2275. The power of attorney of Legros, the vendor of the deceased, was acknowledged with formality and the attesting certificates were appended to it. There could be no reasonable objection to its form.

The plaintiff should have complied with the terms of sale. The defendant put her in default by tendering her the *procès verbal* or act of sale, and upon her continued refusal to accept it, had protest made of her refusal. The expenses of the second sale ($51.80) and the cost of the notary ($10) and the loss at second sale ($425) must be borne by her. From the cash payment of $741.65, now in the hands of the judicial

sequestrator, must be deducted the aggregate of these sums, and the residue be returned to her. The judgment of the lower court dismissed her suit against the defendant, but ordered that the auctioneer should return to her the full sum paid on the day of sale. It is erroneous. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is reversed, and that the plaintiff's demands be rejected, except that the sum of two hundred and fifty-four dollars and eighty-five cents be returned to her by W. I. Hodgson, in whose hands the fund has been judicially sequestered, and the residue thereof be paid to the defendant by him, and that the defendant have and recover of the plaintiff the costs of appeal.

No. 6842.

THE STATE VS. ALONZO BROOKS AND JOHN BROOKS, SR.

One who has not resided within the parish in which a certain case is tried, for one year next preceding the trial, is not qualified to serve as a juror in that case.

Where two persons are jointly charged with the commission of a crime, the State is entitled, on a proper showing, to a continuance as to *both*, even though one of the accused is ready for, and demands a trial.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea*, J.

H. N. Ogden, Attorney General, for the State.

W. F. Kernan and *T. B. Lyons* for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendants were indicted for murder. John was acquitted. Alonzo was convicted of manslaughter, and sentenced to confinement in the Penitentiary for ten years. He appeals, and assigns for error,

1. That a juror, having been tendered, disclosed in his testimony on the *voir dire* that he had not resided in this State twelve months, and was ordered by the court for that reason to stand aside.

The qualifications of a juror are that he shall be a citizen, and a *bona fide* male resident of the parish in and for which the court is to be holden for one year next preceding such service, not under interdiction, or charged with any infamous crime, or offense punishable by hard labor, provided etc. Acts 1877, p. 55.

The juror had not the qualification of a residence in the parish for one year next preceding the trial, and was properly rejected from the panel by the court.

2. At the May term, the defendants' counsel moved a severance of

trial, which was refused. The State at the same term applied for and obtained a continuance as to both defendants because of the absence of a material witness. When this application was made by the State, John Brooks announced himself ready for trial, but the court continued as to both. The error assigned is in refusing the severance.

No trial was had at that term, or could be had of either defendant, since the State had asked a continuance, made a proper shewing, and obtained it. The defendant who was not permitted to go to trial then, notwithstanding his announcement of his readiness, was acquitted, and of course is not complaining. The trial was had at the ensuing term in Oct. 1877.

The convicted party relies upon the law which provides that when two or more persons shall be charged jointly with the commission of any crime in the same indictment, and the cause is continued as to one or more of the parties, the others so indicted shall be admitted to trial, unless the State can shew good cause for a continuance; no one so indicted shall be deprived of a trial in consequence of a continuance of the case as to any of the other parties thus indicted. Rev. Stats. 1870 sec. 999.

The cause was continued as to both. There was not here a continuance as to one, and a deprivation of trial by the other in consequence of the continuance of the case as to that one. The State shewed good cause for the continuance of the trial of both, and the law invoked is not applicable to such case. It is not included in its terms.

We see no error in the ruling of the court, and the judgment is therefore affirmed.

No. 6702.

BREAUX, FENNER & HALL vs. JUSTUS FRANCKE.

In fixing the compensation for the professional services of a lawyer in any particular case, there are two considerations which will determine the judgment of this court. One is the amount and character of the work done, and the other is the ability of the debtor to pay.

The fees due the lawyer for successfully defending a wife in a suit of her interdiction brought by her husband, are a debt for the community.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Breaux, Fenner & Hall and *John Finney* for plaintiffs and appellees.

J. L. Tissot and *Thos. Gilmore & Sons* for defendants.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by MANNING, C. J.

DEBLANC, J. In 1876, on the thirty-first of January, the defendant

—now dead—brought suit to interdict his wife. In that suit, finally decided by this court in April last, Mrs. Francke was represented by plaintiffs, attorneys and counsellors-at-law, who, for their professional services, claimed against defendant, and now claim against his succession, the sum of $2500.

From the decree allowing their demand, the executors of defendant's last will have appealed. They contend that the amount allowed is excessive and should be reduced to $750. They invoke the established rule that we can fix the value of services rendered by attorneys and evidenced by the record, without reference to the opinion and utterances of witnesses.

The intrinsic value of professional services — of those services which tend to protect life, liberty, reputation or property, is not to be measured by the client's standing or his ability to pay, but by their character and importance, the nature and the difficulties of the litigation, the advantages to be gained or lost by its result, the researches to be made, the time and care to be given, the obstacles to be overcome, the intellectual exertion required to unmask pretension and expose errors honestly asserted and earnestly sustained by experience and talent.

The humble and the poor—whose life and liberty, whose reputation or property is imperilled, attach as much importance to their protection as does the proud or the wealthy, and the sum of material and intellectual labor required to defend the first, is never less and often more than that required to defend the latter. When the service has been rendered, its value is commensurate with the service itself: the compensation alone, though unequal to the labor, must be measured to the client's financial condition.

Considering, as we do, the time and attention which must have been bestowed on a memorable cause, the judicial battle fought on different fields, the adjudication of a respected court, based on the estimates of honorable witnesses; remembering that part of plaintiffs' task performed in our presence and before this tribunal, we are not inclined to underrate the services which we are called upon to value.

What should have been and what should be allowed? From the pleadings, the facts disclosed on the trial, the printed and oral arguments, the authorities cited, we can justly presume that—at intervals—a considerable portion of the valuable time of the plaintiffs must have been consecrated to the preparation of the defence in the interdiction suit, and, for their personal services, they are entitled to a compensation of fifteen hundred dollars, and to whatever they have had to disburse to have their brief printed.

Is the whole of that amount due by exclusively the succession of

Francke? We believe not; that amount constitutes a debt of the community, and, as such, must be acquitted out of the common funds. R. C. C. 2403–2409. It is true that the 397th article of said Code provides "that—if the interdiction be not pronounced—the costs of the attempt to interdict shall fall on the petitioner, but those costs do not include the fees of the attorneys employed *by the party* sought to be interdicted, and could be claimed but as damages under the provisions of art 419 of the Rev. C. C.

It may be said that, without the husband's consent, no debt can be created against the community, and that inasmuch as plaintiffs have acted, not only without that consent, but in direct opposition to the husband himself, to his wishes and his demands, the community can not be held liable for their fees. This is the general rule, but, in the interdiction suit, the husband's action rendered indispensable the services of counsel, and—if the wife had not selected those by whom she was represented, it would have been the duty of the judge to name one for that purpose. A defendant in interdiction, be it a wife, is specially authorized to choose her counsel, and the latter's compensation, when he has represented the wife against the husband, should be paid by the community, unless perhaps in a case wherein it would be *alleged and proved* that the husband had acted from motives of interest or passion.

R. C. C. 419.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that plaintiff recover of the community which heretofore existed between the late Justus Francke and Pauline Landreaux, his surviving widow, the sum of fifteen hundred thirty-nine dollars and fifty cents, with legal interest thereon from the 24th of April 1877; the costs of the appeal to be paid by plaintiffs, those of the lower court by said community.

ON REHEARING.

MANNING, C. J. Two factors enter into the calculation of fees for services, such as those rendered by the plaintiffs. One is the extent and kind of service, and the labor incident to its rendition—the other is the ability of the party, who is liable, to pay.

Giving due consideration to both of them, we think the demand of the plaintiffs is reasonable, and therefore

It is ordered and adjudged that our former decree is amended by inserting therein the sum of twenty-five hundred and thirty-nine dollars and fifty cents instead of the sum therein mentioned, and as thus amended, that it be and remain the judgment of the court.

No. 6824.

THE STATE EX REL. MONROE M. SAMUEL VS. ALLEN JUMEL, AUDITOR.

The claims of sheriffs, and clerks of courts, for the annual sums of money due them for their services in the criminal matters arising in their courts, are not prescribed in two years from their maturity unless proved up, and audited within that time. This prescription only applies to claims which require evidence to establish, not to those whose amounts are fixed by law.

The holder of a claim against the State, the amount of which is fixed by law, may compel the Auditor by mandamus to warrant for the amount, unless the latter shows that no appropriation was made for its payment, or that the appropriation was exhausted, or that the claim exceeded the revenue of the year in which it was exigible.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

R. L. & B. W. Belden and *A. L. Tucker* for relator and appellant.

H. N. Ogden, Attorney General, for respondent.

The opinion of the court was delivered by

DEBLANC, J. Under section 795 of the Revised Statutes, "every sheriff is entitled to one hundred dollars, and every clerk to fifty dollars per annum, as a compensation for their services in matters of a criminal nature pending in their respective courts."

The relator is the transferee of several claims due, under said section, to sheriffs and clerks, for services by them rendered during the years 1874 and 1875.

The amount of these claims could not be, their existence is not contested—but the officer who now fills the position of State Auditor refuses to issue warrants to the relator, on the ground that said claims have not been presented to be audited, within two years after they accrued.

When did they accrue? On the last days of the years 1874 and 1875, and plaintiff's applications for a mandamus to compel the issuance of warrants in his favor, were filed—one on the 30th of July, the other on the 28th of September 1877. If the prescription invoked by defendant could apply in this instance, it would bar plaintiff's action but as regards the claim of 1874. This is conceded.

Section 179 of the Revised Statutes, the only law relied upon by defendant's counsel, has reference to that class of claims which—to be allowed—must be supported by evidence and audited, and not to those the amount of which is fixed by law and can neither be reduced nor increased.

Defendant also alleged that the appropriation made to pay the claims described in relator's petition as due for the year 1875, has been exhausted and that he is prohibited by law from issuing warrants in

excess of appropriations. He, however, discovered that this was a mistake, and immediately addressed a letter to the judge of the lower court, in which he satisfactorily explains and corrects the alleged mistake.

As to the claims of 1874, it is not charged that they are not due, that no appropriation has been made to pay them—that any appropriation made has been exhausted, or that it was in excess of the revenue, and—under the circumstances—warrants should be drawn on the treasury for the claims of 1874 and 1875, held by relator.

On the 3d of April 1875, two distinct appropriations of each $7500 were made by the Legislature to pay for services rendered by sheriffs and clerks, in accordance with sections 765 and 3563 of the Revised Statutes, and the warrants to be drawn in favor of the relator shall express on their face that they are to be paid, those of 1875 out of the funds appropriated for that purpose by the first section of act No. 17 of the Legislature, approved on the 3d of April, 1875, and those of 1874 out of the funds appropriated for that purpose by the second section of said act.

For these reasons, the judgment of the lower court is partly reversed and amended, and the alternative writ of mandamus granted on the 31st of July, 1877 is made peremptory at defendant's costs.

No. 6909.

THE STATE VS. AUGUSTIN ROBERTSON.

The defendant who is on trial for murder, can not introduce evidence of the quarrelsome, or dangerous character of the deceased, in justification; but he may introduce evidence of such character, in excuse for the killing, or in palliation of the offense, provided he first shows that he was actually attacked by the deceased, and that he was aware of the latter's character.

In an indictment for murder or manslaughter, the character and nature of the wound which caused the death need not be set forth. The indictment need only charge that defendant did *willfully, feloniously, and of his malice aforethought kill and murder the deceased.*

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie*, J.

H. N. Ogden, Attorney General, for the State.

John S. Billin for the defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant was indicted, by the grand jury of the parish of Lafourche, for the murder of Octave Roberts. He was tried, found guilty of manslaughter, applied, but in vain, for a new trial and the arrest of the judgment, was sentenced to imprisonment at hard

labor for the space of twenty years and to pay a fine of five dollars and the costs of the prosecution, and he appealed.

No brief has been filed in this case, either in behalf of the defendant or of the State.

The record contains but one bill of exception, and we learn—from its recital—that one of the State witnesses was asked by the prisoner's counsel whether the deceased was of a quarrelsome disposition, and he answered that he did not know. The question was reiterated, objected to and overruled by the court, on the ground that the deceased's character for violence could be inquired into only after laying a foundation for the inquiry, by proof of previous threats and causes which—after a first attack—would justify the accused in being in greater than usual fear. In the meanwhile the witness again declared that he knew nothing of the deceased's character, and thereafter several witnesses testified on this point without objection.

Though it does not appear that the judge's decision impaired or affected the weight of any evidence offered by the prisoner, it is proper to state that said decision was strictly correct. "As a general rule, evidence is not admissible—as a ground of justification, of the character of the deceased; but, on the other hand, if we suppose the offer to be—not justification—but an excuse on the ground of self-defence, or mitigation of the grade of guilt, and—in such a case—it be proved that the defendant was actually attacked, and if evidence should be then tendered that the deceased was a man of ferocious temper, of malignant disposition and of overpowering strength; and if in addition it be offered to be proved that the defendant had notice of these characteristics, the better opinion is that such evidence is admissible." Wharton, on Criminal Law. Edition of 1874, vol. 1st, No. 641.

The judge's decision is consistent with that rule.

To sustain his motion in arrest of the judgment, the prisoner relies on three grounds:

1. That, when the death is charged to have been occasioned by a wound, the description of the wound should be set forth in the indictment.

2. In describing the wound, the term "*mortal*" is indispensable, and that term is not in the indictment.

3. It is not alleged that the party died of the wound so inflicted.

I. II. III.

"Formerly, as said by this court in State vs. Hornsby, the failure to dot an i, or to cross a t, or something equally absurd, was considered fatal to an indictment. Substance was sacrificed to form, or rather form became substance, and substance mere form. That ancient strictness has been banished from the English and the American courts.

"In any indictment for murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which the death was caused. It shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully and of his malice aforethought, kill and murder the deceased."

Rev. St. Sect. 1048.

In this case, after the averments that "Augustin Robertson did cut, stab and wound the said Octave Roberts, the indictment further charges, in the very words of the Statutes, that he—the said Augustin Robertson did—the said Octave Roberts—then and there wilfully, feloniously, and of his malice aforethought, kill and murder.

The life of every inhabitant in the State—high or low, white or black—is under the protection of the State and of its courts, and those who are disposed to attempt or destroy the lives of others, should remember—before it be too late to do so, that—here—no frivolous technicality shall prevail against the verdict of a jury, or reverse any sentence responsive to that verdict.

The judgment of the lower court is affirmed.

No. 6804.

MRS. MARY SEXTON vs. M. O. SULLIVAN ET AL.

The Third District Court for the parish of Orleans having exclusive jurisdiction of all suits to enjoin proceedings in justices' courts, the Superior District Court was utterly without jurisdiction of such suits, and had no power to impair, or interfere in any way, with this exclusive jurisdiction of the Third District Court.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

R. King Cutler for plaintiff and appellant.

J. C. Peirce for defendant and appellee.

The opinion of the court was delivered by

MARR, J. In November, 1875, John W. Price brought suit before the first justice of the peace for the parish of Orleans to eject his tenant, MRS. Mary Sexton.

She set up in defense:

1. Want of jurisdiction, *ratione materiæ*.

2. That she deposited the promissory note of W. H. Waters for $2500, secured by mortgage, with Elder, agent of Price, and in September, 1874, contracted with him that she was to retain possession of

the premises, at a rent of $1000, payable by the year, until the amount of the note should be consumed and exhausted by the rent.

The judgment of the justice was in favor of Price. Mrs. Sexton took a suspensive appeal, which was dismissed, and she then took a devolutive appeal, pending which she obtained from the appellate tribunal, the Third District Court, an injunction prohibiting further proceedings on the judgment, on the same grounds, substantially, as set up in the suit before the justice.

The appeal was tried and judgment was rendered on the twenty-fifth of January, 1876, affirming the judgment of the justice of the peace. This judgment was suspended by a motion for a new trial, and it was signed on the ninth of March.

The injunction suit was also tried; and judgment was rendered on the twenty-third of February, dissolving the injunction with damages, and dismissing the suit. This judgment was also suspended by a motion for new trial; and it was signed on the fourteenth of March.

On the seventh of March Mrs. Sexton brought suit in the Superior District Court against the justice, M. O. Sullivan the constable, Price and Elder, his agent; and obtained an injunction prohibiting further proceedings in the suit of Price vs. Mrs. Sexton.

On the twenty-first of March Price filed an exception setting up—

1. Want of jurisdiction in the Superior District Court;

2. The plea of *res judicata*, by reason of the judgment of the Third District Court in the injunction suit;

3. That the petition sets forth no legal cause of action.

It seems that this exception was tried; and that it was dismissed on the twenty-ninth of April; and that in May an answer was filed reserving the benefit of the exception. Nevertheless, the record shows that on the third of Juiy an agreement was signed by counsel for both parties fixing the exception for trial on the tenth of July: that it was continued by consent on the tenth; that it was taken under advisement on the eighteenth: that there were several subsequent continuances by consent, until, finally, the Superior District Court was abolished and the case was transferred to the Third District Court.

After several continuances in the Third District Court the exception was fixed, tried, and maintained; and a judgment was rendered dissolving the injunction with $100 damages, and dismissing the suit. A new trial was granted; and final judgment was rendered dissolving the injunction with $75 damages, and dismissing the suit; and Mrs. Sexton appealed from that judgment.

Under the constitution, article eighty-three, the acts of the Legislature, Revised Statutes of 1870, sections 2006, 2012, 2013; the act of 1870, called session, p. 2; and the act of 1872, extra session, No. 2, in

acts of 1873, p. 38, the Third District Court had exclusive jurisdiction of the appeal from the justice, and to enjoin, or to stay, by mandamus or prohibition, further proceedings on the judgment of the justice. The Superior District Court was absolutely without jurisdiction; and the judgment appealed from would be correct on that ground alone.

But the entire controversy was settled, so far as the ejection of the tenant was concerned, by the judgment of the justice, and that of the Third District Court, affirming that judgment; and by the judgment of the Third District Court dissolving the injunction and dismissing the original suit brought in that court. If the Superior District Court had been of competent jurisdiction, the plea of *res judicata* should have been maintained; and the suit dismissed.

The injunction was asked for and obtained in the Superior District Court on grounds which not only should have been but which actually were set up in the justice's court and in the Third District Court; and they had been passed upon definitively before the petition was filed in the Superior District Court.

This appeal is not taken from, nor does it bring under our review the judgment of the justice, nor that of the Third District Court affirming that judgment; nor the judgment dissolving the injunction and dismissing the suit brought originally in the Third District Court. The justice may have erred, and the judge of the Third District Court may have erred. We do not mean to express any opinion as to the correctness of these judgments, because they are not included in this appeal; and they are final. They certainly did not fall within the jurisdiction or control of the Superior District Court; and the Third District Court, to which causes pending in the Superior District Court were transferred by the act abolishing the Superior District Court, acquired no greater authority in this case than the Superior District Court had; and that was, to dissolve the injunction which should not have been granted, and to dismiss the suit which should not have been brought.

The suit which is now or which lately was pending in the Sixth District Court, for arrears of rent claimed by Price of Mrs. Sexton, can have no effect upon the judgment ejecting Mrs. Sexton, which is final and conclusive.

We find no error in the judgment appealed from; and it is, therefore, affirmed with costs.

No. 5470.

CHOPPIN & BEARD VS. LOUISIANA LEVEE COMPANY.

Under the acts of the Legislature which set forth the terms of the contract made by the State with the Louisiana Levee Company, the company are bound to construct, or repair, or strengthen in any given year only such levees, as the commission of engineers, created by those acts, shall require, and furnish estimates of the work of, before the first of October of the preceding year; and to maintain every *completed* section of the levee, up to the standard dimensions prescribed by the commission of engineers. One who claims damages of the company therefore, for injury caused by a crevasse at any given point on the levee, must, in order to set forth a *prima facie* cause of action, allege that the company failed to build, or repair the levee at the crevasse point after having been directed by the engineers to do it, or, had not done the work according to the standard fixed by the engineers; or, that the crevasse had occurred at some point on a completed section of the levee, where the standard dimensions prescribed by the engineers had not been maintained by the company; or, that on account of the imperfection of the work, the crevasse occurred when the water was below the standard height fixed by the engineers.

Whether the journals of the Houses of the Legislature are admissible in evidence to prove that a certain act was passed in disregard of the constitutional forms necessary to give it validity as a law, is an open question before this court.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

James H. Grover and *T. J. Semmes* for plaintiffs and appellants.

T. Gilmore & Sons and *John A. Campbell* for defendants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs, owners of a plantation in Iberville parish, allege that it was seriously injured by an inundation in April 1874, by three crevasses in the levees on the Mississippi river at Morganza, Point Manoir, and Hickey, and they claim indemnity from the defendant for the loss sustained in that and the following years. The damages are laid at forty-three thousand seven hundred dollars.

The defendant excepted to the action for this;—that for none of the matters and things alleged in the petition is the defendant liable, or indebted in law to the plaintiffs, there being no privity of contract between them, and that the petition discloses no cause of action.

The plaintiffs then filed a supplemental and amended petition. The exception was sustained, and the suit dismissed.

The controversy turns upon the nature and extent of the contract of the defendant under the Acts of the Legislature specially relating to the company, and the sufficiency of the allegations of the petition to constitute a *prima facie* cause of action for breach of that contract. It becomes necessary therefore to analyze the Acts with some minuteness of detail, and to scrutinize the allegations of the petition, in order to discover whether the plaintiffs have made the necessary averments to

entitle them to be heard when complaining of the defendant's non-performance of obligations, charged to have been assumed under the Acts of the General Assembly.

The Louisiana Levee Company organized as a corporation under the general laws of the State by a notarial act in February 1871. Shortly thereafter, on the twentieth of that month, the Legislature passed an act, recognizing that incorporation, and contracted with the Company as follows;

That in order to maintain a uniform and perfect system, the location and dimensions of all levees to be constructed, maintained, repaired, and kept in repair and managed, shall be determined by a commission of three engineers, whose duty shall be, and who are expressly directed to determine the proper location and dimensions of all levees to be constructed, repaired, or strengthened by the company, and the standard of dimensions to which they shall be maintained by it, and to report the same with maps and profiles thereof, and the number of cubic yards to be built in the construction of new levees, and in strengthening, enlarging, and repairing the levees now in existence, which report shall be of sections of levees of five miles or more. In consideration of the compensation, benefits, rights and powers, conferred by the Act, the Company shall take charge of, manage, control, construct, maintain, repair, and keep in repair all the levees in this State, and certain others, and for the purpose of enabling the Company to fulfill its duty in this regard, it is vested with the sole and exclusive custody, management, and control of all the levees in this State for twenty-one years, and its engineers and surveyors, contractors, agents, and servants are empowered to enter upon and occupy all lands that may be necessary, and to remain as long as may be necessary to do and perform every thing required of the company by the Act, investing it with all the powers and prerogatives in respect to the levees as was until then vested in the State, parish, or municipal authorities, except that the company could not assess or collect any tax, nor compel the owner of land to build or repair any levees. The company is obliged to commence the construction of levees within sixty days from the receipt of the report of the commission of engineers, and must thereafter construct not less than three millions of cubic yards every year until the levee is completed according to the standard required by that report, and after the completion of any section of a levee, the company must maintain it up to the standard dimensions specified in the report, and in the event of its failing to do so, it shall be liable in damages to any person injured by reason of such neglect or failure, unless the injury is caused by acts of violence of men, the wrongful acts of individuals, the existence of obstacles interposed by the action of courts, or the operation of causes over which the com-

pany can have no control, or on account of the floods rising above the standard height determined by the commission of engineers. In subsequent sections the act provides that the Governor shall cause an estimate to be made of the cost of constructing or completing the levees according to the standard required by the engineers' report, within thirty days after the receipt of that report, and to transmit the estimate to the Auditor, who shall thereupon apportion the estimated cost among the several parishes according to the assessment rolls of the State, and shall annually thereafter cause to be collected the taxes necessary to pay this estimate in certain proportions specified in the act. Acts 1871, p. 29 *et seq.*

A contract was formally made by the Governor, and the Company under this Act, and was ratified by the legislature on the 28th. of same month. *Ibid.*, p. 64.

On March 6, 1873, an act amendatory of these two of 1871 was passed, re-enacting the main features of those acts which we have epitomised above, but changing the requirement of the construction of a specified number of cubic yards of levee each year into one for the construction of not less than the number of cubic yards in each year required by the estimate of the engineers, and reducing the rate of compensation from sixty to fifty cents per cubic yard, and requiring the engineers to report before October 1st. of each year a detailed statement of the number and size and location of the levees to be constructed during the next ensuing year. The enactment is then made in specific terms, that the company shall not be required to build during the year any levees except those required to be built by said commission, unless there is a destruction or threatened destruction of any levees from the caving of banks after the commission have made their report. Acts 1873, p. 83.

On March 9, 1874 there was another Act which provided that if the Company, within twelve months after the promulgation of the Funding Act, should file in the office of the Secretary of State an acceptance of the reduction of the tax of four mills for the repair and construction of levees to three mills, then that section of the Act of February 20, 1871 which made the company liable for damages for its failure to maintain the levees up to the standard dimensions required by the engineers' report, was repealed.

Under this legislation, and the contract made by the Levee Company, the plaintiffs sue. They allege that the Company undertook and contracted to construct, maintain, repair, and keep in repair all the levees in this State, and to protect any of the lands of this State from overflow by the waters of the Mississippi river, and bound itself to construct not less than three millions of cubic yards of levees each year until the entire line of levees of the State reached a standard which

would effect the purposes of the company's organization, which was to secure the alluvial lands within the State from overflow. They allege that the company has reaped the benefits of this contract with the State in receiving bonds of the State amounting to a million of dollars, but has failed to fulfill its obligations—that it has not protected the alluvial lands of the State, and especially it has not protected the plaintiffs' land, from overflow—it has not built the required number of cubic yards of levees each year, nor repaired them—that it was bound by its contract to protect the plaintiffs' plantation from overflow, and has not done it, and in consequence of this failure to protect it, it has been inundated by the water through three crevasses—that the company had knowledge, or ought to have had knowledge that the levees were not sufficiently strong to resist the pressure of the water which would come against them—that its officers knew or ought to have known the levees were in a dangerous condition and needed repairs, but the company failed to make these repairs, and while giving its means and energies to close other crevasses, made no effort to close either of these three through which the water flowed over the plaintiffs' plantation, occasioning destruction of the growing crops, the buildings, etc., and causing damage to the amount before stated.

The petition was filed May 1. 1874. The exception was made on the 8th. and a supplemental petition filed on the 18th. of same month. In it, the plaintiffs reiterate their allegations that under the act of 1871, the defendant was liable in damages to any person who was injured by its failure to comply with the obligations assumed in its contract with the State, and that by reason of its neglect to construct, repair, and keep in repair the levees mentioned in the original petition according to the standard to be fixed in accordance with that Act, these levees gave way, and the plaintiffs were damaged thereby—that the overflow and consequent injury was caused by the defendant's neglect to comply with the requirements of its contract, and that the plaintiffs suffered injury within the intent and meaning of that Act. They then allege that the Act of March 9, 1874, which assumed to relieve the Company from liability for damage, is unconstitutional, because it is in conflict with the constitutions of the United States, and of this State, in this, that it destroys a vested right of the plaintiffs, and impairs the obligation of a contract, by virtue of which the defendant was liable in damages to them.

It will be observed that the Acts of the Legislature set out the contract, its object, and the mode of its execution, with industrious particularity. The object was to maintain a uniform and perfect system of levees throughout the State. The means adopted to attain it was to entrust to a commission of engineers the right and the power to deter-

mine both the location and the dimensions of all levees, whether old and needing repair, or new and requiring construction. And this delegation of power is exclusive. No one else, and no other body, had the right to demand or require the construction of a new levee, or the repair and strengthening of an old levee, but the commission of engineers, who are entrusted with plenary power in every thing that relates to the location and dimensions of the levees, nor was the Auditor required to levy or cause to be collected by taxation any sum for the payment of the company, except such sum as was sufficient to cover the cost of the levees which the commission of engineers had located and estimated. And the obligation of the Company is likewise single, and exclusive of every source but one—it could not be required to build during a year any levees but those which had been located by the engineers before October 1st. of the previous year, except in one emergency.

These Acts, instead of conferring the absolute power upon the Company to build whatever levees they pleased, or imposing upon it the obligation to build all needed levees, restricts and hampers it by commanding that it shall not build any levees until the commission of engineers have fixed their location, prescribed their dimensions, and reported estimates of the work before a given day in each year. The acts are so deftly draughted that the commission of engineers is the governing power, without whose fiat nothing can be done, but who are themselves required to do all things before a specified day in order to impose an obligation upon the Company to do any thing. And if they or either of them shall fail to do his duty in locating levees, or fixing their dimensions, or making the estimates, there appears no provision in these statutes for his displacement, or compulsion. One of them is appointed by the Governor another by the Directors of the company, and the third by the President, but when appointed, they are not the Company's officers, and are not more amenable to it than to any citizen, and while the company is invested with all the powers and prerogatives with respect to the location, construction, and control of levees that either the State, or the parishes, or the municipal authorities had and exercised until these acts were passed, it is subject to the direction of the engineers in locating and building and repairing the levees.

The company could only construct as directed by the engineers, but when any section of a levee was completed, or when the whole system of levees was perfected, then the Company must maintain it up to the standard dimensions specified in the report of the engineers, and if it failed to do so, liability in damages resulted.

This being the contract between the State and the Levee Company, we have now to inquire whether the allegations of the petition disclose a cause of action for its breach.

There is not among these allegations, one that the commission of engineers at any time located a levee at either of the three points where crevasses occurred, or directed the construction of one there, or prescribed its dimensions, or that a levee having been located and constructed there, it did not conform to the standard fixed in the engineers' report, or had not been maintained up to that standard. There is no allegation that the levee having been built, and maintained up to the standard, gave way from imperfection of the work, notwithstanding the floods did not rise above the standard height. The plaintiffs' case, as set forth in their petition, is that in consideration of the compensation, rights, and powers conferred by the legislature upon the Company, it had agreed to protect the alluvial portions of the State from overflow, and that it had failed to protect the plaintiffs' lands which are in the alluvial district from overflow, and hence it was liable in damages. The petition does not allege any neglect or failure of the company to do all that the statutes required it to do anterior to the disaster which occasioned them injury. There must have been a duty or obligation on the part of the defendant to the plaintiffs, and a breach of it to the plaintiffs' injury, and their pleadings must set forth the obligation, and it must appear on their face that the alleged breach was of an obligation which the statutes had imposed. The petition is deficient of those essential averments, and the exception was properly sustained.

We have been urged to consider and declare the effect of the statute of March 9, 1874, the constitutionality of which is attacked in the supplemental petition, but it has become unnecessary to do so, since our decision is based upon the inherent defects of the pleadings, which are wholly independent of the question of the validity of that law. But if it were otherwise, we should maintain the correctness of the lower court's ruling upon the rejection of the evidence offered by the plaintiffs.

The journals of the two houses of the legislature were offered in evidence to shew that the Act above mentioned did not pass with observance of the forms required for the passage of statutes, in being read in each House on three several days unless there was a dispensation of the rules. Const. art. 42.

We are not to be understood as expressing or intimating an opinion upon the question, whether or not the journals are admissible in evidence to shew want of compliance with the forms necessary to impart to a bill the force of law. The question has been variously determined in different States, and is an open one before us. The People v. Mahaney, 13 Mich. 481. Spangle v. Jacoby, 14 Ill. 297. Miller v. the State, 3 Ohio, 475. Dew v. Cunningham, 28 Ala. 467. The People v. Devlin, 33 N. Y. 269. Broadnax v. Groom, 64 N. C. 244. But the evidence was properly excluded, because there is no averment in the supplemental peti-

tion that would warrant its reception. That petition was framed expressly to attack that Act. By way of exordium, it recites briefly the substantive allegations of the original petition, and then charges the unconstitutionality of that Act because it destroys, or attempts to destroy a vested right, and impairs the obligation of a contract. There is no allegation that the bill did not go through the regular processes of legislative gestation, constitutionally demanded, before it can be ushered into existence as a perfect law. On the contrary, the allegations of the supplemental petition presuppose that the Act was regularly passed, but assert its invalidity, because it is violative of a constitutional right. And surely upon so grave a matter, some averment, striking directly at the point of attack, must be made before evidence can be properly admitted such as was offered in the lower court. It was properly rejected, and for the reason that there was no allegation in either of plaintiffs' petitions under which it could be admitted.

The court below dismissed the plaintiffs' petition on the exception of the defendant to its sufficiency and completeness of allegation.

It is ordered and decreed that the judgment of the lower court is affirmed with costs.

No. 7054.

SUCCESSION OF W. D. GALE. ON OPPOSITION OF WM. SADLER.

The legal mortgage on a person's property resulting from the registry of his official bond as sheriff, is extinguished by prescription, unless re-inscribed within ten years from the date of said registry. The necessity of a re-inscription every ten years, applies to *all* mortgages, except those specifically exempted from that necessity.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Brame*, J., special judge.

K. A. Cross and *D. C. Hardee* for opponent and appellant.

Hedge & Moore for tutor and appellee.

The opinion of the court was delivered by

SPENCER, J. The only question which it is necessary for us to decide in this case is, whether the re-inscription of a sheriff's bond, in the mortgage office, within ten years from its original registry, is necessary to preserve the legal mortgage resulting therefrom? If it is necessary, then the opponent Sadler has no claim to be ranked as first mortgage creditor on the real estate of W. D. Gayle, deceased, against whose succession he obtained judgment for moneys received by Gayle in his official capacity as sheriff of East Feliciana. Gayle qualified as sheriff in January, 1862, and received from his predecessor $1292 35;

which sum was in contest between Sadler and others, and was finally on appeal adjudged to Sadler in February, 1870.

Gayle's minor children, in right of their mother, have a duly preserved legal mortgage, resulting from an adjudication to the father of the common property in January, 1866. Gayle himself died November, 1867. The contest is between these minors claiming under their legal mortgage, and Sadler claiming under the legal mortgage resulting from the registry of the sheriff's bond in 1862.

The want of re-inscription of the legal mortgage, asserted by Sadler, is pleaded, and is, we think, fatal to his pretensions.

Article 3317 C. C. (of 1825) provided that "*all mortgages*, whether conventional, *legal*, or judicial, are required to be recorded in the manner hereafter provided."

Article 3298, same Code, exempts from this necessity of registry the mortgages "in favor of minors, interdicted and absent persons, on the property of their tutors, curators, etc," and "mortgages of the wife on the property of her husband," etc.

Article 3333, same Code, provides that "this registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of their date; their effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, *in the manner in which they were first made.* But this rule does not obtain with regard to the mortgages" in favor of wives, minors, etc.

By acts of 1842 there were also excepted from the necessity of re-inscription mortgages by the stockholders of the Property Bank. By an act of 1843 the same Property Bank mortgages, and those of wives, minors, and interdicts. By act of 1853, those in favor of the commissioners of the Poydras legacy, etc.

It is not pretended that the legal mortgage resulting from the registry of the sheriff's bond comes within any of those exceptions. But it is urged that this legal mortgage against public officers was only created by act of 1847, and it is argued that as the law creating it only required its registry and is silent as to its re-inscription, therefore we can not apply Art. 3333, of the Code of 1825, to it. It is further urged that this legal mortgage was created after the Acts of 1842 and 1843 above referred to were passed, and therefore no argument is to be drawn from its not being included in the exceptions created by said acts. Whatever force this argument might have (and we confess it has but little), is overcome by the fact that in 1853, six years after this particular legal mortgage had been created by statute, the Legislature enacted another law, exempting the mortgages to the "Poydras fund"—and still we find no mention of this legal mortgage against public officers. But

we do not propose to rest our opinion upon this view of the case. The process by which we reach our conclusion is simply this: The law declares that *all legal mortgages must be recorded*, excepting certain specified ones. The opponent's legal mortgage is not one of those so excepted.

The law requires all *inscriptions* of mortgages (whether legal, conventional, or judicial, matters not) to be renewed within ten years. It excepts from this rule certain legal and conventional mortgages; but the opponent's mortgage is not among those excepted. Therefore the legal mortgage in question must be registered, and must be re-inscribed, to have effect against third persons. It was registered, but was not re-inscribed. It is, therefore, without effect as to the minor children of Gayle. We see no possible reason for supposing that the Legislature in creating this legal mortgage and requiring its registry intended to exempt it from the operation of a general law of the State in no way inconsistent with the act creating it. On the contrary, the fact that the Legislature required it to be *registered* in order to preserve it, is potent if not conclusive proof, in the absence of express exemption, that it intended that it should be re-inscribed as all other mortgages. The reason of the law, in requiring re-inscription, is as strongly applicable to this class of mortgages as to any other. When the law does not make the exception, we can make none.

The judgment appealed from is correct, and is affirmed with costs.

No. 6982.

SCHMIDT & ZEIGLER vs. CALEB SANDEL ET AL.

The purchaser of property, sold in fraud of his creditors by an insolvent debtor, who pays by anticipation a part of the nominal price after the institution of a suit to annul the sale on the ground of fraud, is not entitled to be refunded the sum he has thus paid.

One who constitutes another his agent with full power to manage his mercantile house, and to do all acts appertaining to its business, makes himself liable for the value of all goods purchased by the agent in the line of that business.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea*, J.

Wedge & Moore for plaintiffs and appellees.

W. F. Kernan and *D. C. Hardee* for defendants.

The opinion of the court was delivered by

MANNING, C. J. This suit is on an account for over seven hundred dollars, and with it is coupled a demand for the annulment of a sale of

land made by Sandel to his co-defendant and sister, Mrs. Delery, as in fraud of creditors and simulated.

J. D. Delery, the brother-in-law of Sandel, formerly kept a store in Jackson, failed, and was sold out under execution. Sandel bought the stock of goods, and continued the business, leaving Delery in sole charge, and not apparently interfering in its management. This was in May, 1874, at which time he executed this power of attorney——"Know all men by these presents that I hereby appoint J. D. Delery as my agent to represent me in my store in Jackson, to manage the same, and to do and perform any and all acts for me appertaining to said business." By December 1875, Delery had got Sandel's store in the same condition his own was the previous year. Claims, exceeding the sum expressed in the act as the price of the land, were about to be put in suit against Sandel, and on the 27th. of that month and year he executed with his sister a notarial act of sale of his land, the stipulated price being $2500, of which $225 was to be paid one year from the day of sale, $1000 in two years, and $1275 in three years, and left for Texas.

In less than a month after this Act was passed and recorded, the present suit was filed and process served, the absent Sandel being represented by a curator.

Mrs. Delery answers that she purchased in good faith, and has paid $1225 of the price, and would willingly surrender the land if this sum were repaid her, and her notes were returned. Sandel's testimony was taken, and he says there was a distinct understanding between him and Delery that the latter should buy and sell for cash only. His deposition is wholly occupied by statements that he did not know Delery was buying, or that any body was selling him goods on his (Sandel's) account, and that he never gave him authority to buy on credit, and such like. He says nothing about the sale of land to his sister. Not a word is uttered as to its verity or good faith.

The fraud intended to be perpetrated is transparent, and Mrs. Delery can not claim exemption from its consequences. If she paid to her brother any sum, she did it with full knowledge of the attack on the sale by the plaintiffs. The citation was served on her in the month following the sale. The first payment was not due until a year after it. The particular sum she alleges to have paid is the sum total of the instalments that were due in one and two years. She can not expect relief from such fatuous conduct.

This is but a sample of the shallow devices sometimes adopted to baffle creditors. Delery can not pay his debts, and the sheriff sells him out. A friend or relation makes the purchase, and the old occupant continues in the store, all the surroundings and appurtenances of which are unchanged except the cabalistic letters on the signboard, *agt.* The

insolvent occupant scorns to permit any one but himself to be chargeable with liability for the debts of the store, (Delery swore the plaintiffs would not have sold the goods on credit, but for their knowledge of his business capacity,) and his principal hopes to evade responsibility because he did not personally supervise its operations, or specifically authorize every particular purchase. When the agency was created, the authority delegated was to represent the principal in his store, to manage it, and to do every thing appertaining to the business. Keeping a store means *ex vi termini* buying and selling merchandize. The parties so understood it, and so did the public. Sandel must pay the penalty of his misplaced confidence.

Judgment affirmed.

No. 6740.

SATTLER & CO. vs. LEONARD MARINO.

Where an insolvent merchant, pressed by creditors, nominally sells to his penniless clerk a stock of goods which the clerk and he know are not paid for and accepts in payment of the goods a debt for pretended wages he owes the clerk, and the promissory notes of the clerk, the transaction will be considered a fraudulent simulation.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

F. L. Richardson for plaintiffs and appellees.

L. A. Sheldon for Salvador Marino, intervenor and appellant.

Thos. Gilmore & Sons for Hernsheim & Co., intervenors and appellees.

The opinion of the court was delivered by

DEBLANC, J. Leonard Marino had a store in this city, and—judging from the number of his creditors and the amount of their bills, his credit far exceeded his means. He became seriously involved, asked the attorney representing one of his creditors a delay of two months to satisfy his claim, and five days after—before the creditor's answer—sold his stock of goods to his brother Salvador, who—since his arrival from Europe, had lodged and boarded with him.

The sale from Leonard to Salvador Marino is attacked, by the creditors of the former, as being a mere simulation intended to cover up his property; or at least that which he alleges he transferred to his brother, and which—at sheriff's sale, brought $1100.

At the date of the sale, what was the state of the affairs of Leonard Marino? He confessed on the trial that—at said date—he could not have paid what he owed.

He was asked:

"What was the amount of your debts when you sold your property?"

A. "I have not made a regular calculation."

Q. "Did you owe over $20,000?"

A. "I made no regular calculation."

Q. "Did you owe over $20,000?"

A. "I made no calculation; it might have been less, it might be more."

Q. "Don't you know whether you owed over $10,000?"

A. "I believe I do."

Q. "You know you owed a great deal more than that."

A. "If I had the accounts I could add them up."

Q. "Do you mean to say you did not add up your accounts before the sale?"

A. "I never kept regular books."

Question repeated.

A. "No, I did not."

Q. "How long before the sale did you add up your accounts?"

A. "I did not keep regular books. I used to keep the invoices."

Q. "Did you ever know how much you owed?"

A. "Not exactly."

Salvador Marino testified as follows:

Q. "Did you make the purchase of the stock of goods which has been seized and sold?"

A. "Yes, sir."

Q. "Of whom, and when?"

A. "From my brother on the twentieth of January."

Q. "When did you take possession?"

A. "The same day."

Q. "Who had possession from the twentieth up to the time of seizure?"

A. "I had."

Q. "Had Leonard Marino any thing to do after time of sale up to the time of seizure?"

A. "No, sir, nothing at all."

Q. "State what were the terms of sale."

A. "I bought it for eighteen months' wages due me, and three notes."

Q. "How much were the wages?"

A. "Seventy-five dollars a month."

Q. "How much did the notes amount to?"

A. "Four thousand five hundred and fifty-seven dollars."

Q. "After you took possession, and before the seizure, did you buy any goods of any body else?"

A. "Yes, I did."

Q. "Have you got the bills of those purchases?"

A. "I have."

Q. "Do these bills show these purchases, and where you made them?"

A. "Yes, they do."

Q. "Who paid for the goods—those last bills?"

A. "I did."

Q. "Were these goods in the store, when the sheriff made the seizure?"

A. "Not all of them."

Q. "A portion of them were?"

A. "A majority," etc.

The deputy sheriff who made the seizure, was asked: "Whom did you find in possession of the store, when you seized it?" He answered: "Salvador Marino, a good many clerks and negroes: Salvador Marino claimed possession of the store, and said, in an excited manner that it did not belong to his brother, but to him: to which the deputy replied it made no difference, and seized.

At the date of his intervention in this suit, Salvador Marino had been in this country for about four years, and—from the first day of his arrival here until the twentieth of January 1877—he was, he said, in his brother's store and had never been out of it. There he lodged and boarded. On the twentieth of January, for his wages as a clerk, his brother was owing him—this is his own declaration, thirteen hundred and fifty dollars, and—on that day—he, the favorite clerk and pretended creditor, became the owner of the store.

The proposition to sell came from Leonard, and the consideration of a transfer proposed by and accepted by one who—then—was notoriously insolvent, and about to be sued, was the wages alleged to be due by the vendor to the vendee, and four notes from the latter to the former, payable at twelve, eighteen, twenty-four and thirty months—in all $5807. Not a cent of the price was paid in cash, though on that day—according to Salvador's sworn declaration, he had and could have paid—on account—the sum of two hundred dollars. It is true that, on the very same day, he told Leonard "I have no money," and Leonard replied "You can give me notes."

This Salvador did, and took possession—without being asked by, or informing any one whither he was going, Leonard said: "Good evening; I hope all of you shall have better luck than I have had." He then left penniless the store in which, during four years, he had entertained

apenniless brother, and that brother did not even invite him to spend the approaching night in the home where—for so long—they had lived, boarded and slept together. Did they so part because Leonard was angry with Salvador for having accepted his proposition, or because that unnatural parting had been pre-arranged and agreed upon between the two brothers? The creditors, bills in hand, had already knocked at the door, a cloud big with petitions, citations and notices of seizure was about to burst on the store, and—to avert its effects, the semblance of a sale was interposed between the creditors and the merchandize, the price of which—to the knowledge of vendor and vendee—was and is yet unpaid.

Leonard, after the sale from him to Salvador, sold some wagons for five hundred dollars, and, at about that time, drew out what he had in bank and even overdrew his account, and, with that money, paid unnamed merchants, and did not pay any one of the merchants who had supplied his store in September, October, November and December 1876, nor the balances due to his many clerks and employees. Do not these facts justify at least a presumption that he divided with his brother—took all the funds which had been realized from the sale of the unpaid merchandize, and apparently transferred to his brother, to be held for his and their common benefit—whatever there remained in the store.

The marked ability with which Salvador's pretensions have been sustained, has partly disguised the enormity of those pretensions, the baldness of as palpable a fraud as ever was attempted. "It looks funny," as said to Leonard by one of his creditors, "that you sold your store for notes." He replied that he considered as the most honorable of his debts that which he had thus paid.

We learn from the evidence, that Leonard was indebted to one G. Grande—his friend and countryman—for three thousand five hundred dollars, which he swore he borrowed from him. To that friend, in part payment of that indebtedness, he transferred three of the notes subscribed in his favor by Salvador, and that too indifferent transferee stood by, allowed the store to be sold by the sheriff, and did not claim the vendor's lien securing the notes which he took from Leonard.

Had it been proven that—for wages due from Leonard to Salvador—a lot of merchandize equal in value to the amount of the wages, had been transferred from the notoriously insolvent merchant to a favored clerk, the sale—though fraudulent—would have been merely voidable; but—here—the whole of a store valued at $5807, was sold by an insolvent and pressed debtor, in part for wages claimed, and which—if due—would amount to only $1350. To presume that they are due, we would have to presume that one who—outside of his wages—was absolutely without means, has—for the space of eighteen months provided for him-

self the necessaries of life, without drawing a cent from his salary, without incurring any liability toward the employer, at whose table he took his meals, in whose bed he slept. This is incredible.

The fact that—after the sale of the twentieth of January—Salvador hastened to buy in his own name, for what he calls his store, was only an additional precaution resorted to by him to manufacture and obtain evidence, to conceal a manifest simulation.

Be this as it may, no insolvent merchant can sell to his insolvent clerk, for the latter's wages, and at twelve, eighteen, twenty-four and thirty months' credit, a stock of goods valued by themselves at more than four times the amount of the wages, and the price of which both the merchant and the clerk know to be yet due to those who furnished the goods. Such a sale is, beyond a doubt, a fraudulent simulation. Were it simulated but in part, how could we distinguish its real and unreal parts, and decide which of the contents of a store sold as an entirety, should pass to one who did not intend to buy, and which should be considered as still belonging to one who did not intend to sell. The fraud, in this instance, does not merely consist in the endeavor to give or obtain a preference over other creditors, but to place out of those creditors' reach the property which is their common pledge, and that fraud tainted and nullified, at its very inception, the whole of a contract, no branch of which ever had a legal existence.

The judgment appealed from is affirmed with costs.

No. 6984.

JOSHUA C. THOMS vs. B. W. SEWELL ET AL.

In a suit for damages on the ground of a wrongful sequestration of land, the judgment rendered in a former suit between the same parties, involving the ownership of the land, can not be pleaded as *res adjudicata*. The objects aimed at, and the causes of action in the two suits are entirely different.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Brame*, special judge.

W. F. Kernan for plaintiff and appellant.

Wedge & Moore for defendant.

The opinion of the court was delivered by

SPENCER, J. In 1869 J. C. Thoms sued B. W. Sewell and Mrs. Kennedy to recover and be decreed owner of a tract of land, and to annul a sale thereof made by Mrs. Kennedy to Sewell as fraudulent.

Pending this suit, Sewell commenced suit against Thoms, claiming ownership of this same land, and had the same sequestered.

Thoms filed a plea of *lis pendens* to Sewell's suit, averring that "all the matters therein alleged are pending between defendant and plaintiff, in the case of Thoms vs. Sewell and Mrs. Kennedy."

The case of Thoms vs. Sewell and Kennedy was finally decided by this court in favor of Thoms. See 24 An. 209. He was decreed owner of the land.

Subsequent to this decision, on the fourteenth of June, 1870, Sewell's counsel filed in his suit against Thoms a written consent that the plea of *lis pendens* be sustained and the suit dismissed—which was accordingly done.

Thereupon, Thoms brought the present suit on the sequestration bond given in Sewell vs. Thoms for damages.

The defendant pleads the judgment of this court in Thoms vs. Sewell and Kennedy in bar and as *res adjudicata*.

The court below sustained the plea, and plaintiff appeals.

It is difficult to see by what process of reasoning the court below reached such a conclusion.

There is but one of the elements of *res adjudicata* present, to wit: identity of the parties to the two suits. The objects of the two demands and the causes of action are wholly different.

In the suit of Thoms vs. Sewell and Kennedy the cause of action was ownership, and its object the land. In the present suit the cause of the action is an alleged wrong by seizure of property, and its object money.

In the suit of Thoms vs. Sewell and Kennedy, plaintiff did not and could not demand damages for a sequestration which was not levied until afterward in another suit. He could not have legally claimed it by way of reconvention even, in this other suit of Sewell vs. Thoms, as both parties lived in the same parish. 24 A. 208; 12 A. 114; 17 L. 176; 10 A. 10; 3 A. 588. Defendant's counsel insists, however, if there is not technically *res adjudicata* plaintiff is at least estopped by his assertion in his plea of *lis pendens*, that *all the matters alleged in Sewell's suit against him were involved in his suit against Sewell and Kennedy.*

That statement was legally true, for the thing in dispute in both cases was the land, and we are at a loss to see how that averment now estops plaintiff from claiming what he could only claim after those suits had terminated.

The judgment appealed from is erroneous, and it is ordered, adjudged, and decreed that the same be set aside and reversed, and that defendant's plea of *res adjudicata* and estoppel be overruled, and that this cause be remanded to be proceeded with according to law; defendant and appellee paying costs of appeal.

No. 6993.

HOWARD MCKNIGHT VS. THE PARISH OF GRANT.

Land which has been donated to a parish and dedicated to public use, can not be seized for any debt due by the parish.

The contractor who furnishes the material and builds a jail for a parish, under a contract with the police jury of the parish, has the mechanics' lien and privilege on the jail, to secure the payment of what is due him under the contract.

APPEAL from the Ninth Judicial District Court, parish of Grant. *Blackman*, J.

R. A. Hunter for plaintiff and appellant.

A. Cazabat, Parish Attorney, for defendant.

The opinion of the court was delivered by

SPENCER, J. The police jury of the parish of Grant by ordinance appointed a committee to contract for building a public jail at Colfax; made the necessary appropriation, and levied a tax of two mills to pay for the same. The contract was made with plaintiff, who undertook to furnish all the material and build the jail for $1000, payable in cash when completed. There is no dispute that he fully complied with his contract. The parish authorities received the building, and have ever since occupied it. Plaintiff duly recorded his contract. Only $155 have been paid him, and as it seems no effort is made to collect the tax, or if collected as it has not been paid to him, he brings this suit for the balance due him, and claims the mechanics' and builders' lien on the jail and on one acre of ground on which it is situated, under article 3249 of the Civil Code.

The district judge gave him a judgment for the amount due, but refused to recognize his lien, and plaintiff appeals. It seems that the land on which the jail is built was expressly bought and donated to the parish, for the purpose of a jail lot. We have lately held, in the case of Parish Plaquemines vs. Foulhouze, that under such circumstances the land has been dedicated to public uses and can not be seized for debts of the parish. That it does not constitute property of the parish in the ordinary acceptation of that term, being out of commerce and belonging to the public.

But because the soil upon which a building is erected can not be sold to pay the cost of its erection, it by no means follows that the building itself may not be. The 3249th article of the C. C. gives the lien "upon the building *and* upon the lot of ground;" and then proceeds to provide for the case where the lot of ground belongs to another than the party having the work done, and where, therefore, it is not alienable in satisfaction of the debt. We think the spirit of this article requires us to recognize the lien on the building. It would be

monstrous to allow the parish to appropriate another man's material and labor in the form of a house, and refuse to pay him because the land on which it is built is inalienable, and out of commerce. The builder in such a case as this may be in some sort assimilated to a vendor of the materials and labor represented in the house. Good conscience forbids that he be denied the right to subject the building to his debt.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and is so amended as to recognize and render executory the building lien claimed by plaintiff on and upon the jail building of the parish of Grant, at Colfax, and that the same be seized and sold to satisfy plaintiff's judgment. That in other respects the judgment appealed from be affirmed, and that defendant pay the costs of appeal.

No. 6541.

THE STATE VS. JUDGE SPENCER.

Dying declarations made by a deceased person under a sense of immediate and impending death are admissible in evidence.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough*, J.

H. N. Ogden, Attorney General, for the State.

Griffith & Brown for defendant.

The opinion of the court was delivered by

SPENCER, J. The defendant was convicted of murder without capital punishment.

The sole question presented is as to the admissibility of the dying declarations of the deceased. The bill of exceptions discloses that the deceased was shot about nine o'clock at night. The witness details the facts as follows:

"As the shot was fired, the deceased fell and cried out, 'Oh Lord! I am shot!' Being asked where, he replied, 'In the stomach.' His bowels were protruding from his abdomen, he was too weak to help himself, and his wife and witness took hold of him and put him to bed. He asked witness to pour water on his wound, which witness did. After he had been placed in bed and after he had asked witness to pour water on his wounds, he said the accused, Judge Spencer, had shot him. *Immediately after saying this*, witness said to him, 'Gilbert you had better pray.' He told witness to pray for him; and *immediately* afterward he called his children around his bedside and bade them goodbye, and said to his wife take care of the children as best she could. He then became speechless and died at five minutes past twelve o'clock."

Dying declarations are admissible only when it appears that they were made under a sense of immediate and impending death. The actions and declarations of the deceased must manifest his consciousness of and belief in speedy dissolution. Greenleaf, vol. 1, sec. 158. Archbold, vol. 1, p. 140.

We think the condition of the deceased at the time of and his actions and declarations accompanying and *immediately following* his statement that the defendant had shot him bring this case within the rule, and that the judge *a quo* did not err in admitting them as declarations made in the presence and with a full sense of impending death.

The judgment appealed from is affirmed.

No. 6870.

VICTOR LAURENT VS. A. J. BEELMAN AND F. M. BEELMAN.

A judgment rendered against a party who was not cited, and who has not put in an appearance, is null and void.

A final judgment on default, signed by the judge *in chambers*, is absolutely void. Such a judgment, to be valid, must be read, and signed, in open court.

A void judgment can not be revived.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Marks*, J.

Breaux, Fenner & Hall for plaintiffs and appellants.

J. D. Augustin for defendants.

The opinion of the court was delivered by

SPENCER, J. On the thirteenth of March, 1867, plaintiff filed a suit claiming judgment against the defendants separately as joint indorsers of a note. He prayed for citation of each defendant, as usual, and that each of them be condemned to pay him one half the note.

A citation issued, addressed to "F. M. Beelman, Parish of St. Charles." The sheriff's return states; "Received copies of the within summons and petition accompanying, on the thirteenth of March, 1867, and served the same on A. J. Beelman and F. M. Beelman, personally," etc.

Judgment by default was confirmed against both defendants, and "signed on the tenth of August, 1867, *at chambers*."

On the tenth of July, 1877, plaintiff filed petition to revive this judgment, citing both defendants personally to show cause, etc.

A. J. Beelman appeared and pleaded as cause against revival that the so-called judgment was rendered on default without his having ever been cited, and was signed *at chambers* and not read and signed *in open*

court as required by law. The court below sustained this defense and rejected plaintiff's demand. Plaintiff appeals.

There is no error in the judgment. Both objections are fatal to plaintiff's pretensions. A judgment rendered without citation to or appearance of defendant is absolutely null and void. C. P. 612. *It is not a judgment.* It has no existence. It never drew the breath of life. You can not *keep alive* that which *never existed.* This was the view taken by the majority of this court, after much consideration, in the late case of "Conery vs. Rotchford, Brown & Co."

It is equally clear that where *a final judgment, on default,* is not "read" and "signed" *in open court,* but *at chambers,* the act is void and does not constitute a judgment. C. P. 543 and 546. A final judgment is the act of *a court,* and not of *a judge only.* Unless there is a special statute authorizing it (or perhaps a special agreement, on which we express no opinion), no final judgment can be rendered, read, or signed at chambers. The law says expressly they must be "read in open court," C. P. 543, and "signed before the adjournment of court." C. P. 546. There being no judgment, *even in form,* there is nothing to revive.

The judgment appealed from is affirmed with costs of both courts.

No. 7023.

THE STATE VS. JAMES V. WHITE.

As a general proposition, the question whether an application for a change of venue in a criminal case shall be granted, or refused, is a question which is confided exclusively to the discretion of the lower court.

The charge given by the judge to the jury, in the trial of a criminal case, to the effect that unless it was shown that the killing was done while the accused and the deceased were clutched, or in actual combat, it was not done in the heat of passion, but through malice, is fatally erroneous, and will authorize the setting aside of the verdict. The special grade of crime involved in a homicide, is not to be determined by the mere fact that the parties were, or were not, at the moment of the killing engaged in an actual struggle, but by other facts showing malice, or the absence of malice.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist,* J.

H. N. Ogden, Attorney General, for the State.

R. C. Wickliffe for the defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The prisoner was convicted of murder and sentenced to death. Upon appeal to this court, he complains of error in the ruling of the lower court in several particulars, of which two only need be noticed.

The prisoner moved a change of venue upon his own affidavit, and the supporting proof of four witnesses, that he could not have a fair and impartial trial in the parish of West Feliciana, because of the existence of prejudice in the public mind against him. No evidence was offered by the State in rebuttal. The judge refused the motion, declaring the evidence insufficient, by which we understand him to mean, it did not convince him that an impartial trial could not be had there. It is also stated in the bill of exceptions that the four witnesses proved the fact, and we read this as an awkward and inaccurate way of saying that the witnesses swore to the fact, for if it were meant that the fact of inability to have a fair trial was established, it would be difficult for the judge to explain why he forced the prisoner to stand a trial which was not fair.

The question, as it is presented in this case, is not within our cognisance. We are not prepared to say that a case might not arise, presenting a question of law on the refusal of a judge to grant a change of venue, of which we would have jurisdiction. But as a general proposition it is true that a change of venue in a criminal cause is confided to the discretion of the district judge exclusively, whose decision upon its propriety, rightfulness, and necessity is final. State v. Bunger, 11 Annual 607.

It was held in Indiana that the refusal of the lower court to change the venue in a criminal cause can not be assigned for error, and this is based on the phraseology of the statute there—"which change of venue the court may at its discretion award"—and consequently the discretion when exercised was not examinable on appeal. Findley v. the State, 5 Blackf. 576. Spence v. the State, 8 Blackf. 281. In Illinois, a prisoner is entitled to a change of venue whenever by petition, verified by affidavit, he brings himself within the requisitions of the statute, and the statute says the court shall in that case award a change. The language is peremptory, and does not admit the exercise of discretion. Clark v. the People, 1 Scam. 117. In Missouri, where the affidavits are required to be made by respectable witnesses, and the court refused the change because it did not appear that the witnesses were respectable, the Supreme Court held they must be assumed to be so until the contrary appeared, and that the court had not the right to refuse the change as a mere matter of discretion. Freleigh v. the State, 8 Mo. 606.

Our statute is, if on the hearing and examination of the evidence adduced, the judge shall be of opinion that the party applying can not have a fair and impartial trial in the parish where the indictment is pending, he shall award a change of venue. The absolute and imperative language of the statutes of Illinois and Missouri is absent here. The judge's opinion is to be formed after hearing the evidence, and is to control his action, and his ruling thereon refusing a change can not be

reviewed by us. It might be otherwise under a different application of the law to another state of facts.

The lower court charged the jury that unless it was shewn that the homicide was committed in actual combat, and a scuffle, a struggle was going on between the two parties, or while they were 'clutched,' it was not done in the heat of passion, but was done through malice aforethought.

This charge, made broadly and without qualification, was calculated to mislead the jury. It is not true that a homicide is mitigated from murder to manslaughter only when it is committed while the parties are actually 'clutched.' Where persons fight on fair terms, blows having been given by each, and after an interval, one draws a deadly instrument and inflicts a deadly injury on the other, it is manslaughter only, although it would be murder if the one inflicting the injury entered the contest dangerously armed and fights under an unfair advantage. State v. Hildreth, 9 Iredell, 429. The true principle is, that if a person, on whom an assault is made with violence, or circumstances of indignity, resent it immediately by killing the aggressor, and act therein in heat of blood and under that provocation, it is manslaughter only. State v. Tackett, 1 Hawks, 210. State v. Jarrott, 1 Iredell 76. The same rule applies to homicide in mutual combat, which is attributable to sudden and violent anger occasioned by the combat, and not to malice, as when two meet, not intending to quarrel, and angry words are used and a conflict suddenly occurs, in which blows are mutually given. If no unfair advantage is taken in the outset, and the occasion is not sought for the purpose of gratifying malice, and one seizes a weapon and strikes a deadly blow, it is homicide in heat of blood, and though not excusable, yet it is not murder. Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice either express or implied, which is the essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionally lenient. Com. v. Webster, 5 Cush. 295.

The fatal blow may have been inflicted while the parties were actually grappled, and yet the homicide may be murder, and on the other hand the blow may have been inflicted while the parties were not actually grappled and the homicide may be manslaughter. The fact that the combatants were, or were not, actually grappled, when the fatal blow is given, does not constitute the distinguishing feature of the one crime from the other, but the circumstances that preceded and attended the combat, which either shew malice prepense, or repel its actual or implied existence, determine the grade of the crime.

The jury were not correctly instructed, and a new trial must therefore be had.

It is ordered and decreed that the verdict of the jury be set aside, the judgment of the lower court be avoided and reversed, and the cause be remanded for a new trial.

No. 6910.

THE STATE VS. JOSEPH CHRISTIAN.

The trial of a criminal case without any plea having been filed by, or on behalf of the accused, is fatally irregular; and any verdict against the accused, in such a case, will be set aside.

Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled, and set aside.

When the entry in the record of a criminal case states that the jury were duly sworn and empaneled, it will be presumed that all of the jurors were sworn, although only eight of them are *expressly* mentioned as having been sworn.

Denunciation of another jury, for having found a wrongful verdict in a different case, (made by the District Attorney in the argument of a criminal case,) although objectionable, is not ground for setting aside a verdict.

Indictments charging the crime of larceny, and burglary, may be repeatedly amended during the trial of the case, in order to set forth the names of the real owners of the property charged to have been stolen.

Even after the jury in a criminal case have been impaneled, the statement of defendant's counsel that they would impeach the character of a brother of one of the jurors, who was a witness for the State, may sometimes, but not always, make it proper for the court to excuse the juror.

Where the accused, who is charged in one indictment with burglary, and grand larceny, has been convicted of burglary, the entry of a *nolle prosequi*, as to the charge of grand larceny, will not warrant an arrest of judgment.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie*, J.

H. N. Ogden, Attorney General, for the State.

Jno. B. Winder and *Thos. L. Winder* for defendant.

The opinion of the court was delivered by

EGAN, J. The defendant avers that he was indicted for burglary and grand larceny, and such seem to be the entries in the record. He was convicted and sentenced to fourteen years in the Penitentiary at hard labor, and from that sentence appeals. He assigns as error—

First—That no plea was entered, and there was no joinder of issue.

Second—That he was not present in court during the trial or any proceedings from arraignment to sentence, and was deprived of the right of confronting the witnesses who appeared against him.

Third—That the jurors who tried the case were not sworn; and,

Fourth—That the District Attorney was permitted by the court,

against the protest of the prisoner's counsel, to make an improper argument to the jury.

As to the first ground, it appears that the prisoner was arraigned, *i. e.*, called to the bar to answer or plead to the matters charged against him in the indictment, whereupon, through counsel, he asked permission of the court to withhold his plea, which was granted. He does not appear at any subsequent time to have been called upon to enter or to have entered plea. There was therefore no issue made up between him and the State, without which it was irregular to proceed to trial, as there was nothing to try. The object of arraignment is to inform the accused of the nature of the accusation against him, and to evoke plea.

As to the second ground of error, that the prisoner was not present in court during the trial or any proceedings from arraignment to sentence, the entry in the record is in these words: "This case having been regularly fixed for trial was this day called and taken up and tried and the persons whose names follow were duly impaneled and sworn to try this case, viz.: Then follow the names of the jurors, of the regular panel to the number of eight, and other entries showing the drawing of talesmen to complete the jury, and after two several amendments of the indictment, there appears this further entry: "And the said jurors after having heard the evidence adduced and the charge of the court, retired to their room to consider their verdict." Then follows the returning of the verdict into court, the verdict, the polling of the jury and the recording of the verdict, and finally the judgment or sentence of the court based upon the verdict, while nowhere after the arraignment until the sentence does it appear from the record that the accused was present in court otherwise than by counsel. Whatever moral impressions may exist in the mind of the court, and however the rule "*omnia præsumuntur*" may apply in civil matters, no such presumption exists in criminal cases, and however reluctant we are to do so after a case has passed through all the stages of a trial, we can not sustain so loose a record of conviction, nor disregard the constitutional right of the accused to be confronted with the witnesses and to be present in court during all the stages of the trial, and at every step in the progress of the case. This ground of error is also well taken.

As to the third ground, that the jurors who tried the case were not sworn, it will be seen from the entry already quoted that eight jurors of the regular jury panel were sworn to try the case. The sheriff then proceeded to draw from the box of tales jurors the ninth juror, and that box being exhausted, to summon other talesmen, of whom three, whose names are given were chosen to complete the jury. No special mention is made of the swearing of three additional or tales jurors. But we think, though not very closely conjoined, that they are embraced by

the general entry in relation to the due impaneling and swearing of the jurors in the case which precedes the names and numbers of all the jurors.

Fourth—As to the improper argument by the District Attorney, which is charged to have affected the jury unfavorably, it consisted in a reference to and denunciation in strong language of an alleged improper acquittal the day before, and in calling upon the jury not to render a like verdict of which they would be ashamed.

While we differ with the judge *a quo* as to his right to restrain counsel within reasonable limits and to pertinent grounds in argument, he was the best judge in this instance, and seems to have regarded it as simply in bad taste, we can not consider it from the record before us as an error which will warrant our disturbing the proceedings below on this ground. The defendant's counsel excepted to the District Attorney being permitted to amend the indictment twice on the trial. Both amendments are as to *the names* of the *owners* of articles charged in the indictment to have been stolen, and whatever may have been the case at common law or may be now in other States, such amendments are allowed in this State by the express terms of the statute. See R. S. 1870, section 1047. A bill of exceptions is taken to the refusal by the court at the request of defendant's counsel, after his challenges were exhausted, to excuse under the discretionary power granted the court a juror for the reason that defendant's counsel declared their purpose to impeach the character of a brother of the juror, a witness for the State. The court states at the foot of the bill that "no impeachment of the witness was made except in argument." While this is not made a cause of challenge by the accused, the State and the law desire an impartial trial unaffected by bias or prejudice; and while this matter was discretionary with the court when called upon by the defendant's counsel, the reason given by the judge *a quo* for refusing to excuse the juror is hardly a sufficient one, as it was only developed after the juror was impaneled and "*non constat*," but that, as stated by him, the counsel may have been prevented from attempting the desired impeachment for fear of prejudicing the juror, brother of the witness. Of this we would only remark that such a statement by reputable counsel under circumstances not suspicious, and where it could not prevent an impartial trial, might well have warranted the excusing of the juror by the court. We are not however prepared to say that the failure to do so in this instance was error. After the verdict the District Attorney entered a *nolle prosequi* as to the charge of grand larceny, of which, as well as of burglary, the jury had found the defendant guilty. Upon this his counsel bases a motion in arrest of judgment, and charges that the District Attorney abandoned the prosecution, and did after verdict rendered

enter a *nolle prosequi*, which had the effect of annulling the verdict as rendered. However questionable is the use of the *nolle prosequi* in such a case after verdict, we do not think it good ground to arrest the judgment. Burglary and larceny, whether grand or petty, are among the exceptions to the rule that two distinct offenses should not be charged in the same indictment, which would not therefore be liable to the charge of duplicity. It is well settled that in such a case the jury might have found a verdict of guilty of burglary and not guilty of larceny without affecting the conviction. Wharton's American Criminal Law, title Duplicity. If then the jury might so find, we see no reason why the prosecuting officer might not, with leave of the court, so order without affecting that part of the verdict in regard to the other charge of burglary. Besides, the judge *a quo* seems to have entertained grave doubts whether the indictment was really one good for any thing more than burglary; and if it was not, then there is still less in the motion to arrest the judgment for a *nolle prosequi* as to a crime not properly charged in the bill; and in the Ford case, just decided, we held it to be in law an indictment for burglary only.

Much as we regret the necessity under the law of so doing in regard to an offender of this class, if he indeed be such, the very loose and irregular record before us leaves us no alternative but to sustain his appeal upon the grounds favorably passed upon in this opinion.

It is therefore ordered and adjudged that the verdict and sentence appealed from be and they are avoided and set aside; that the accused be detained in custody to answer to the indictment, and the case be remanded to the court below to be proceeded with according to law and the principles of this opinion.

No. 7044.

SUCCESSION OF JOHN L. POINTER. ON OPPOSITION OF MESSRS. BARROW & POPE AND V. J. DUPUY.

This court has not jurisdiction of a suit against the executor of a succession, when the amount claimed is less than $500, and it further appears that all the assets of the succession have passed into the hands of the heirs.

APPEAL from the Parish Court of Iberville parish. *Crowell*, J.

Samuel Matthews for executor and appellant.

Geo. Wailes for Barrow & Pope, opponent and appellee.

Ed. B. Talbot for V. J. Dupuy, appellant.

The opinion of the court was delivered by

DEBLANC, J. In this case, we have before us three parties: the law

firm of Barrow & Pope and V. J. Dupuy—now, and so far as we are informed by the pleadings and evidence, the only creditors of the succession of John L. Pointer; and Gervais Schlatre, the executor of said deceased's last will. Those creditors claim against the succession—the first, the sum of two hundred and fifty dollars, with the privilege allowed to attorneys by the 128th section of the Revised Statutes—the other, the sum of one hundred and four dollars, the amount of a judgment obtained by him against said succession. Those creditors claim that the fees and judgment due to them should be paid—by preference—out of a sum of one thousand dollars received by the executor, for said succession, on the sixth of May 1872, subsequent to the homologation of his final account. This is proved and admitted.

To those creditors' demand, the executor's answer is that he has paid, under orders of the parish court, all the money that has come into his hands, except the aforesaid sum of one thousand dollars, which—without any order of court, but with the consent of the universal legatee of John L. Pointer, he has paid—on the sixth of May 1872—to Mr. Matthews, an attorney-at-law, by whom he was represented as executor in an important suit reported in the 24th A. That the whole of whatever composed the succession of said Pointer, has been delivered to his legatee, and that he has now neither money, nor property belonging to said succession. This is not denied by the creditors, and this is shown by the evidence.

The executor's statement of the disposition made of the sum of one thousand dollars, was—as would have been a regular account rendered by him, opposed by Messrs. Barrow & Pope, on the ground that said amount was recovered to the succession by their professional exertions, and that the privilege securing the payment of their fee for said collection, bears on the amount so recovered by them. As to Dupuy. his opposition is based on his judgment.

The opposition of Messrs. Barrow & Pope was sustained, that of Dupuy dismissed, and he and the executor have appealed.

Is this a case of which we have jurisdiction? The amounts involved in it, whether we consider them together or separately, are under five hundred dollars. There are no funds to be distributed—no dispute as to the correctness of Mr. Matthews' claim—no dispute as to the validity of Dupuy's judgment—no dispute as to the character and amount of the account of Messrs. Barrow & Pope. The succession of John L. Pointer is closed and has passed to his universal legatee. Under these circumstances, we can not entertain jurisdiction of this case.

The appeals taken by Dupuy and the executor from the judgment of the lower court are—therefore—dismissed at their costs.

No. 6970.

JOHN A. KLEIN VS. E. M. CRAMER, SHERIFF, ET AL.

Where an injunction is asked for in a case that comes within the jurisdiction of the District Court, and the District Judge is absent, and the parish judge is legally recused, the parish judge of an adjoining parish may grant the injunction.

APPEAL from the Thirteenth Judicial District Court, Madison parish. *Hough*, J.

James B. Corkern for plaintiff and appellant.

J. Tyson Lane for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff desired to obtain an injunction in a matter within the jurisdiction of the District Court. The district judge was absent, and an affidavit to that effect was made by plaintiff's attorney, who then applied to the parish judge for the injunction. The parish judge recused himself because of interest, and the injunction was then granted by the parish judge of an adjoining parish.

Defendants moved to dissolve because of want of authority in that parish judge to grant the injunction. There were other causes assigned which we will assume were not seriously made, one of which was that the affidavit of absence was made by the attorney of the plaintiff instead of the plaintiff himself.

It is not at all clear from the statutes, which judge would have authority to direct the issuing of an injunction in the circumstances presented here. There is no doubt that the parish judge has authority to grant injunctions in the absence of the district judge. It is conferred in three distinct sections of the Revisal of 1870, viz 1747, 2027, and 3195 the last two being fuller in one respect than the other. It is also provided that when the parish judge is recused or can not act, either the parish judge of an adjoining parish, or the district judge, may grant all orders in cases in the parish courts which might have been granted by the parish judge, if he had not been recused. sec. 3194. But *quære*—who is to grant the desired order if the case be in the district court, and neither the district nor the parish judge is able to act?

Art. 128 of the Code of Practice, as amended, furnishes the only clue to the solution of the difficulty, and we think the power of the parish judge of an adjoining parish to grant the order in this case is fairly deducible from it.

The parish judge of any parish may grant orders of every kind, in the absence of the parish judge of an adjoining parish, or of the district judge from his district, or when these judges are interested, or are recused, or can not act, and this power is extended to all sorts of cases

in their courts, wherein the orders might have been granted by the judges themselves, if they had not been absent or recused.

This is a paraphrase of the article, or rather a transposition of its clauses, which enables one to catch its meaning more readily than the text does.

The parish judge of Tensas properly granted the injunction, the district judge being absent from his district, and the parish judge of an adjoining parish (Madison) being recused and unable to act.

The lower court ruled the contrary, and even inflicted damages for wrongfully suing out the injunction, which, considering the dubiety and haziness in which the statutes have enveloped the question, might well have been deemed as not legally incurred. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and the injunction is reinstated, and the cause is remanded to be proceeded in its trial according to law, the appellees paying costs of appeal.

Mr. Justice Spencer recuses himself in this case.

No. 6952.

ALFRED S. BASS vs. WM. R. MESSICK, SHERIFF, ET AL. ALCUS SCHERCK & AUTEY, INTERVENORS.

The mere fact that one member of an ordinary, planting partnership is entrusted with the management of the plantation, will not authorize him to make a *dation* in payment of certain property of the partnership to one of the partnership creditors, and thus place the interest of his copartner, in said property, beyond the reach of other creditors of the partnership.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Yoist*, J.

Irion & Thorpe for plaintiff and appellant.

Thos. Overton and *E. J. Joffrion* for defendant.

H. A. Bordelon for intervenors and appellees.

The opinion of the court was delivered by

SPENCER, J. Alcus Scherck & Autey having become owners by transfer of a judgment against J. W. Bass & Co., a planting partnership composed of J. W. Bass and Thomas T. A. Lyon, issued execution, and the sheriff seized a portable steam engine and other movables connected with it, and four mules, all at the time in possession of Alfred S. Bass.

All of said property, except the mules, belonged originally to J. W. Bass & Co., the mules to J. W. Bass.

J. W. Bass, who seems to have been the managing partner of Bass

& Co., had employed his sons, Alfred S. Bass and D. W. Bass, as managers of the plantations worked by the partnership, and there seems no serious doubt that the firm was indebted to them in quite large amounts of money. The firm also owed their factors, Alcus Scherck & Autey, about $30,000 or more, and was evidently largely insolvent. In January, 1875, J. W. Bass, who subsequently confessed judgments *individually* in favor of his sons, transferred to Alfred S. Bass a number of mules, and the engine and tackle seized, and to his son D. W. Bass the four mules seized, in satisfaction *pro tanto* of their claims.

The sheriff having, as stated, seized the engine and machinery, and the four mules in A. S. Bass's possession, the latter enjoined the sale, making the sheriff alone defendant. Alcus Scherck & Autey thereupon intervened and joined the sheriff. A. S. Bass claims all the property as his own, except the four mules which he claims as lessee of his brother.

The defendant and intervenors plead a general denial, and that the property belonged to the firm of J. W. Bass & Co., and that plaintiff's title, if any he had, was fraudulent and simulated. The seizure was made in September, 1876.

The evidence satisfies us, as it did the district judge, that these *dations en paiement* were not simulations, but real contracts, with valid considerations to rest upon. So far, therefore, as they transferred the property and interests of J. W. Bass, they could not be attacked by seizure, however fraudulent they may have been as to other creditors over whom preference was thus given.

But, as before stated, the property transferred to A. S. Bass and seized by the sheriff belonged to the partnership of J. W. Bass & Co., an ordinary planting association. Plaintiff's counsel contends that as J. W. Bass was the managing partner he had the right to sell and dispose of the partnership property in liquidation of the partnership debts. It is not pretended that J. W. Bass derived any such authority from the articles of partnership; nor that any special power was ever given him by his partner Lyon to do so. True, it is shown that, by Lyon's acquiescence and perhaps consent, J. W. Bass managed and administered the partnership business, but we do not think the power to alienate the property composing the capital of the firm can be inferred or implied from this fact. We think that it clearly results from articles 2867 and 2870 of the Civil Code that the power of administration which carries with it that of alienation must be specially given in writing, either in the articles of partnership or otherwise.

It is further contended that Lyon was advised or knew of these transfers by J. W. Bass to his sons, and made no objections. J. W. Bass so swears, but Lyon, who seems to be without interest in the matter, swears that they were made without his knowledge, consent, or acquies-

cence. A. S. Bass swears that Lyon saw him using the things for his own purposes, but admits that he does not know that he was aware of their having been transferred to him by his father. Another witness swears to a conversation with Lyon, but speaks hesitatingly about it—and at most says that Lyon knew of the transfer. We think the district judge correctly held that Lyon's half of the property was not conveyed by the acts of J. W. Bass.

We think the evidence shows that the gin-stand seized was bought for A. S. Bass and paid for by him, and is his separate property. The judgment appealed from must be amended so as to perpetuate the injunction as to it. We decline to allow damages either way, as we think the parties have both been partly right and partly wrong, and may therefore well compensate their respective damages.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to perpetuate the injunction as to the gin-stand in its entirety, and that in other respects the said judgment be affirmed; the costs of appeal to be borne by appellees.

No. 6723.

J. G. E. AURICH VS. GEO. G. WOLF & LEVI. JOSEPH WOLF, INTERVENOR.

Where the lease of a store-house is taken in the *name* of one person, but is really taken, with the full knowledge, and consent of the lessor, for the exclusive use, and benefit of a third person, such third person will be deemed the real lessee.

The property of a party who, to the knowledge and with the consent of the lessor, is the real, although not the nominal lessee, can not be seized under a writ of provisional seizure issued in a suit against the nominal lessee, and directed solely against the property of the nominal lessee.

The interlocutory decree of the lower court maintaining a provisional seizure may, on the general appeal of the case on the merits, be reviewed by this court.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Hornor & Benedict and *M. M. Cohen* for plaintiff and appellee.

B. F. Jonas and *Labatt, Aroni & Clinton* for intervenors and appellants.

Jas. Graham, curator ad hoc, for defendants.

The opinion of the court was delivered by

EGAN, J. The substantial facts of this case as they have impressed us are, that the defendants were merchants in good credit and doing a large business in the city of New Orleans in 1872. Joseph Wolf, a

brother of George G. Wolf, came to New Orleans a stranger and desired to lease a store-house in which to open a mercantile business. He selected No. 633 Magazine street, the property of the plaintiff, with whom he agreed upon a lease for two years and ten months from the first of December, 1872. Being, however, a stranger to Aurich, and it being necessary to give security for the payment of the lease price, $115 per month, and his brother George G. Wolf being prohibited by the terms of the articles of partnership between him and his partner from becoming surety, he agreed—his partner being at the time absent—to take the lease and sign the notes in the name of his firm, which was accordingly done, although the lease was for the benefit and use of Joseph Wolf, and not of George G. Wolf & Levi. The evidence of the notary and other witnesses sufficiently establishes that all this was done with the full knowledge and consent of the plaintiff. The notary swears that Joseph Wolf and Aurich went together to his office and had him to draw the lease; that they met there several times before they came to the final conclusion; that he "understood that Wolf rented the place for a crockery store in the course of conversation without any reference to making out the lease." That there was nothing said about its being a branch of the down-town store. That "Joseph Wolf" is the one he refers to, and that George G. Wolf was never there until he came there to sign the lease. For a time it appears that the notes were presented to and paid by George G. Wolf & Levi, and subsequently repaid to them by Joseph Wolf. After that Joseph Wolf was otherwise assisted by his brother or his brother's firm until he had fairly established himself in business. When Aurich grumbled at receiving certified checks while the banks were suspended, he was told by George G. Wolf & Levi to present the notes for payment as they fell due directly to Joseph Wolf, which he did from that time, and they were regularly paid to him by Joseph Wolf, the last payment being made on the fourth of June, 1874, of all rent or lease price then due. This was only four days before the institution of this suit. It appears that George G. Wolf & Levi failed for a large amount in the fall of 1873. That a judgment of over $100,000 was recovered against them by one of their creditors, under which their entire stock of goods was seized on the 12th of January, 1874, and sold as soon after as possible, beginning, according to the sheriff's return, on the twenty-fifth of February and ending the sale on the eleventh of March, 1874, and the writ returned only partly satisfied and no other property of the defendants being found, although as appears from the evidence, from sixty to eighty thousand dollars was still due upon the judgment after the sheriff's sale. This of course put an end to the business and firm of George G. Wolf & Levi, the former of whom shortly after left New Orleans and returned to Europe, where

he has since resided, and the latter, Levi, went into the employment of another house in New Orleans as clerk, and so continued, as appears from the evidence. Meanwhile, Joseph Wolf continued his business at No. 633 Magazine street, the store leased from the plaintiff, and paid regularly, and the plaintiff as regularly received, his monthly rent—the last payment so made being, as before stated, on the fourth of June, 1874, only four days prior to the institution of this suit. All of these facts were notorious, and could not have been unknown to so vigilant a creditor as the plaintiff, who lived next door but one to the property occupied by Joseph Wolf, not only as a store-house but also as a residence for his family. The failure of George G. Wolf & Levi, the public sheriff's sale of all their goods, and the consequent extinguishment of the firm, the departure for Europe of George G. Wolf and the employment of Levi as a mere clerk in another house in the city, all of which occurred several months before, do not seem to have alarmed the plaintiff. Neither did the fact which seems to have been known to him that Joseph Wolf had repeatedly done, as seems to have been his custom, and that of other merchants, sent for sale to auction marts in the city goods which he found accumulating upon him and not salable in the ordinary course of business. Nor did he become alarmed at the fact that Joseph Wolf had a month or two before shipped to Chicago for more ready and profitable sale a quantity of goods purchased by him at the sale of the stock of George G. Wolf & Levi and otherwise at auction in this city, and perhaps some few goods from his store, and had himself gone with the goods to Chicago to attend to their sale, and had been absent from New Orleans on that account for several weeks, during which time the rent note for the month of April fell due and remained unpaid for several days, until the return of Joseph Wolf, when it was immediately paid by him. On the eighth of June, however, only four days after the payment of the note due on the first of that month, the plaintiff Aurich filed his petition in the Fourth District Court of Orleans against *George G. Wolf and Isidore Levi* only, and not against Joseph Wolf, setting forth the lease to George G. Wolf & Levi of the store and dwelling No. 633 Magazine street, and the execution of thirty-four notes for the lease price, of which he claimed and annexed the sixteen notes that remained unpaid, the first of which would fall due on the first of July following, and the others in their order on the first of each successive month thereafter; each note being for $115, with eight per cent interest from maturity. He further claimed a lien, privilege, and pledge upon the goods and other property in the two-story brick store and dwelling 633 Magazine street, alleged the recent dissolution of the firm of the lessees and the selling out "*by the sheriff*" of "*their large stock of goods* in another and larger store, occupied by Joseph

Wolf as a store and dwelling, of which he claims that 633 was "*a branch* conducted by Joseph Wolf for George G. Wolf & Levi, although the name on the place was Joseph Wolf & Co." He also alleged that George G. Wolf "has departed from this city for Europe and Isidore Levi is now employed as a clerk in another establishment in this city;" all of which, as we have already seen, occurred several months before, and without any action on the part of the plaintiff or any evidence of apprehension of the loss of his rent, and now on the eighth of June he alleges and swears that he has good reason to believe that his said lessees, George G. Wolf & Isidore Levi, whom alone he sues and cites or prays to cite, and against whom alone he prays for judgment *in solido*, "will remove the furniture or property upon which he has a lien or privilege out of the premises, and that he may be thereby deprived of his lien," and that he has frequently demanded of the parties some satisfactory explanations and arrangements, but never could obtain either from them."

These are all of the allegations as to any facts relating to or acts or conduct on the part of the defendants and alleged lessees, George G. Wolf and Isidore Levi. The petition however further alleges that "*Joseph Wolf* is rapidly and extensively selling out the goods and other property in the store and dwelling leased to George G. Wolf & Levi, and that placards have been for more than a week past extensively placed on said store, announcing among other things that the goods therein will be sold at half the cost of the goods at the factory, and that at the expiration of fourteen days the balance will be sold at auction to make a clean sweep." Upon these allegations a writ of provisional seizure was sued out and goods, etc., in the house seized to the value, according to the sheriff's inventory, which does not seem to have been taken with great minuteness, of between eight and nine thousand dollars, and according to other evidence in the record to considerably more than that sum. On the sixteenth of the same month, about one week after the seizure, Joseph Wolf filed an intervention claiming to be the occupant and lessee of the store and dwelling, and that he had occupied and carried on a commercial business there since the winter of 1872–3 with the full knowledge and consent of the lessor and owner, John G. Aurich; that he leased the same from George G. Wolf & Levi, lessees of plaintiff, and that he had regularly paid the monthly rent notes; that for many months past Aurich had regularly presented them to him for payment at his said place of business, and has recognized and treated him, said Joseph, as tenant and sub-lessee of said premises; and has voluntarily and by verbal agreement reduced the monthly rent to one hundred dollars, and from that time had claimed no more, and that all the rent due up to the first of June, 1874, had been paid, and no more would

become due till the first of July. He alleges his own sole ownership of the goods and other property; that George G. Wolf & Levi were neither owners thereof nor occupants of the premises, nor ever had any interest in them; that they were worth over ten thousand dollars, *and all paid for;* that Aurich well knew the facts when he sued out the provisional seizure; that the allegations of the petition and the affidavit were false to the knowledge of Aurich; that the rent of the building was all paid, and Aurich had by law no lien or privilege on said goods and merchandise. He further alleged that he had no intention to remove the merchandise and other property out of the premises, and prayed that the provisional seizure be set aside; that his right to claim damages be reserved, etc. On the thirtieth of the same month Aurich filed his answer to this intervention, and "specially denies that said intervenor is the sub-lessee of said store and premises in question as by him represented and claimed in his petition of intervention; *but on the contrary your respondent affirms and charges* that although said lease was taken in the name of George G. Wolf & Levi as lessees of said store and premises, *that the same* was so taken at the request, with the full knowledge and for the benefit of the intervenor; *that he profited by said lease; is the real lessee* and is bound by *the terms and conditions thereof.* Further answering, he says that the goods, merchandise, etc., are not the property of intervenor, but of George G. Wolf & Levi, who fictitiously transferred them to the intervenor to defraud their creditors, and adds "and your respondent reiterates the charge *'that said lessee'* will remove the furniture, etc., on which he has a lien, and he may be thereby deprived of said lien." On the twenty-eighth of September, 1874, Aurich filed a supplemental petition, alleging that the lease was made for the benefit of Joseph Wolf, who expressly assumed all the obligations of the original lessees under the lease, and is liable as well as the said George G. Wolf & Levi for the lease price as claimed in the original petition; "*that he was not until lately informed* of said facts and of the assumption by said Joseph Wolf of said obligations, and consequently did not so charge him in his original petition, *his knowledge on the subject having been obtained since the filing thereof,*" and prays as in his original petition, and also for citation to and judgment against Joseph Wolf; also for the same amount claimed by him in his original petition, "payable in *such manner* and on such *terms and times* as the law directs in such cases, and corresponding with the dates of the maturity of the rent notes filed in the case." The answer of Joseph Wolf to this supplemental petition was simply a general denial. An attorney *ad hoc* was appointed and answered for George G. Wolf, the absent defendant, also by a general denial. Isidore Levi answered denying the indebtedness of himself or his late firm for the rent of 633 Magazine street, and also

denying that they have any interest in the goods or property therein, which he avers belongs to Joseph Wolf, to whom respondents' late firm sublet the said premises with the knowledge and consent of plaintiff, and that no rent is due said firm by said Joseph Wolf.

On the thirteenth of November, 1874, judgment was rendered in favor of the plaintiff against Isidore Levi personally for the amount of his demand, with lien and privilege upon the property provisionally seized, execution to be issued from month to month as each and every note falls due. This judgment was, however, subsequently set aside and a new trial granted. In February, 1875, the case was tried by a jury as to George G. Wolf and Joseph Wolf, and there were verdict and judgment in favor of the intervenor and defendant, dismissing plaintiff's original and supplemental petition, setting aside the provisional seizure, and reserving the intervenor's right to claim damages for the illegal seizure. The plaintiff filed an application for and obtained a new trial, alleging several grounds for the same, only one of which, as it contains a judicial admission which bears necessarily on the issues before us, it is necessary for us to notice. That admission is in these words: "That said original lease was made *exclusively for his* (the intervenor's) *benefit and advantage*, and that the same *so* inured to his advantage and benefit that *he is the lessee* of plaintiff, and to be treated and considered as such." This is not only a reiteration of the averment and allegation contained in the answer of Aurich to the intervention and his supplemental petition that Joseph Wolf was his lessee, but it goes further and distinctly contradicts the allegations and affidavit upon which the provisional seizure was sued out, by alleging that *the lease was made exclusively for and inured exclusively to the benefit and advantage of Joseph Wolf.*

Indeed, this contradiction is apparent from the answer and supplemental petition in which Joseph Wolf is alleged to be the real lessee. Aside, then, from the evidence on the subject, which we think supports the truth of these later allegations of plaintiff and shows that to the knowledge and with the assent of all the parties while the lease was taken and the notes given in the name of George G. Wolf & Levi, who thereby became bound for the lease price, their obligations were in fact those of suretyship for Joseph Wolf, the real lessee, and it is evident that the plaintiff himself so understood it. It may be said, however, that Joseph Wolf claimed to be sub-lessee, and that one judicial allegation offsets the other; or, in the language of the books, "leaves the matter at large." If this be true, then the evidence is that he was in form sub-lessee, under a written sub-lease from George G. Wolf & Levi, and that he had fully paid all the lease price due up to the date of seizure, and was not, therefore, liable to suit or seizure; while, on the other hand, if he was the real lessee there is no affidavit or provis-

ional seizure against him or his property. The matter was not, however, left at large, for the plaintiff thought proper twice again to reiterate his judicial allegations, and, as we have seen, the last time in terms too strong to admit of further question as to the relation of the parties to each other. We think that not only the allegations of the plaintiff, but the evidence contemporaneous with the lease, and the subsequent conduct of the parties, as established by several witnesses, among whom is the plaintiff himself, show that the real relation between him and Joseph Wolf was that of landlord and tenant, lessor and lessee. We have examined with care the various bills or invoices of goods purchased by Joseph Wolf from George G. Wolf & Levi, as well as other persons, and we find nothing suspicious about them. It appears from marginal notes and memoranda that they were carefully scrutinized and often corrected and complaint made of over charges, as is not unfrequent among merchants. These facts, as well as the form of the bills and the direct and uncontradicted statements of witnesses in the record, all go to establish that Joseph Wolf was a real purchaser, and was looking after his interest as such. The fact of George G. Wolf & Levi taking out in their own name some of the policies of insurance is explained by other evidence, but is easily accounted for, as they seem to have sold largely to Joseph Wolf on a credit, and doubtless had an interest in having the stock insured. They are not shown to have ever been in possession or to have exercised any control over the business of Joseph Wolf. Their business both began and ended before his; and at the very time this suit was instituted not only had George G. Wolf & Levi failed and been sold out by the sheriff, but according to the allegations of plaintiff himself in his *original* petition, George G. Wolf had left the country and gone to Europe, and Levi had quit business on his own account and was clerking in another establishment in this city, and did not then or at any other time appear to have the slightest connection with or control over the business of Joseph Wolf, or Joseph Wolf & Co., as it seems he chose to do business under that name, although he had no partner. All the parties, George G. Wolf, Levi, and Joseph Wolf, swear positively that George G. Wolf & Levi had not at any time any interest in the business carried on at 633 Magazine street by Joseph, and the attempt by Aurich to show by his own evidence that George G. Wolf told him he wanted the store for a branch establishment of their down-town house is entitled to but little consideration in view of his own contradictory allegations and the other testimony in the record. A loose conversation with George G. Wolf to similar effect is detailed by one other witness but is not supported by the facts and circumstances of the case, and besides being, (especially under the circumstances detailed), entitled to but little credence in itself is flatly contradicted by the other party to the alleged conversation. We find nothing suspi-

cious in the fact that George G. Wolf, who was already established in business, and seems at the time to have had the means and the credit to do so, assisted his brother to procure a place of business and to establish himself. Nor is it surprising that his partner at least tacitly acquiesced in his so doing on and after his return home. Had he been in the city at the time of the lease it might possibly have been arranged otherwise; but he was not, and when he did return he made no objection to what was done.

The assistance rendered Joseph Wolf was natural and commendable and very frequent, especially between persons of that lineage standing in such relation to each other. The allegations of the plaintiff that he only recently, before filing his supplemental petition, ascertained the facts therein alleged, is not supported; but on the contrary, is contradicted by the evidence, and even by his own previous judicial admissions. He can not then claim any benefit, if such there be, from such state of facts. The view taken by the judge *a quo* in his charge to the jury, and in argument before us by plaintiff's counsel, rests upon the doctrine of estoppel, and might have had greater force if it were not evident that the plaintiff was in no manner deceived by the lease being taken in the name of George G. Wolf & Levi, by the consent of Joseph. The evidence of the notary who drew the lease and that of other witnesses, and the conduct of the parties, leave no room to doubt the plaintiff's knowledge of the facts from the beginning. We think the real lessee was Joseph Wolf, that the property provisionally seized was his, and that the plaintiff knew, or had reason to know, these facts when he sued out his provisional seizure and made his affidavit, and brought his suit against George G. Wolf & Isidore Levi, only. Nowhere in the record, either in the original or supplemental petition, is there any allegation or affidavit for provisional seizure as against Joseph Wolf or his property, and without it the seizure could not be and was not legally made and must fall. We have not overlooked the extensive posters and other acts or facts relating to him, and which it is claimed were sufficient to warrant the suing out of the writ as against Joseph Wolf, about which we are not, however, called upon to express an opinion, as no such use was made of them or action taken against him based upon them. It is, however, urged by the able and experienced counsel for the plaintiff, that we can not now go into the question of the provisional seizure, as it had already been adjudged in favor of the plaintiff upon a rule in the court below to set aside the provisional seizure, from which no appeal was or could now be taken. However plausible this may seem, it is now too well settled that the action of the court below in interlocutory matters comes before this court for review on the general appeal of the whole case, whether an appeal could have been taken

from the particular order or not. In this instance we think no appeal lay in favor of the party against whom the interlocutory order was made. Had the court dissolved the writ the plaintiff might have appealed, but not so the defendants or intervenor; and the latter may as well now invite our attention to this as to any other erroneous ruling in the court below anterior to final judgment as well as in that judgment itself. The conclusions to which we have arrived make it unnecessary to notice the several bills of exceptions reserved in the progress of the case. Had exception been taken to the prematurity of the plaintiff's demand against Joseph Wolf we would have been compelled to sustain it. We do not regard the allegation that he was sub-lessee and had fully paid his rent as such exception. Neither do we regard him as sub-lessee in fact, though he was so in name. We think, however, that it is sufficiently shown by the testimony of other witnesses, and even of the plaintiff himself, that from the time of general depression in the winter of 1873-4, when other landlords were reducing their rents, the plaintiff did agree with Joseph Wolf to reduce his rent from $115 to $100 until business revived; and that he received rent several times at the reduced rate. There is no evidence that trade did revive, but rather the contrary, and he must be held to his reduction as agreed on. It is further urged that Joseph Wolf paid one month's rent, $100, to the sheriff, which has accrued or will accrue to the benefit of plaintiff. The sheriff had in hand no writ authorizing the reception of this money, which was, therefore, no payment to the plaintiff. The amount is still the property of Joseph Wolf. It also appears that he tendered to plaintiff, through a notary, in the presence of two witnesses the sum of seven hundred and fifty dollars, and repeatedly, through his counsel, offered to pay the other rent notes as they fell due, but the plaintiff would not receive it. This continued up to the termination of the lease. It does not appear, however, that the money was deposited, and the intervenor and his counsel admit his liability for the rent, at the rate of one hundred dollars per month, with eight per cent per annum interest from the maturity of each month's rent remaining unpaid.

Under this state of facts, and considering he was not in default when sued, he is entitled to be relieved from costs, but not from interest. The only part of the case before us results from a verdict and judgment after several trials, with varying fortune, in favor of the plaintiff, Aurich, against Joseph Wolf, on the intervention and the main suit.

It is therefore ordered, adjudged, and decreed that the verdict and judgment in the court below be and they are avoided and set aside; that Joseph Wolf be decreed to be the owner of the property provisionally seized; that the provisional seizure sued out in this case be and it is dissolved, and the seizure under it released at the cost of the plaintiff,

Aurich; and that said plaintiff do have and recover from the defendant and intervenor, Joseph Wolf, the sum of sixteen hundred dollars principal debt, with eight per cent per annum interest on one hundred dollars thereof from the first day of July, 1874, and on each remaining hundred dollars as it matured according to the lease from the first of each succeeding month thereafter until and including the first day of October, 1875, for the maturity of the last installment, until paid, and that his lessor's lien and privilege be recognized on any property subject to it which may be found. It is further ordered and adjudged that all costs of both courts be paid by plaintiff, J. G. E. Aurich.

No. 6671.

HENRY PINARD VS. M. M. GEORGE. C. C. HALEY, SURETY.

An advertisement that "*all* the judgments" belonging to the succession of a certain decedent will be sold, is sufficiently specific to authorize the sale of every such judgment.

Neither the judgment debtor of a succession, nor the surety on the appeal bond of such debtor, is entitled to notice of the public sale of the judgment against such debtor, made in the course of administration.

The surety on an appeal bond, when his principal has been cast on appeal, may be proceeded against by rule for the amount of the judgment when the uncontradicted return of the sheriff on the *fi. fa.* against the principal, shows that after diligent search the principal could not be found; that the surety failed to point out property of the principal after being called on by the sheriff to do so; and that the sheriff could find no property of the principal to levy on.

Until traversed, and disproved, the declarations of the sheriff in his return on a writ of *fi. fa.* are taken to be true.

The surety on an appeal bond can not escape his liability on the ground that the sheriff's return on the *fi. fa.* against the principal on the bond was prematurely made, unless he proves that in some form or other that premature return has inured to his injury. To the extent of such injury, and only to that extent he would be discharged.

Where the attorney of the plaintiff in execution instructs the sheriff to make a return of *nulla bona*, it relieves the sheriff, from the necessity of calling on the plaintiff to point out property of the defendant.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Louque & Fernandez for plaintiff and appellee.

J. Livingston for surety and appellant.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the application for a rehearing by EGAN, J.

DEBLANC, J. During the pendency of this suit between the original parties, Henry Pinard died. His widow prosecuted said suit as natural tutrix of her children and administratrix of the deceased's succession, and—as such—obtained against the defendant, M. M. George, a judg-

ment for $451, with interest. From that judgment, the said M. M. George took a suspensive appeal, and furnished bond in the sum of $800, with Cornelius C. Haley as her surety. The judgment appealed from was amended by this court, and increased to $687, with legal interest from the seventh of February 1873.

On the judgment thus rendered execution issued, and—on said execution—the sheriff made the following return: "Received February 7th 1877. After diligent search and inquiry, could not find the defendant. I was credibly informed that she was absent from the city. I called upon C. C. Haley, security on the sequestration bond, to point out property belonging to defendant, which he failed to do, and the sheriff could not find any property upon which to levy. I, therefore, return this writ no property found, by order of plaintiff's attorney."

This return, signed by a deputy sheriff, was made on the twentieth of March 1877, and—on that day—on application of the widow and heirs of the late Henry Pinard, one of whom is the transferee of the judgment rendered against M. M. George, Cornelius C. Haley was ordered to show cause, on the third of April 1877, why he should not be held liable, as surety, on the appeal bond herein mentioned for the sum of $897.69.

He appeared, and—for answer to the rule taken against him—alleges:

1. That the plaintiffs in said rule were not the plaintiffs in the original suit.

2. That there is no evidence of the pretended transfer of the judgment against M. M. George, and that—if any such transfer does exist, he was not notified of it.

3. That no demand was made upon M. M. George, the defendant in the original suit, and that he can not be held liable as surety, and—if at all—but for the amount of his bond, and not until all legal means have been exhausted to recover from said defendant.

He was condemned to pay an amount equal, in principal and interest, to that of the judgment rendered against M. M. George; said amount not to exceed that of the bond signed by him as surety. He appealed, and plaintiffs in rule—considering the appeal as frivolous—pray, on that account, to be allowed damages against him.

The two first grounds of the surety's defence are not sustained by the facts. It is admitted that Henry Pinard, the son of the original plaintiff, is the transferee of the judgment against M. M. George, and that transferee—with the widow and heirs of said plaintiff—took the rule made absolute against appellant. We have before us, not only the adjudicatee of the aforesaid judgment, but every one of those who, heretofore, had an interest in it.

Respondent complains that the advertisement that a sale was to be made of the effects and credits belonging to the succession of the original plaintiff, was insufficient and not such as the law requires. That advertisement was as follows: "All claims and judgments in favor of Henry Pinard, deceased, a list of which is on file in this, the auctioneer's office." Neither he nor defendant George were entitled to notice of that sale, and—as they knew that a judgment had then already been rendered against said George and in favor of the legal representatives of said Pinard, they could not be deceived as to the fact that said judgment was certainly included in the advertisement of the intended sale of "*all judgments* in favor of Henry Pinard, deceased."

Is the sheriff's return on the execution sufficient to hold respondent as a surety on the appeal bond? That return mentions five distinct facts—1: After diligent search, the sheriff could not find defendant George—2: He was informed, and so believed, that defendant was absent from the city—3: He called upon Haley to point out property belonging to said George, and he failed to do so—4: He could not find any property of defendant upon which to levy—5: And, on the twenty-first of March returned the writ which he had received on the seventh of the preceding month.

Sheriffs are not required to accomplish impossibilities, and—in this case, the sheriff has done all that he could justly have been asked or expected to do. He diligently searched for and found neither the defendant, nor property belonging to her: he applied to Haley, who was her surety on two bonds—one furnished by her for the release of furniture sequestered by Pinard—one to obtain a suspensive appeal of the judgment obtained against her, and he failed to point out any property of the principal on said bond. We presume that, as Haley, the plaintiffs and their attorneys were unable to point out any, and—under the instructions of said attorneys, the writ was returned.

The sheriff's return stands uncontradicted: his statements are not denied in the answer of the surety, not refuted by any evidence, and that return creates at least a presumption that the principal on the bond is no longer in the city, and that she has no property which could or can be seized by the sheriff. Though not conclusive, though it may be traversed, that presumption justifies the creditor's action against the surety, and shifts the burden of proof. To avoid the effects of such a return, the surety must allege and prove its falsity; he must allege and prove that his principal does own property, rights or credits—which can be levied upon, and that he informed the sheriff of that fact: otherwise, many a bond of appeal would never mature.

In the case relied upon by the surety's counsel, and reported in 10th R. three executions had been issued: under the last one, no demand for

property of the debtor appeared to have been made of any one: the return on a previous one did not show that a demand had been made of plaintiff, his agent or counsel, and the declaration in that return that no property could be found, was contradicted on the trial. The demand on a plaintiff in execution is intended to prevent an improper return, one in the interest of the judgment debtor. When the sheriff has been unable to discover, the surety unable to point out any property of the defendant, and the creditor's counsel orders the return of the execution, we are bound to presume that he did so after the required demand by the sheriff, after having ascertained that defendant had no property which could have been seized.

Haley's counsel contends—in his printed argument—that the execution against defendant George has been returned too soon to fix the liability of his client as a surety. In the case of Duncan Stewart vs. Charles Lacoume, decided on the seventh of this month, we said: Had the surety on the bond proven that—on account of such a premature return—any property which could have been seized from the date of that return to that fixed by law and the writ for said return, was no longer subject to said writ, or had the surety proven that he has been in any way injured by said hasty action, he could certainly claim that, to the extent of the injury sustained, he has been discharged from his obligation.

In the case of A. H. Gale & Co. vs. Geo. W. Doll, our predecessors, discussing the same question, held that a similar defence could not avail the surety, because he had not shown in what he had been injured—and, in that case, the writ received by the sheriff, on the fifth of January, had been, by order of plaintiff's counsel, returned on the twelfth of said month:

28 A. p. 718. Ante. p.

We are not inclined to discourage the exercise of the constitutional privilege of appeal, but when that privilege is used to delay or defeat the enforcement of a just claim, those who sign the bond of appeal, whether as principals or as sureties, should remember that—in so doing—they assume a liability and contract an obligation.

We do not consider the appeal as frivolous, and merely affirm the judgment with costs.

ON APPLICATION FOR REHEARING.

EGAN, J. We are urged to grant a rehearing in this case on the ground that the sheriff's return does not show that the *fi. fa.* was returned *nulla bona* after demand upon the *plaintiff* as well as the defendant—that the law requires a demand upon both parties before

such return. It is only necessary to add to what was already said in an opinion heretofore read that this ground of objection was not set up in the answer of the surety to the rule, and that the sheriff's return is accompanied by the written instructions of plaintiff's attorney, which are referred to in the return itself. These instruct the sheriff to return the *fi. fa.* "No property found" after demand upon both parties. It was by virtue of this order that the writ was returned. A demand upon the attorney was for this purpose a demand on the plaintiff. We think, from all the facts in the record, that the law was substantially complied with.

It is therefore ordered that the rehearing asked for is refused.

No. 7003.

MRS. EUPHROSINE BLAKE ET AL. VS. THE MINORS FRANK KEARNEY AND ANN ELIZA LAKE.

The existence of a succession free of debt can not be terminated, and its administration avoided, and the jurisdiction of the probate court thereby divested, by any agreement of the heirs to enter into possession of and divide the succession property, when one of the heirs is a minor, represented by a dative tutor, and one of the major heirs demands an administration.

APPEAL from the Parish Court of Iberville. *Crowell*, J.

Barrow & Pope for plaintiff and appellant.

Samuel Matthews for defendant.

The opinion of the court was delivered by

SPENCER, J. This is an action brought in the parish court of Iberville to partition the succession of Adeline Dupuy, Widow Fenn, among her descendants, children, grandchildren, and great grandchildren.

The minors, Frank Kearney and Ann Eliza Lake, having no tutors, Richard A. Kearney, the father, was appointed tutor *ad hoc* to his son Frank, and A. Petit tutor *ad hoc* to Ann Eliza Lake. The facts are as follows: After the death of the ancestor, Adeline Dupuy, her heirs of age and the minors (some of whom are declared to have been emancipated, and one of them, Ann Eliza Lake, to be under dative tutorship of said Richard A. Kearney, who assumes to represent her), entered into an agreement by private act, whereby they declare and fix their respective interests in the estate, enumerate its effects in detail, and, to avoid the expenses of a judicial settlement, they, "the heirs of age and emancipated, and the said R. A. Kearney, assuming the entire responsibility of this act as far as it regards the interests of his ward, Eliza Ann Lake," do covenant and agree that said R. A. Kearney be constituted

the agent of said heirs, with full authority to liquidate said estate, to sell its effects, to pay its debts, and thereafter to distribute to the heirs the balance according to their several rights, etc. This agreement is dated October 24, 1874. On the same day certain of the heirs acknowledge to have received, by way of distribution, from Kearney the sum of $250, being the balance of cash on hand belonging to the estate, after paying certain debts.

Richard A. Kearney, cited in the present suit as tutor *ad hoc* for his minor son Frank, appeared and excepted to the jurisdiction of the parish court, on the ground "that the heirs of Adeline Dupuy have long since entered into possession of the property of her estate, have sold a portion thereof and partitioned among themselves a part thereof, and have done acts of heirship and ownership which show an acceptance, pure and simple, and a mingling of the patrimony, so there is no succession remaining over which this court has jurisdiction to decree a partition," etc., "the property of said estate to be partitioned exceeding $500 in value." It seems that the plaintiff, Euphrosine Blake, has caused herself to be appointed administratrix of the estate of the deceased; but the date and circumstances of her appointment are not stated. The parish judge sustained the exception and dismissed the suit, and plaintiffs appeal.

The sole questions, therefore, are, where some of the heirs are majors accepting unconditionally and some minors necessarily beneficiary, and where there are no debts, can these heirs *by agreement* enter into possession and terminate, extra judicially, the existence of an estate where one of the majors demands an administration? Will such agreement and possession defeat a subsequent administration and take the estate out of the hands of the probate court?

C. C. 1047 provides: "If there be several heirs to a succession, some of whom have accepted unconditionally, and others claim the benefit of the term for deliberating (benefit of inventory), the judge of the place where the succession is opened shall, notwithstanding, cause an inventory to be made, * * and shall appoint an administrator to manage until a partition of the same be among the heirs."

A minor, *ex necessitate legis*, claims the benefit of inventory. The Code directs, therefore, that an administrator shall be appointed to estates in which there are minor heirs concurring with majors who accept unconditionally. The only exception to this rule we have lately had occasion to review in the case of Soye vs. Price, not yet reported. It is to the effect that *the natural tutors of minor children*, may *as such* take possession of and administer the estates of the deceased parents of such children, unless and until creditors or heirs of age demand the appointment of an administrator.

It is admitted that plaintiff, Euphrosine Blake, has demanded to be and been appointed administratrix of the estate. We do not consider the acts of the major heirs as affecting the interests of the minors who were totally without power by themselves or tutors to accept unconditionally the estate. We think the probate court has jurisdiction of the succession, which has never ceased to exist, because the minors were without power to do, extra judicially, the acts necessary to terminate it. It is now the well-settled jurisprudence of this State that where heirs of age are permitted to take possession of an estate without an administration, and to partition or dispose of its effects among themselves, the estate ceases to exist and the patrimony of the deceased is lost by confusion with that of the heir. A succession is an ideal being, a unity. It can not exist as to one heir and be extinct as to another. To terminate the existence of a succession the heirs must all be *sui juris*, and have capacity to render themselves, by their acts, unconditionally liable for the succession debts. This a minor can not do; and, therefore, no extra judicial acts or contracts of a minor can legally terminate the existence of the succession.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, and that the defendants' exception to the jurisdiction of the parish court be overruled, and that this cause be remanded to be proceeded with according to law, appellee paying costs of appeal.

No. 5945.

B. F. George vs. N. Amacker.

The tutor who received the proceeds of the sale of slaves, the property of the minors under his tutorship, some time before the late civil war, is liable to the minors for the amount of those proceeds.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Kemp*, J. Trial by jury.

E. F. Russell for plaintiff and appellant.

O. P. Amacker for defendant.

The opinion of the court was delivered by

Spencer, J. Plaintiff, as transferee of a note of defendant for $767 50, brings this suit therefor. This note was given in renewal of a previous note of defendant for $750, in favor of Mrs. Emma Dean Odom.

The defense is that this note for $750, in renewal of which the note sued upon was given, was based upon a Confederate money and negro slave consideration, and was, therefore, void; and, therefore, that the note in renewal is also void. The case was tried by a jury, and there was verdict and judgment for defendant, and plaintiff appeals.

The facts are as follows: William P. Dean died some time about 1852, and defendant was appointed tutor of his minor children. Dean left an estate of some $6000, consisting of land, slaves, and movables. In 1853 this property was all sold and the proceeds, consisting of money and notes, were paid over to defendant, as tutor of the minors to the extent of their interest in the estate.

In May, 1861, Amacker rendered a provisional account of tutorship, in which he charges himself with a balance in his hands, due the minors, $3988 38; of which he shows the sum of $2599 24 to be due to one of his wards, Emma Dean. This account was duly homologated.

In 1866 the tutor filed his final account, which, upon appeal being taken, was compromised and a judgment rendered in accordance with the compromise terms. In this compromise judgment the tutor, N. Amacker, "agrees to pay to Mrs. Emma Dean (Odom)" (who was one of his wards) "the sum of two thousand dollars, one fourth cash, and the balance in one and two years, with interest from maturity until paid; notes to be given, each for the sum of $750." The tutor goes on to state, in said compromise, "*that he believes said arrangement a fair and equitable settlement of his indebtedness to the parties by reason of his tutorship of them, and that the same is advantageous to himself.*" Here we have the origin of the $750 note, basis of the note for $767 50 sued upon.

There was annexed to the tutor's final account a list of notes which he says were partitioned to him as tutor, from the estate of William P. Dean, "or have been derived therefrom in due course of administration for the best interests of the minors at the time, and are now on hand." This list consists almost entirely of the notes of one D. W. Thompson, said to be defendant's son-in-law, amounting to nearly $3000.

We presume the intention of the tutor (though not so expressed) was to force his wards to take this list of notes in satisfaction of what he owed them. But, as stated, the judgment on the compromise ignored all of these and gave a money judgment, in satisfaction of which, in part, the note sued on was by renewal given.

Strange to say, Amacker swears that the notes *on this list* were based upon Confederate money and slave consideration; and, stranger still, there was not one of the notes on this list which he derived from the estate of William P. Dean. He does not explain how *the cash* in his hands in 1861 got into the shape of *Confederate money and slave* notes in 1866.

The truth is that these notes did not belong to the minors. Their property was sold in 1853, and Amacker received and collected the proceeds long before Confederate money was dreamed of, and when a slave consideration was not under ban. True, the money he received

was largely the price of slaves sold in 1853. His self-abnegation and anxiety to save his wards from contact with this polluted gold, by appropriating it to himself and taking the sin thereof upon his own shoulders, are, to say the least, refreshing, and smack very much of the martyr. We prefer that he should not burden himself thus with the sins of others, notwithstanding the magnanimity of his desire to do so.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be annulled and reversed, and it is now ordered and decreed that the plaintiff, B. F. George, do recover of the defendant, N. Amacker, the sum of seven hundred and sixty-seven dollars and fifty cents, with eight per cent interest thereon from March 1, 1869, till paid, and costs of both courts.

No. 5488.

M. GOEPPER & SONS vs. CASPAR LUSSE.

The facts that a written demand was made on defendant before suit was brought, that he answered by a general denial, and specially averred in his answer that too much interest was demanded, and it appears that he and his counsel were absent on the trial of the cause, are all corroborating circumstances, and in conjunction with the testimony of one witness, will prove a claim for more than five hundred dollars.

Damages will be allowed for a frivolous appeal.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

Gabriel Fernandez for plaintiffs and appellees.

Hornor & Benedict for defendant.

The opinion of the court was delivered by

SPENCER, J. This is a suit for the balance of an open account for $861 87, one item of which is for two hundred bags malt, amounting to $822 14, under date October 10, 1873. The defendant was personally cited and answered by a general denial, and a special plea that the account sued upon includes interest upon which interest is claimed.

The defendant and his counsel were absent at the trial. There was judgment for plaintiff for the sum of $851 54, with legal interest from October 17, 1873, the date of closing the account. The judge *a quo* evidently rejected the item $14 93 interest charged in the account. Defendant took a suspensive appeal, and urges as the sole ground for reversal that the item $822 14 is established only by the testimony of a single witness who proves the defendant's acknowledgments of the correctness of the account. This witness, plaintiffs' attorney, testifies that he, on receipt of the account, wrote defendant a letter (a copy of which he

produces and offers in evidence) informing him thereof, and of its amount. That he soon after saw the defendant himself, who said the account was right and just, and that he would pay half of it in a few days and the balance at another stated time. There is annexed to plaintiff's petition, but not formally offered in evidence (so far as the note of evidence shows), what purports to be a telegram from defendant to plaintiffs, of date October 7, 1873, ordering two hundred sacks of malt.

The defendant was personally cited. He answered by a general denial, and a plea that too much interest was claimed. He absented himself from the trial, and made no effort to contradict the plaintiffs' witness by his own or other evidence. The truth of plaintiffs' witness is corroborated by these circumstances, and by the undisputed evidence that the letter was sent to defendant. Defendant's appeal is manifestly frivolous and for delay, and plaintiffs have prayed damages therefor, and are entitled to it.

It is therefore ordered and decreed that the judgment appealed from be affirmed, with ten per cent on the principal amount thereof as damages for frivolous appeal; and that defendant pay costs of both courts.

No. 6903.

HERRMANN & VIGNES VS. JUSTIN L. AMÉDÉE.

On the rule to dissolve an attachment the defendant in the suit may put at issue, and require to be passed on, all of the allegations of the plaintiff's affidavit, on which the writ of attachment itself legally rests. And when such allegations are thus put at issue, the plaintiff must prove them to be true. On such a rule however, no allegation, or fact, involving the merits of the case, will be considered.

APPEAL from the Fifteenth Judicial District, parish of Lafourche. *Beattie*, J.

J. D. Moore and *T. A. Badeaux* for plaintiff and appellant.

E. W. Blake and *E. A. O'Sullivan* for defendant.

The opinion of the court was delivered by

MARR, J. This suit was brought to recover the balance of an account.

The petition charges that "said Justin L. Amédée has mortgaged, assigned, or disposed of, or is about to mortgage, assign, or dispose of, his property, rights, or credits, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; and that he has converted, or is about to convert, his property into money

or evidences of debt, with intent to place it beyond the reach of his creditors."

The allegations of the petition were sworn to, and process of attachment issued, which was dissolved on rule to show cause, and the case comes up on the appeal of plaintiffs from this judgment.

The testimony which was offered in the district court was not reduced to writing, and there is no bill of exceptions in the record. Appellants, suggesting that defendant refused to join them in drawing a statement of facts, applied to the judge for such statement. The judge answered:

"My only recollection of the facts proven in this case are stated in my opinion on file in the record, being reasons for judgment. In answer to this application for a statement of facts, I make that opinion my statement. It was written immediately after the matter was submitted to me."

The minutes show that the rule was tried and taken under advisement on the fourth of December; and that the opinion and judgment were pronounced in open court and filed the next day, as follows:

"The evidence shows that defendant had, some time in 1874, mortgaged certain property in the parish of St. James; and that shortly before the attachment was issued he sold some horses and mules.

"Defendant was a merchant doing business in this parish. The debt sued on is an open account for goods and merchandise sold to him by plaintiffs from June 4, 1875, to May 18, 1877, amounting to $9551 88. Credits for payments made are allowed at different dates from June 4, 1875, up to June 20, 1877, amounting to $8050 86, leaving due $1501 02.

"While the affidavit made to obtain the writ is *prima facie* evidence, the facts which necessitate the issuance of the writ must be shown affirmatively. 24 An. 485.

"The evidence does not disclose any fraudulent disposition of the property of defendant. It shows that he was selling and paying off his debts to plaintiffs and others; but does not show an undue, unjust, and fraudulent preference. 24 An. 485.

"I do not think that the mere selling of goods by a merchant in embarrassed circumstances, or the payment of one creditor by such a sale as made by defendant herein, is such a 'giving of unfair preference' as is contemplated by the act of 1868.

"For these reasons it is ordered and adjudged that the attachment herein issued be set aside and annulled, at plaintiff's costs."

From the commencement of our jurisprudence under the Code of Practice, the defendant has always been allowed to prove, summarily, that the allegations on which the attachment was obtained were false and to have the writ set aside. C. P. article 258.

In Evans v. Saul the attachment was granted on the ground that defendant concealed himself to avoid being cited. The proof was that he absconded to avoid a criminal prosecution; and the attachment was dissolved. 8 N. S. 249.

In Read vs. Ware, 2 An. 498, a non-resident defendant was permitted to have the attachment set aside on rule to show cause on proof that his liability to plaintiffs was contingent. They had accepted bills for his accommodation which had not matured and which they had not paid; and in Price vs. Merritt, 13 An. 526, the attachment was dismissed on motion on the same ground.

Where the petition fails to show a cause of action, or shows that no cause of action exists, the attachment may be set aside, summarily, on exception *in limine*, or on rule to show cause. Where the petition shows a cause of action, but the allegations are not true in fact, or the defendant has defenses on which the demand of the plaintiff may be defeated on the merits, neither the truth of the allegations nor the defenses on the merits can be inquired into on the rule to show cause.

Where the affidavit shows any one of the causes of attachment, such as the non-residence of the defendant, or that he has departed, or that he is about to depart, from the State permanently, or that he has disposed of, or is about to dispose of, his property fraudulently, etc., the truth of the affidavit, so far as the writ itself is concerned, without reference to the merits, may be inquired into summarily on the rule to show cause.

In Miller vs. Chandler, 29 An. 89, the attachment was obtained on the ground that defendant resided in the State of Arkansas. One of the grounds of the motion was that the affidavit was untrue. All the allegations of the petition were sworn to. It was not pretended, nor was there any offer to prove, that the defendant did not reside in the State of Arkansas. There was but one traversable allegation in the petition that did not go to the merits; and that was as to the residence of the defendant, which pertained to the writ alone. We decided that the burden was on the defendant to disprove the sworn allegation as to his residence; and that on the motion to dismiss the plaintiff could not be put upon the proof of his case on the merits.

We do not understand the District Judge to mean that in all cases of motions to dissolve attachments the plaintiff is obliged to prove the truth of the allegations which he has sworn to in order to obtain the writ. It is only where the allegations so sworn to by him are denied, and the *prima facie* case made by his affidavit is rebutted, that he must support his affidavit by proof; and the opinion of the Judge must be limited to the case, to the facts proven.

The motion to dissolve in this case is not so specific as it might have

been; and it is possible that the District Judge would have rejected the testimony offered if objection had been made by plaintiffs on that ground. It is obvious that the defendant meant, and the counsel on both sides and the Judge understood, that the matter to be tried on the rule to show cause was the question, having no relation to the merits, as to the truth of the allegations of the fraudulent disposition by defendant of his property. The inquiry was limited to that ground of the attachment; and this is the only question passed upon by the Judge. The testimony offered was received without objection, apparently; and the Judge was bound to give it its legitimate effect.

We do not know and we can not know any thing of the facts proven except as stated in the opinion of the Judge. If his statement be correct, and we are bound to accept it as correct, he has properly applied the law: the attachment was not warranted by the facts; and it was consequently dissolved.

The judgment appealed from is therefore affirmed with costs.

No. 7040.

H. J. MITCHELL, TUTRIX, vs. T. H. D'ARMOND.

Joint obligors may be sued separately, and judgment recovered against each of them for his proportion of the debt, without making his co-obligors parties to the suit.

Where the evidence shows that the two individual signers of a merely joint note were, at the date of the note, commercial partners, and that the consideration of the note was money borrowed for, and used by the partnership, each of the makers will be liable on the note *in solido*.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea*, J.

W. F. Kernan for plaintiff and appellee.

D. C. Hardee for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant is sued on this obligation;

"CLINTON, July 27. 1869

"Four years after date we promise to pay A. Mitchell, or order, the sum of four thousand dollars, in eight instalments, of five hundred dollars each, to be paid every six months, from January first, 1870, each instalment of five hundred dollars, bearing eight per cent interest after maturity till paid, for value received.

T. H. D'ARMOND,
C. R. CORNELIUS."

The plaintiff is the representative of the deceased payee, and prays a judgment for the whole amount, having alleged and proved that the two makers were commercial partners at the date of the note, and that its consideration was money loaned to the partnership, and used for partnership purposes. When this testimony was offered, the defendant objected to its reception on the ground that, the trial could not proceed, and no evidence could be received until the other maker was made a party to the suit.

Prior to the act of December 30, 1870, it was well settled that all the parties to a joint obligation must be sued together. That statute enacted that hereafter in all suits against joint obligors, it shall be unnecessary to make all the obligors parties to the suit, but each of the joint obligors may be sued and judgment may be obtained against each of them separately for his proportion of the obligation, whether all are joined in the suit or not. Acts 1871 p. 18.

But the plaintiff has not treated it as a joint obligation. He alleges solidarity, by reason of the existence of a commercial partnership between the makers at and before the date of the note, and when he offered testimony to establish his allegations, objection was not made that the terms of the written contract could not be varied or altered by parol testimony, and he was permitted to prove by the defendant himself that he and his co-obligor were commercial partners, and the note was given for money, borrowed and used for and by the partnership. The style of the partnership is nowhere mentioned, and for aught that appears in the record, the style or partnership name might have been as the signature to the note reads.

The admission of this proof without other objection than that no proof at all could be received because of non-joinder, which was untenable under the law of 1870, perfects the plaintiff's case. It establishes the fact that the note, though in form joint, was solidary in reality, and necessarily so from the relations in which the parties stood to each other. Two persons, who are commercial partners, may execute an obligation in their individual names, and if it is joint in form, it may well be presumed that they did not intend to bind themselves otherwise, and this presumption would be strengthened very greatly if the firm had a name, and failed to use it in the signature. We are not left to presumptions in this case.

The judgment omits a credit which is set forth in the petition as a diminution *pro tanto* of the demand, and this will throw the costs of this court on the appellee. The judgment is carelessly drawn too, in reciting that interest shall run on each 'instalment' without saying what sum the instalment is, so that one must look outside of the judgment and

examine the note in order to ascertain what the total sum really is. We shall amend it. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is amended, and that the plaintiff have and recover of the defendant, T. H. D'Armond, four thousand dollars with eight per centum per annum interest on each five hundred dollars thereof from the first days of January and July of each of the years, 1870, 1871, 1872, and 1873 respectively, subject to the credits of five hundred dollars of date July 1st. 1870 and six hundred and seventy dollars and eight cents of date August 28, 1871 and the costs of the lower court, and as thus amended that it be affirmed, the appellee paying the costs of appeal.

No. 7058.

HENRY RENSHAW vs. A. KEENE RICHARDS.

In order to recover from the maker of a promissory note it is not necessary to make a demand at the place of payment designated in the note.

The evidence is sufficient to authorize an order of seizure and sale, when the act of mortgage, note, and protest, are authentic in form.

The clause in an act of mortgage fixing the fees of the creditor's attorney at five per cent, in the event of the non-payment of the debt at its maturity, makes the debtor, on the happening of that event, absolutely liable for that amount; and this liability can not be affected by the fact that the creditor has not really paid, or obligated himself to pay that amount of attorney's fees.

When a creditor, who proceeds by executory process, states in the charging part of his petition that he has received a certain sum, in part payment of his debt, but in the prayer of his petition sets forth that he has received a less sum, the statement in the charging part of the petition will govern the prayer, and the order of seizure and sale, and entitle the debt to credit for the larger sum.

Damages may be allowed for a frivolous appeal.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough*, J.

Chas. M. Pilcher for plaintiff and appellee.

J. N. Montgomery for defendant.

The opinion of the court was delivered by

MARR, J. This is an appeal from an order of seizure and sale. Appellant assigns for error:

First—That there was no authentic evidence before the judge in granting the order; that the act of mortgage does not show how much fees for attorney's services were "incurred and paid" by the plaintiff in suing out executory process; and although the act of mortgage says such fees shall be fixed at five per cent, still there is nothing to show that such sum was either incurred or paid.

Second—That the order of the judge directs the writ to issue for six dollars costs of protest, while the payment of such sum is indorsed on the notes filed.

Appellant also urges, in his printed brief, that after the notes had been protested payment was extended on both to first December, 1876; and that demand was not then made at the place of payment designated.

There were two notes, both dated sixth of January, 1873, one payable on the twenty-fifth of January, 1874, the other on the fourth of February, 1874, secured by mortgage of same date, with which they are perfectly identified.

On the thirtieth of December, 1873, before the maturity of either, the payment was extended on the one to twenty-fifth January, 1875, and on the other to fourth February, 1875. They were not paid at those dates, and were protested, after presentation and demand at the bank in New Orleans at which they were payable. Subsequently, Richards paid on account of the first note, interest and costs of protest, $1000, credited on the face of the note; and payment was extended to first December, 1876; and on the other note he paid $428 on account of interest and costs of protest.

It is well settled that it is not necessary to make demand at the place of payment designated in a note in order to recover of the maker. Ripka vs. Pope, 5 An. 61; Posey vs. Bank of Louisiana, 5 An. 188; McCalop vs. Fluker, 12 An. 551. In this case, however, at the maturity as fixed by the first extension, demand was made at the place of payment, and there were no funds provided. The new extension was a matter of grace and favor to the maker; and no new demand was necessary. If he had actually provided funds, on showing that fact he might have been relieved of costs, on making a real tender.

The evidence on which the order was granted consisted of the mortgage, the notes, and the protests, all being authentic evidence, and sufficient to establish plaintiff's right.

As to the attorney's fees, we do not see how there could be any doubt or question. The mortgagor binds himself to the holder of the notes to pay "all such lawyer's fees, together with all such costs, charges, and expenses as said mortgagee or any such holder shall or may incur or pay, in the event of non-payment of said notes at maturity; said attorney's fees, however, to be fixed at five per cent on the amount so in suit."

There can be no doubt about the meaning of this clause. It could not be known what costs, charges, and expenses might be incurred and paid in the event of non-payment at maturity; and, therefore, the mortgagor obligates himself to pay "all such costs, charges, and expenses

as may be incurred and paid," together with lawyer's fees. He did not choose to bind himself for any fees that the mortgagee or holder of the notes might choose to pay his attorney; and therefore the obligation was that the fees should be fixed at five per cent on the amount sued for, absolutely and unconditionally without reference to any contract that the mortgagor or holder might make with his attorney, or to the amount which might actually be paid to the attorney.

There is as little question about the six dollars costs of protest. The petition states all the credits, and the dates. Whenever the mortgage debt is to be paid, whether by the sheriff or by the mortgagor, the amount of the notes, with interest up to the date of the payment on account, and costs of protest, will be aggregated; and the payment deducted at that date. The balance constitutes the capital sum on which interest will be calculated and added up to the date of the final payment. All this is mere matter of calculation, about which no mistake need be made. By error in the prayer, a credit which is written in the charging part of the petition in words and figures, "four hundred and twenty-eight dollars, $428," is written in words alone four hundred and twenty-one dollars. The statement in the charging part that such sum had been paid at such date, on account of principal, interest, and costs of protest, as is the case with respect to the credit of $1000, on one of the notes, and such sum at such date, on account of interest and costs of protest, as is the case with respect to the other note, controls the prayer and the order of seizure and sale; and compels the holder of the notes to apply these precise sums, as credits, judicially admitted, on the aggregate amount due, composed of principal, interest, and costs of protest.

We do not think the mortgagor had any cause of complaint; and we do not see how he could have hoped that the judgment appealed from would be reversed or modified. The appellee is entitled to damages for a frivolous appeal, as prayed for in his answer; but, as the debt bears interest at eight per cent, we shall allow only five per cent as damages.

The judgment appealed from is therefore affirmed with costs, and five per cent damages.

No. 6876.

THE STATE VS. R. W. SNOW.

An information for uttering a forged bill is prescribed by the lapse of one year from the time the offense was brought to the knowledge of the officer charged with the prosecution.

Forging a document, and uttering that document are two separate, and distinct offenses, and hence the charge of one, in an information, will not include a charge of the other.

When the plea of prescription appears good, on the face of the information, the burden of proof is on the State to show that the plea is not well founded.

The allowance of an amendment to an information, changing the date of the bill charged to have been forged and uttered, allowed during the trial, and after certain admissions of the accused, will not warrant the rejection of the admissions, nor an arrest of judgment, when it appears that no injury to the accused resulted from the amendment.

The question of the sufficiency, or the insufficiency of the evidence to convict, is one of which this court has no jurisdiction.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

H. N. Ogden, Attorney General, for the State.

Robert Ray for defendant.

The opinion of the court was delivered by

EGAN, J. On the sixth of December, 1877, the District Attorney filed in the District Court of Ouachita an information against the defendant, charging that on the twenty-first of November, 1868, he did falsely and fraudulently forge and counterfeit a certain draft, order, or bill of exchange; and in a second count, that on the same date, November 21, 1868, said defendant did feloniously, etc., offer, utter, dispose of, and put off as true and genuine said forged document or writing, knowing the same to be forged and counterfeit, etc. On the eighth of December, 1877, the accused was arrested, arraigned, and pleaded not guilty. The District Attorney thereupon made an affidavit for continuance to obtain the testimony of one Morris, by whom he swears that he expected to prove "that the check alleged to have been forged and counterfeited was not drawn by D. T. Head nor executed for his benefit, as it purports on its face, and he is informed that he can also prove by this witness that the indorsement "W. T. Morris" upon the back thereof is not his genuine signature and indorsement, but a forgery." To avoid a continuance and obtain an immediate trial, the accused agreed to admit that the witness if present would swear to the facts stated in the affidavit. The trial was then begun, and during its progress the District Attorney, with leave of the court, amended the information "by averring that the offenses charged in the original information to have been committed on the twenty-first of November, 1868, were in reality committed on the twenty-first of November, 1867." To this amendment the counsel for the accused

excepted on the ground "that the amendment sought to be made was a matter of substance, and could not be made on the trial." After the amendment the District Attorney offered and was permitted to introduce the before-mentioned admission of the defendant which had been made before the trial began or the amendment made, and in view of the prosecution as then shaped and the issues then made. To the introduction of which the counsel for the accused excepted on the ground "that he had the constitutional right to be confronted with the witnesses and that the admissions were made when the information was improper and had not been amended." The trial proceeded and resulted in a general verdict of guilty as charged, which covered both counts.

A motion for new trial was filed and overruled, and a motion in arrest of judgment made.

First—Because the second count in the information was prescribed by the lapse of more than one year from the time it was brought to the knowledge of the officer charged with the prosecution.

Second—That under the charge of the court the jury should have brought in a verdict upon each count of the information.

In support of the plea of prescription the defendant's counsel filed in evidence a copy of a bill of indictment against the same defendant for the same forgery (as admitted by the District Attorney), filed March 16, 1869. This bill however contained no count or charge of uttering. The plea of prescription should have been maintained as to the charge of "uttering" contained in the second count of the information. The offense charged is distinct from that of forgery, of which it is not even a necessary element. It is punishable differently, and is prescriptible by twelve months, as forgery is not. R. S. 1870, section 986. There is nothing in the information or evidence to take it out of prescription, and the plea was good on the face of the information. State vs. Walters, 16 An. 400; State vs. Freeman, 17 An. 69; 23 An. 433. The burden is upon the State to rebut the plea. It has not done so, and it must prevail. In indictments for forgery at common law it was necessary to set forth the exact tenor of the forged instrument, and any, even a very slight variance, was fatal. This rule which was likewise applicable to misdemeanors also, was relaxed as to them by act of parliament. 9 Geo. IV C.; 15, 12, and 13 Victoria C., 45. Subsequently this relaxation was extended by statute, 14 and 15 Victoria C., 100, from which our own statute regulating the mode of procedure in criminal cases is borrowed almost in exact terms. The adjudications under these acts of parliament, and under similar statutes of other States, are therefore not without weight in interpreting our own law, and so it has been considered by our courts. See 20 An. 145 and 408; 29 An. 601, and cases there cited. By section 1049 R. S., 1870, it is provided that in any indictment for

forging, uttering, etc., any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known *or by the purport thereof*, by which is meant the "substance of the instrument as it appears on its face to every eye that reads it." Archbold's Criminal Practice and Pleadings, vol. 1, 7th ed., p. 297, (N. 1); same vol. 2nd p. 804. It was then not necessary to set forth in the information the exact tenor or language of the instrument charged to have been forged and falsely uttered. While, however, it is not necessary to set forth the exact tenor and date of the instrument, if such description is used, even though unnecessarily, it must be proved as laid. 1 Archbold, p. 297, citing 1 McLean, 441 U. S. vs. Keene; same, p. 389 (N. 1), to the effect that "in all cases where bills of exchange, promissory notes, or other written instruments, not under seal, are pleaded the date *if stated*, must correspond with the date of the instrument when produced in evidence on the trial." See, also, Wharton's American Criminal Law, 4th ed., sections 599, 306, and 307. The date of the uttering of the forged instrument is material but only in view of the statute of limitations. See same author, section 275; Waterman's U. S. Criminal Dig., p. 333, section 108; same, 334, section 120; and such is the rule of our own law. See, again, 16 An. 400; 17 An. 69, and 23 An. 433. Where, however, the instrument or writing is set forth in full in the bill or information *in totidem verbis* any lack of definiteness in its designation or description otherwise was cured even at common law; and an incorrect designation might be rejected as surplusage. Wharton's American Criminal Law, 7th ed., sec. 1467, and n. p. and authorities cited. See, also, State vs. Crawford, 13 La. An. Reports, p. 300, citing Regina vs. Williams; 2d Eng. Law and Equity Reports, p. 533. The statute of fourteenth of March, 1855, which in this respect is in terms re-enacted in section 1063 of the Revised Statutes of 1870, provides that "no indictment for any offense shall be held insufficient for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or an impossible day, or on a day that never happened." See, also, 10 An. 168.

The information in the present case sets out at length the exact tenor and date of the forged instrument in accordance with that stated in the amendment, which was for that reason and under the statute just quoted unnecessary, and may be treated as surplusage, so far at least as relates to the charge laid in the first count, which is imprescriptible, while the amendment did not cure the defect as to the charge laid in the second count, which was prescriptible and prescribed on the face both of the original and amended information. Its allowance therefore worked

no injury to the accused. As to the alleged insufficiency of the evidence to convict, we could not consider that, even were the evidence before us, as it is not. 2 An. 921; 3 An. 497; Const. art. 74.

The admission of the accused, though made prior to the amendment, which was not only unnecessary but immaterial, was therefore properly received in evidence. The general verdict did not vitiate the finding on the good count of the information.

It is therefore ordered, adjudged, and decreed that the defendant's plea of prescription be sustained, and the judgment arrested as to the second count for the uttering of the forged instrument, and that he be discharged from further answering thereto, and that the verdict and sentence on the first count for the forgery charged therein be and they are affirmed.

No. 6930.

MRS. CHATENOND AND HUSBAND VS. EVARISTE HEBERT ET AL.

Where a surviving husband, who under a judgment in a partition suit, afterwards annulled, has bought certain community property in which he had a fourth, and his children also a fourth undivided interest, subsequently by notarial act pledges to a creditor his and their share of the notes executed by him as vendee in the partition sale, secured by mortgage and vendor's privilege on said property—the mere fact that his children of age join in the notarial act to give their consent to the pledge of the notes, in which they claimed an interest, will not bind them for the debt thus secured, nor will it amount to their renunciation of the previous mortgage they have on their father's interest in said property, on account of paraphernal claims of their mother.

Where a question of estoppel, as between certain parties to a suit, has been expressly, or by necessary implication raised, and definitively passed on, it can not again be put at issue in any subsequent suit between them.

The nullity of the principal debt annuls the mortgage securing it.

APPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie*, J.

Edward N. Pugh and *L. W. Folse* for defendants and appellees.

Armand Pitot and *J. R. Whittington* for intervenors and appellants.

The opinion of the court was delivered by

SPENCER, J. The facts of this case are very complicated, but it is necessary to state them.

Evariste Hebert in community with his wife, and Frederick Avet in community with his wife, were joint and equal owners of a sugar plantation in the parish of Assumption. Hebert's wife died in 1860, leaving, by her marriage with him, ten minor children, of whom Hebert qualified as natural tutor in 1861. Frederick Avet also died, leaving a widow (now Mrs. Ballu) and a number of children, of whom plaintiff is one.

After the death of Mrs. Hebert and Frederick Avet, the property belonged as follows: One fourth to Evariste Hebert and one fourth to his ten children by inheritance from their mother. One fourth to the Widow Avet (Mrs. Ballu), and one fourth to the children of Frederick Avet.

On December 24, 1867, Evariste Hebert, alleging himself to be owner of *one undivided half* of said plantation, brought suit in the Second District Court of New Orleans against the widow and heirs of Avet, owners of the other half, for a partition of said plantation, and praying for a sale thereof to effect the same.

On February 4, 1870, judgment was rendered by the Second District Court decreeing the partition and ordering the sale, fixing terms, etc., and referring the parties to Selim Magner, notary, to partition the proceeds.

At the sale the plantation was bought by Evariste Hebert for $24-000, one fifth to be paid cash, and the balance in one, two, three, and four years, to be represented by notes secured by mortgage and vendor's lien. The sale having been completed and ten notes executed, the parties went before the notary on twenty-eighth of June, 1870, and passed an act of partition. The mass to be divided was stated by the notary as follows:

Cash	$4800 00
Four notes of twelve hundred dollars each, at one year	$4800 00
Two notes of twenty-four hundred dollars each, at two years	$4800 00
Two notes of twenty-four hundred dollars each, at three years	$4800 00
Two notes of twenty-four hundred dollars each, at four years	$4800 00
Making	$24,000 00

Which notes were by paraph identified with the act of partition.

He then states the "debts due by the plantation and parties interested, and to be deducted from the proceeds of the sale," as amounting (detailing the items) to $5808 77. Leaving "amount to be divided, $18,191 23; or $9095 61½ to each said Mrs. Avet and Evariste Hebert." These debts of $5808 77 were due in nearly their entirety to one S. Cambon.

It is then stated that the cash only amounting to $4800, and the debts being $5808 77, the difference, $1008 77, will have to be made up by said Hebert and Mrs. Avet; said Avet now paying in cash her part, $504 38½, and said Hebert paying in cash like sum. Mrs. Avet then acknowledges to have received $2400 in cash, and five of said notes, to wit: two for $1200 each, and three for $2400 each, and accepts the same as her and her children's share in said plantation; and then declares that the said $2400 in cash, and the said $504 38½ are by her "to be

applied as so much toward the payment of the afore established liabilities," being one half thereof. Hebert then declares that although it is stated in the *procès verbal* of sale that he had paid $4800 cash, he had in truth only paid $2400 (Avet's share), and that by agreement and arrangement time was to be granted him to pay his share of the said liabilities; and, in order to carry out said agreement, it is stipulated that "in order to secure the payment on the part of him, said Evariste Hebert, first, of the sum of $2400, being the balance due cash; second, the sum of $504 38½" (being the excess of his half of debts over the $2400), as stated in above account, and the further sum of $468 50 due by him individually to said Cambon, all his, said Hebert's, share of the said notes (being five in number) representing his portion in this partition, shall remain on deposit in the Citizens' Bank, in the joint names of Armand Pitot and Selim Magner as a pledge until final payment of his said indebtedness. It is then stated that this pledge shall create no novation of the debt due to said Cambon for supplies, so as to destroy his privilege on the crops, etc., but that it shall remain in force to secure said Cambon his claim or any transferee thereof, up to the amount due him, the payment of which is extended to April 1, 1871, by Cambon, who intervenes and becomes party to the act.

Armand Pitot as agent of certain of Hebert's children, to wit: Emile L., Oscar F., Aubert P., Rodolph, and Louise, wife of McNeil, annexing his power of attorney, intervenes in the act; "said constituents being interested in this partition by reason of their rights in the estate of their deceased mother," and agrees and consents, on behalf of his constituents, to the pledging of the said notes, in which they are "interested," "in order to secure the payment on the part of him, said Evariste Hebert," of the debts before stated.

Evariste Hebert and Mrs. Avet then declare this partition final of the said property so "held by undivided halves between them." The act is signed by the agents of Evariste Hebert, widow and heirs of Avet, by S. Cambon, and by Armand Pitot, agent.

On same day, June 28, 1870, Evariste Hebert executed a special mortgage on the whole plantation in favor of his children to secure them from loss they might sustain by reason of allowing the said notes to be pledged for his debts. This mortgage was accepted by Pitot, agent, by virtue of the same power. In April, 1871, Evariste Hebert entered into a contract of antichresis of this plantation with Joseph Avet, to which some of the children of Hebert gave their consent.

The notes given by Evariste Hebert for the price, and held by Widow Avet, not being paid, she, in 1873, took executory process to foreclose the mortgage, in the district court of Assumption. This sale was enjoined by the heirs of Hebert's deceased wife, Eulalie Labadie,

on various grounds, the most important of which were that the judgment of partition in the Second District Court of Orleans, the sale thereunder, the act of partition, and the notes and mortgage given by Evariste Hebert for the price, and all other proceedings connected therewith, were null and void, because the said court was without jurisdiction *ratione materiæ* and *ratione personæ*, and because the heirs of Eulalie Labadie, deceased wife, who were owners of one undivided fourth of said property, were not parties thereto. All those who were parties to the partition suit and to the act of partition of June 28, 1870, and all the children of Mrs. Hebert (one of the ten having in meantime died in minority) were parties to this suit. There was a final judgment in favor of plaintiffs, declaring and decreeing "that all the proceedings taken and had in the matter" of the said partition suit, "commencing with the petition filed therein December 24, 1869, and up to and including the decree of homologation of partition therein rendered on July 19, 1870, be and they are hereby adjudged and decreed to be absolutely null, and in their entirety absolute nullities, and especially the judgment rendered in said matter on January 31, 1870, and signed February 4, 1870, the sale made on March 26, 1870, the notes given by Evariste Hebert as adjudicatee under the sale of March 26, 1870, and the partition in said matter, made before Selim Magner on June 28, 1870, be and the same are hereby declared, in their entirety, absolute nullities." The judgment then declares and establishes the joint ownership of Evariste Hebert and his children for half, and the widow and heirs of Avet for half in the plantation, as though said proceedings had never been had.

The judgment then reserves and declares not adjudicated by it "any questions of the rights and obligations, as between themselves, of Evariste Hebert, Widow Avet, Cambon, and any of the heirs of Mrs. Hebert, *in so far as the same are consistent with the present decree, setting the said proceedings aside as absolute nullities.*" This judgment has become *res adjudicata.*

In 1875 Mrs. Chatenond, one of the heirs of Frederick Avet, instituted the suit now before the court for a partition of the plantation. Under these proceedings the plantation has been sold and bought by Widow Avet (now Mrs. Ballu) for $10,000. The contest arises as follows: Mrs. Ballu (Widow Avet) files a third opposition herein, claiming to be a creditor of Evariste Hebert and the heirs of his deceased wife for a large amount; claiming to be paid by preference out of their share of the funds, proceeds of the sale; claiming to hold as transferee the rights of Cambon, and averring that Evariste Hebert and his children are estopped by their acts and admissions in the notarial partition of June 28, 1870, and of antichresis April 3, 1871, from taking any part of said funds before her claims are paid. The heirs of Mrs. Hebert answer

this opposition by pleading the judgment in the injunction suit as *res adjudicata;* that any admissions made by them were made in error; that they are the *first* mortgage creditors of their father, who had received and used during the marriage $9400 of their deceased mother's paraphernal funds; that their legal mortgage therefor had been duly preserved and its amount fixed by the account of tutorship, etc. Evariste Hebert answered to same effect, and pleaded in compensation and reconvention the sum of $2400, paid by him to Mrs. Avet, under the partition proceeding and sale.

There is no doubt about the correctness of this claim of Hebert's children for $9400; nor that it is secured by the first mortgage on his share of the property. Nor is it worth while to discuss the question of the liability of such of those children as were not majors and parties to the act of partition of June 28, 1870. No part of the debt due to Cambon or to Mrs. Avet is shown to be chargeable to them; and they are in no way affected by the act of June 28, 1870, or any other of the proceedings detailed herein.

We, therefore, find it only necessary to discuss the effect of those proceedings upon the rights of Evariste Hebert and the five children represented by Pitot in said act of June 28, 1870.

In that act Evariste Hebert undoubtedly acknowledges an indebtedness to Cambon of $3372 86½; being for his half of the plantation debts, etc., and $468 50 due by him individually; which sum he and Cambon agree shall be paid by April 1, 1871. In order to secure that debt, he, with the consent of the five children (who declare themselves interested therein, in right of their deceased mother), placed the five notes, executed by himself, and falling to himself, as his share of the proceeds of sale, in the hands of Pitot and Magner, as a pledge. He does not give any mortgage to secure Cambon's debt, but pledges notes which are secured by vendor's lien and mortgage, and his children are declared to have an interest in those notes.

The children in no manner bind themselves to pay Cambon; nor do they renounce in his favor their legal mortgage on the father's property for paraphernal claims of their mother. If they were held to be bound by this act, and estopped from disputing the validity of their father's title to the whole property, by reason of having asserted an ownership in the notes given for the price, we do not see how this would help Cambon's claim as to the father's interest in this controversy. If the purchase by Evariste Hebert is valid as against these consenting children, it is only by effect of that consent, and not by effect of a judicial proceeding. If by claiming an interest in the notes given by the father they are estopped, it is only from denying the validity of his purchase of *their* share in the property. They are in no way estopped

from asserting their preference as mortgage creditors on the share of their father in the property. The acquisition of the father being merely conventional, and limited to the interests of his co-proprietors in the property, did not and could not change or affect his title to his own share therein, and any mortgage granted by him in this act of purchase from his co-proprietors could not supersede or take precedence of the pre-existing mortgage of his children as to that. Nor can we infer a renunciation of this pre-existing mortgage from the fact that these children, holding also an interest in notes secured by the second mortgage, consented to their being pledged for a debt which they did not owe or assume to pay. See Newell vs. Buckner, 24 An. 185.

But as we have said, the only estoppel that could, by any construction, be pleaded against these consenting children, as resulting from the act of June 28, 1870, would be that they could not dispute the validity of their father's purchase of *their interest* in the property. That estoppel could, and *indeed of necessity had to* be pleaded in defense of the suit *brought by these children* to annul the sale to their father. If *not* then urged, *it was waived.* If pleaded in that suit, it was necessarily rejected and disallowed by the judgment which declared the sale a nullity. This judgment of nullity of the sale is *utterly inconsistent with the existence of the estoppel*, and must, therefore, both *by its terms*, and on legal principles, be held to be a bar to the renewal of the plea in this case. It constitutes *the thing adjudged*, and the question of estoppel is no longer open to discussion, and does not, and indeed could not, fall within the reservations made in the judgment decreeing the nullity of the partition and sale. That judgment declared the sale to Evariste Hebert, *in its entirety, null and void.* Intervenor now asks in effect that it be held not *null and void, but good and valid quoad* the consenting children and Evariste Hebert. To so decree would be to destroy the previous decree as to these parties; to adjudicate upon a matter that is *res adjudicata.* This view renders it unnecessary for us to enter into a discussion of the questions whether these children were or ought to have been held estopped from disputing their father's title as against themselves, and therefore whether the share of proceeds of sale now to be distributed, coming to them *as owners*, should be applied to the Cambon debt. We have seen that their share, as first mortgage creditors of their father's portion, was in no wise affected or renounced by the act of June 28, 1870. But if the question were before us we incline to think that these children were not bound by their declarations and admissions in said act. That whole act rested upon the validity of the decree of partition and sale. It proceeds from beginning to end upon the hypothesis of the existence of a state of facts which did not exist, to wit: that Evariste Hebert was owner of the whole property, and that he had

secured these children against loss by the mortgage he gave them on the same day, June 28, 1870, upon the whole property. The fundamental fact upon which both these acts of June 28 rested did not exist. Evariste Hebert was not the owner. When the foundation was removed, when his title was annulled, the acts of June 28 and the reciprocal rights and obligations of the parties thereto fell with it. The notes given for the price being all in the hands of parties to the act, were stricken with nullity, for want of a cause. The mortgage securing them, being a mere accessory of the notes, perished with them. "The accessory follows the principal." Where then is *the mortgage securing the Cambon debt, or other claims* of intervenor, entitling her to be paid by preference out of the proceeds of this sale?

Evariste Hebert may be her debtor, but she has no mortgage or privilege on his share of the proceeds of the sale. We find no sufficient proof that any part of her claim so inured to the benefit of the children of Hebert as to make them personally liable for the whole or any part thereof.

The court below decreed the proceeds to be distributed in effect as follows: one half to Evariste Hebert and his children, and one half to the widow and heirs of Frederick Avet. The share of Evariste Hebert to be paid over to his children in satisfaction *pro tanto* of their legal mortgage against him, which is recognized in their favor.

We think the judgment of the court below is correct; and it is ordered and decreed that the same be affirmed with costs.

No. 7011.

ADAM DECKLAR vs. D. FRANKENBERGER.

The parish courts have exclusive jurisdiction in ordinary suits in all cases where the amount in dispute exceeds one hundred dollars, exclusive of interest, and does not exceed five hundred dollars, exclusive of interest.

Thus, where the *principal* of the amount in dispute is exactly $500, the parish courts have jurisdiction, even though there be enough accrued interest demanded to make the whole amount in dispute much more than $500.

The constitution, like legislative acts, must, if possible, be construed in such a way as to render all of its provisions operative, rather than in a way that will make some of them nugatory.

APPEAL from the Parish Court of West Feliciana. *Lawrason*, J.

Wickliffe & Fisher for plaintiff and appellant.

W. W. Leake for defendant.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon a promissory note for five hun-

dred dollars, bearing interest from date, and payable four years thereafter. It is instituted in the parish court.

The defendant excepts to the jurisdiction on the ground that the amount in dispute exceeds five hundred dollars.

This question has disturbed the profession ever since the courts began to interpret the constitution of 1868. The decisions that have been rendered by our immediate predecessors are, that a District court has not jurisdiction of a suit for an amount, less than five hundred dollars principal, although the accrued interest, when added to the principal, exceeded that sum. Badeaux v. Blake, 24 Annual 184. And on the other hand, that a parish court has not jurisdiction of a suit on a claim for less than five hundred dollars principal, when the accrued interest, being added to the principal, will make a sum exceeding five hundred dollars. Parker v. Shropshire, 26 Annual 37.

It results inevitably from these rulings that there is a class of cases that no court can take cognizance of under the present constitution. This case is one of them, and if we should follow implicitly the rules thus enunciated, we must turn the plaintiff away from the portals of justice, and tell him they have been barred against him by the flat of an autocrat, whose words admit of no explanation. We conceive our duty to be to find a forum wherein every claimant for a right shall have audience, and to 'question and cross-question the clauses of the constitution' (as Cooley says) so as to discover in them a meaning consistent with the purposes for which they were framed.

District courts have original jurisdiction in all civil cases when the amount in dispute exceeds five hundred dollars, exclusive of interest. Const. art. 85. The note in suit is for five hundred dollars neat, exclusive of interest. Therefore it does not exceed that sum, without the interest and the District Court is without jurisdiction.

Parish courts have exclusive original jurisdiction in civil cases when the amount in dispute exceeds one hundred dollars, and does not exceed five hundred dollars. art. 87. The amount in dispute here is that sum and several years interest upon it, and therefore exceeds it. The letter of this clause of the constitution read by itself denies the jurisdiction to the parish court.

All courts shall be open, says the constitution, and every person for injury done him in his land, goods, person, or reputation shall have adequate remedy by due process of law. art. 10. The judicial power shall be vested in a Supreme Court, in district courts, in parish courts, and in justices of the peace. art. 73. There is no judicial power lodged anywhere save in these courts, except in the single instance provided for in art. 94. The power to hear a suit upon such an obligation as this now before us must be in one of these courts. If it is not in the District

court, and it certainly is not, it must be in the parish court, since these are the only two that could lay claim to it.

The jurisdiction of justices of the peace in civil causes does not exceed one hundred dollars exclusive of interest. art. 89. Parish courts have concurrent jurisdiction with justices of the peace in cases where the amount in controversy is between twenty-five and one hundred dollars, exclusive of interest. The jurisdiction of the justice of the peace ceases when the exclusive jurisdiction of the parish court commences, and the jurisdiction of the parish court must cease when the exclusive jurisdiction of the district court commences, but it can not cease before.

The difficulty lies in the absence of the words, 'exclusive of interest,' from the first clause of the second sentence of art. 87. They are used in the first sentence, in defining the concurrent jurisdiction of the parish court and of justices of the peace, and also in the last clause of the second sentence, when regulating the appealable sum from the parish to the district court. But it is imperatively necessary to supply them so as to make the first clause of the sentence read as follows, or else there is a hiatus in the provision for jurisdiction of suits, and a denial of that 'adequate remedy' which the bill of rights assures to 'every person for injury done him in land, goods, person, or reputation' —"They (the parish courts) shall have exclusive original jurisdiction in ordinary suits in all cases when the amount in dispute exceeds one hundred dollars exclusive of interest, and does not exceed five hundred dollars, exclusive of interest."

A cardinal rule of interpretation of laws is, that effect must be given, if possible, to every part thereof. Conflicting portions must be harmonized, whenever practicable, and always that construction will be adopted which renders every one of them operative rather than that which will make some of them nugatory. This rule applies to the organic law with equal force as to the statute law. It is impossible to give effect to the rights conferred in the broadest terms by art. 10, by any other construction of art. 87 than that we have adopted.

The General Assembly passed an act defining and extending the jurisdiction of the parish courts. Acts 1876 p. 52. We consider this act merely as a legislative interpretation of the real meaning of art. 87, and we felicitate ourselves and the profession on being able, independent of any suggestion from that source, to conform our judicial interpretation to that of the legislature. Therefore

It is ordered and decreed that the judgment of the lower court is reversed, and the cause is remanded to be proceeded in according to law, the appellee paying costs of appeal.

DISSENTING OPINION.

DEBLANC, J. This suit was brought on a note which—in principal and interest—exceeded, at the date of the institution of said suit, the sum of five hundred dollars. It was brought in, and dismissed by the parish court of West Feliciana, for want of jurisdiction *ratione materiæ*, and, from the decision of that tribunal, plaintiff has obtained and carried an appeal to the Supreme Court of the State.

His counsel contend that the parish court is the only tribunal which has jurisdiction of this case—that it derives its jurisdiction from act No. 28 of the Legislature of 1876, and that said act derives its validity from a clause of the 87th article of the constitution of 1868.

The constitutional clause thus referred to, provides: "that the parish courts shall have the power of committing magistrates, *and such other jurisdiction as may be conferred on them* by law"—and the act relied upon, that "they shall have exclusive original jurisdiction, in ordinary suits, in all cases when the amount in dispute exceeds one hundred dollars, *exclusive of interest*, and does not exceed five hundred dollars, *exclusive of interest.*

Under the constitution, and as to ordinary suits, what jurisdiction is specially conferred on the parish courts? They are—as regards such suits—invested with exclusive original jurisdiction, when the amount in dispute exceeds one hundred dollars and *does not exceed* five hundred dollars; subject to *an appeal to the District Court*, in all cases when the amount in contestation exceeds one hundred dollars, exclusive of interest.

The difference between the act of 1876 and the eighty-seventh article of the constitution, consists of the addition in the act of the words "exclusive of interest," after the words "one hundred" and "five hundred dollars." That difference alters the plain letter, the as plain meaning of that article, and the six words thereto added constitute a manifest violation of the article itself. In other than ordinary suits, and probate matters, the Legislature may—within the specified limits fixed by the constitution, confer on them a jurisdiction not actually prescribed by that instrument; but the Legislature could not—as it attempted to do by the act of 1876—change, in its already fixed and determinate parts—the jurisdiction of that court.

In an ordinary suit, one of those alluded to in the eighty-seventh article of the constitution, the appeal can not ascend from the parish court to this court. The constitutional channel through which those appeals are carried to the appellate jurisdiction, leads directly to and ends in the district court. The terms embraced in that article repel any adverse or different conclusion.

If—says plaintiff—the door of the parish court be closed against me, where am I to go? In the district court; and why? Because at the date of the institution of this suit, the *matter in dispute* exceeded the sum of five hundred dollars. It is true that the constitution provides that the district courts shall have original jurisdiction in all cases where the amount in dispute exceeds five hundred dollars, exclusive of interest; but to give effect to every clause of that instrument, to harmonize those of its sections which seem to conflict, to reconcile the most important of its provisions, a not unreasonable suggestion is to construe it by the light of the many decisions of this court, rendered under previous and dissimilar constitutions, but which—in 1868—had permanently settled the question raised, in this case, as to the correct interpretation of the words "exclusive of interest."

How was it settled? This court held that, howsoever composed, whether of a principal without interest, or of principal and interest, the amount due *at the institution* of the suit constituted the matter in dispute, and that—in computing that amount, the only interest which is not to be considered, is that interest which accrues after the institution of the suit and from judicial demand.

1 N. S. 138; 12 L. 156; 1 R. 25; 5 R. 90; 9 R. 153; 2 A. 793—911.

Applied, as it may be, to the eighty-fifth article of the constitution, and to the terms "exclusive of interest," inserted in that article, that interpretation would reconcile it with every other clause relating to the jurisdiction of our courts, and remove the sole obstacle encumbering the principal avenue to that jurisdiction. These words do—not only not exclude, but justify the construction that they refer to the interest which runs after the institution of the suit, and not to the interest which has been united to and forms part of the debt. They import that meaning and bear that construction, whilst the addition of the very same words to the eighty-seventh article of the constitution, changes its letter and changes its meaning.

The constitution provides, as to appeals from the parish court, that they shall be carried to the district court; and—under the act explaining, or rather amending the constitution, they must be carried there, even when—with the interest accrued on a principal of less than five hundred dollars—that principal far exceeds the sum of five hundred dollars. With that legislative interpretation, what becomes of that part of the seventy-fourth article of the constitution which declares that the jurisdiction thus conferred on the district court belongs to, and can be exercised by exclusively the Supreme Court of the State? The Legislature should also have amended that article—for, it ordains in terms which convey but one, a clear signification, that the jurisdiction of this court shall extend to all cases *where the matter in dispute* shall exceed five

hundred dollars. Unless we presume that the matter in dispute can be but a principal and never a principal and interest, the conclusion is unavoidable, the clause of the constitution which fixes the jurisdiction of this court is in conflict with the amendment promulgated by the Legislature, in 1876, or that amendment in conflict with the constitution.

At the date this suit was filed, the amount in dispute exceeded the sum of five hundred dollars, and there can be no doubt that it was a contestation which could reach our jurisdiction. If so, from what court? Is it from the parish court? That can not be; for, the constitution itself and the legislative amendment expressly provide that appeals from the parish court shall be carried to the district court. Is —as to such appeals—our jurisdiction concurrent with that of the district court? It is not, and none but those of such suits which originate in the district court, can be re-examined in this court, and no decision rendered in such suits—unless it be the decision of a district court, can be passed upon and reviewed by us.

For these reasons, I respectfully dissent from the opinion and decree of the majority of the court.

No. 6838.

STATE EX REL. VICTOR BOUTROUE VS. THE JUDGE OF THE THIRD DISTRICT COURT OF ORLEANS ET AL.

This court has direct and exclusive jurisdiction of appeals in *all* cases whether instituted in district, or justices' courts, where the constitutionality and legality of a tax is put at issue; irrespective of the amount in dispute. And this jurisdiction will not be ousted, or impaired because there are questions of fact in the case, distinct from that of the constitutionality of the tax. In all cases, except criminal cases, of which this court is vested of jurisdiction, it has authority to pass on all questions of fact, or of law, involved; and the appellant from a judgment of a justice's court, involving the constitutionality of a tax, can not defeat the jurisdiction of this court by waiving that issue, and appealing to the Third District Court on a mere issue of fact in the case.

In order that this court may have a record before it, in those cases where appeals from a justice's court are allowed, it is the duty of the justice whose judgment has been appealed from, to make to this court a certified statement of all the facts of the case, and every thing on file in the suit.

APPLICATION for writs of prohibition and mandamus.

Labatt & Clinton and *J. Buisson* for relator.

Sam. P. Blanc and *Jas. H. Grover* for respondents.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the rehearing by DEBLANC, J.

SPENCER, J. Relator instituted suit before the Seventh Justice of the

Peace for the parish of Orleans against the city of New Orleans to recover the sum of thirty dollars which he alleged the city had exacted of him, under a certain ordinance which he alleged to be unconstitional and void. The city answered denying the unconstitutionality of said ordinance, and denying that plaintiff had ever paid the license in question. On these issues the case was tried, and there was judgment in favor of plaintiff for the amount claimed. The city thereupon took a suspensive appeal to the Third District Court. Relator appeared in the Third District Court, and moved to dismiss the appeal on the ground that the appeal from said judgment must be taken to the Supreme Court direct from the magistrate's court, since the question involved the legality and constitutionality of a license tax levied by said city. The judge of the Third District Court overruled the motion to dismiss, and the justice of the peace refuses to issue execution, or rather to afford the necessary remedy to enable plaintiff to register and budget his judgment against the city.

Relator claims that the justice of the peace is guilty of a denial of justice, and that the Third District Court has usurped a jurisdiction belonging to this court. He therefore prays for a mandamus to the former, and a prohibition to the latter. The justice of the peace makes no answer. The judge of the Third District Court shows as cause why the writ prayed for against him should not issue, as follows:

That the plaintiff in said suit demanded the repayment of thirty dollars from the city, because, as alleged, the ordinance levying it was unconstitutional. That the city for answer, while denying the unconstitutionality of the ordinance, also denied that plaintiff ever paid the thirty dollars as alleged. That the question of payment *vel non*, as well as that of the constitutionality of the ordinance was involved, and that defendant has a right to have an appeal as to both questions. That by article eighty-two of the constitution, and laws passed thereunder, all appeals in the parish of Orleans from justices of the peace are returnable to the Third District Court, when the amount in dispute exceeds ten dollars except in cases provided by article seventy-four of the constitution. That article seventy-four confers appellate jurisdiction on the Supreme Court when the constitutionality of any tax is in question, regardless of amount, with a view to the proper determination of questions of constitutional law, and not with a view to the revision of judgments upon mere questions of fact in cases involving less than $500.

That the defendant may waive the question of constitutional law, and appeal only for a revision of the judgment upon questions of fact. That the proceedings before justices of the peace being verbal, there was no evidence in the record in question enabling the Supreme Court to pass upon the facts, and that in effect, by appealing to the Third Dis-

trict Court, the defendant had waived the question of constitutionality of the ordinance, and limited itself to that of fact; to wit: *payment vel non*, a question of which the judge thinks this court has no cognizance. These reasons of the judge *a quo* are certainly plausible, but are not, we think, maintainable under the language of article seventy-four. That article declares that the appellate jurisdiction of this court extends "to all cases in which the constitutionality or legality of any tax * * is in question, whatever be the amount thereof; and in such cases the appeal shall be direct from the court in which the case originated to the Supreme Court; and in criminal matters, *on questions of law only*, whenever," etc. It is manifest that it is *in criminal cases only* that our jurisdiction is confined *to questions of law*. In all other cases it extends *to the law* and *the facts*. And if this court is vested with appellate jurisdiction of *the law and facts*, in "all cases in which the constitutionality and legality" of a tax is drawn into question, that jurisdiction is necessarily exclusive, and we think the constitution so declares it, when it provides that "the appeal shall be direct" to this court. It is admitted that the suit in the Seventh Justice's Court did involve the constitutionality and legality of the city ordinance imposing the tax in question. That being the fact, there was no appeal except to this court, which alone has jurisdiction of the law and the facts.

It is therefore ordered and decreed that the preliminary writ of mandamus directed to the Seventh Justice of the Peace of the parish of Orleans, and of prohibition directed to the judge of the Third District Court of said parish, be made peremptory, and that respondents pay costs.

ON REHEARING.

DEBLANC, J. When, of our own motion, we granted a rehearing of this cause, we did so not that we had discovered any error of law or fact in our first decision, but because of the averred and acknowledged importance of that decision to the city of New Orleans and its taxable inhabitants.

The relator brought suit against the city, to recover from it the sum of thirty dollars, which he alleges he was compelled to pay and which he did pay, in error and without any obligation on his part, for a license to carry on his business as a retail merchant. That suit *originated* in and was tried and decided in favor of plaintiff by the Seventh Justice Court for the parish of Orleans. From that decision the city appealed to the Third District Court.

Has that court appellate jurisdiction of that suit, or of any branch of that suit? The seventy-fourth article of the constitution of 1868

provides, in terms which have but one meaning and from which no inference adverse to that meaning can be drawn, that the appellate jurisdiction of the Supreme Court shall extend to all cases in which the legality and constitutionality of any tax shall be in contestation, and we have before us the indisputable evidence that the actual contestation between the city and relator does involve the legality and constitutionality of a tax.

If we have jurisdiction, is it limited—as contended by the judge of the lower court and the city's counsel—to exclusively the questions of either the legality or constitutionality of the tax? We believe not: under our legislation, no appeal can ascend by fractions from an inferior jurisdiction to both an intermediate and the highest jurisdiction. The constitution does not provide that we shall have jurisdiction only as to the legality or constitutionality of a disputed tax, but that our jurisdiction shall extend to such a case "whatever may be the amount of the tax imposed—even, of course, if that amount were so insignificant as not to authorize an appeal from the justice's court to the Third District Court. The form and indeed every syllable of article seventy-four of the constitution repels the exceptional interpretation urged by defendants.

The party cast is entitled to but one appeal; that appeal can not be divided, and returned—as to the facts in one jurisdiction, and in another as to the law applicable to those facts. What—otherwise—might be the result? This court, to pass upon and determine the questions of constitutionality and legality, would—of necessity—have to assume the existence of facts, which—in the other court—might be absolutely contradicted by the evidence; and then how execute the fractional judgments hatched in two distinct jurisdictions?

Were we to merely pronounce the illegality or unconstitutionality of a tax, without reversing the judgment already rendered to enforce its levy or payment, what would be—to any one of the litigants—the value of our decision? Were we to reverse the judgment appealed from, we might be told—under defendant's interpretation of two clauses of the State constitution: your court has exceeded its power, for that power was exhausted as soon as the illegality or unconstitutionality of the tax was by you discovered and declared. If so, what—after that discovery and declaration—shall we do with the balance of the case? To which court remand it? Shall it be to the court in which it originated, or to an intermediate one which alone—it is urged—has appellate jurisdiction of the questions of facts?

The constitution provides—it is true—that the "Third District Court shall have exclusive jurisdiction of appeals from justices of the peace;" not including—there can be no doubt about this—those appeals which, regardless of the amount involved, are to be sent—in obedience to

the seventy-fourth article of the same constitution—from the court in which the cases originated, to the Supreme Court.

The article of the Constitution of 1868 differs, in regard to the appellate jurisdiction of this court, from that of the Constitution of 1845; by the latter, its appellate jurisdiction was limited to questions of law alone in criminal matters and in matters of fines, forfeitures and penalties imposed by municipal corporations—whilst under the former, that of 1868, its jurisdiction — except in criminal cases — extends to both the law and the facts.

Const. of 1845, art. 63—Const. of 1868, art. 74.

There is—between the two articles cited—another, a marked, an important difference: the constitution of 1868 provides that, in such cases, the appeal shall be direct from the court in which they originated to the Supreme Court: no such provision is to be found in the constitution of 1845, and, considering the differences which exist between the constitution referred to, the opinion delivered, in 1846, by the eminent jurist who was then the president of this court, is not applicable to this controversy and in no way sustains the construction placed by defendants' counsel on the article of the constitution of 1868.

The Third District Court has not a concurrent appellate jurisdiction with this Court: if it has jurisdiction of plaintiff's case, or of any of its branches, we have not: if we have, the jurisdiction of the Third District Court can not partly attach where ours does, and extends to every branch of the litigation. It was and still is our conviction that we alone can hear and determine the appeal when—as plainly written in the Constitution—the matter in dispute exceeds $500, and—besides — in any and every case wherein the constitutionality or legality of a tax is contested, whatever may be the amount involved in said case: otherwise, in a suit involving less than ten dollars and the constitutionality or legality of a tax—howsoever evident it is that the parties would be entitled to an appeal, every avenue to a higher jurisdiction would be effectually closed by defendant's interpretation, as under the law the appeal could not be taken to the Third District Court, and much less to ours under said interpretation, unless we conclude that our jurisdiction embraces and reaches only that class of cases which can not rise to and reach that of the Third District Court.

Were it conceded that—in such cases—our court alone can pass upon the question of legality and unconstitutionality of the tax—and that the decree of the justice's court is based on the twin facts, that the tax levied was unconstitutional, and that—though not due—that tax was paid under compulsion and protest, the Third District Court could neither reverse, nor affirm the decree—for its authority would end with a decision of the facts as to the payment of the tax and the circumstances

under which it was made, and ours commence where the other ended—but, how take and carry the appeal from the district court? That could be done only by ignoring that clause of the constitution which commands that the appeal shall be direct from the court in which the case originated, to the Supreme Court—or by trying in the district courts the facts which—according to the defence—are triable there, to afterwards remand the case to the justice's court, and to then carry it from that original jurisdiction to ours. If so, the constitutional route leading to the constitutional remedy would be discouragingly long.

As the court in which this case originated is not one of record, it can not avail defendants that, in the petition filed in said court, the ordinance attacked as being unconstitutional, and the article of the constitution alleged to have been violated, are not specially described and designated. In a case like this one, the law expressly provides that it shall be the duty of the justice—upon application of either of the parties—to make out a record containing—not merely what may be on file in the suit, but a complete statement of the facts which happened during the trial and certify the same to the Supreme Court.

Rev. Statutes of 1870. Sect. 2086.

In that instance, those who represented the city in the lower court could not have been taken by surprise—for, though plaintiff might have proceeded in the justice's court without a written petition, he did file one in which he indicates as the unconstitutional ordinance attacked by him, that under which the tax of thirty dollars was imposed, and we are bound to presume that he completed—by the production of the assailed ordinance—the perhaps too vague and too general averments of his pleading.

This, however, is a defence which could be considered, only on the trial of an appeal actually returned in this court, on an exception to the pleading for its pretended vagueness and duplicity, and not on, it may be, an incomplete record improperly returned to a court wherein the cases brought on appeal from the justice's court are tried *de novo*, in the last resort, and without a statement of facts. Besides, that defence, now urged in argument, was not made in the answer to plaintiff's action filed by the city in the lower court, nor in that of the district judge to the writ of prohibition.

Defendants contend that even if plaintiff paid a license without being bound to do so, it was paid under a natural obligation to contribute to the support of the city government, and he can not recover back the amount of said license. If—through error or compulsion—plaintiff paid to the city a license which the city had no right to claim from him—if what he was thus compelled to pay was in excess of the contribution which could have been constitutionally or legally required of him,

the city would certainly be bound to restitute what it may have so received in violation of the constitution and laws of the State; but the case in which that defence was presented is not before us—and we are not called upon to decide whether plaintiff has paid and the city received the amount of the license.

It is ordered that our previous decree remain undisturbed.

No. 6839.

STATE EX REL. C. C. HARTWELL VS. ALLEN JUMEL, AUDITOR.

The signature of the judge to any final decree rendered by him, is absolutely necessary to constitute it a judgment. Mere entries of judgment on the minutes of a court, unsigned by the judge of the court, are not judgments.

In order to recover judgment the plaintiff must prove his case.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

T. A. Flanagan for relator.

H. N. Ogden, Attorney General, for respondent and appellant.

The opinion of the court was delivered by

EGAN, J. The relator proceeded by mandamus to compel the Auditor to issue warrants in his favor for the payment of certain vouchers against the contingent expense fund of the Senate and House of Representatives of Louisiana, provided by Act 17, of 1875, approved April 5, 1875. He alleges due approval of his claims; that their payment was enjoined by the former Attorney General, Field, in a suit in the name of the State vs. Charles Clinton, then Auditor; that he intervened in said suit, and that the injunction was dissolved as to his claims; that there are sufficient funds to meet them, but that the Auditor, Jumel, refuses to warrant for their amount. The vouchers were not filed in evidence, nor is there any evidence as to their nature, consideration, or present existence, or of any demand upon the defendant; all of which were put in issue. The only evidence offered was certificates from the Auditor and Treasurer showing a sufficiency of funds to meet plaintiff's demand, and two copies of entries upon the minutes of the late Superior District Court, showing the dissolution of injunction as to certain claims of the present plaintiff in the before mentioned suit of the State vs. Clinton, Auditor. These entries bear date September 24, 1876; are mere entries of judgments having been rendered, and not the judgments themselves signed by the judge, and come to us authenticated only by the certificates of the present custodian of the records of that court. They are not sufficient to show the existence of such a judgment, which

was in its nature final, and required to be signed by the judge of the court which rendered it. *Non constat* but that there may have been some other proceedings in the cause subsequent to said entries. At all events, giving them full force, they do not dispense with the production of the formal, signed judgments in the cause, if such there were. Having before us, then, neither proof of the validity of the claim, in any shape, nor of default on the part of the defendant, the demand of the plaintiff must fail.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be and it is avoided and reversed; that the provisional writ of mandamus be dissolved and set aside, and the peremptory mandamus prayed for be refused. It is further ordered and adjudged that the relator pay costs of both courts.

No. 6887.

SUCCESSION OF FRANÇOIS BOUGÈRE. ON OPPOSITION OF MRS. AMÉLIE RICHARD.

An administrator of a succession who receives from his predecessor in office a certain sum of succession money, which the former administrator had collected, and taken his full commission from, is not entitled to commission on said sum, merely because he divides the money among those to whom it belongs. Such a division does not amount to a new administration of the money.

A second administrator, whether he be a public administrator or not, is not entitled to a commission on any asset of the succession, even though he may have collected it, if the asset appeared in the inventory of, and paid a commission to the former administrator.

Parol evidence is admissible to prove the transfer to a third person of a legatee's interest in a succession.

Funds of the deceased deposited in a bank of a foreign State are a part of his succession, and should be taken into account by the executor in distributing the assets of the succession.

A public administrator, as such, is not entitled to administer as dative testamentary executor a succession of which the testamentary executor has died, and one or more of the heirs are present in the State.

Where a public administrator, who is one of the heirs of a succession, is appointed dative testamentary executor of the same, it will be assumed, if the contrary is not shown, that he was appointed, not as public administrator, but as heir, under the general law, and his commission will be fixed at two and a half per cent.

APPEAL from the Parish Court of St. Charles. *Harper*, J.

Charles F. Claiborne and *J. D. Augustin* for executor and appellant.

Breaux, Fenner & Hall for opponent and appellee.

The opinion of the court was delivered by

DEBLANC, J. François Bougère died in the State of Louisiana. His

legal representatives reside, some here, others in France. E. Filleul, the executor appointed by said deceased's will died, and Achille D. Bougère, the public administrator of the parish of St. Charles was—in his stead—appointed as dative testamentary executor. In that capacity, he filed a tableau of proposed distribution, which was homologated on the 19th of July 1876, so far as not opposed.

Mrs. Amélie Richard, as assignee of one of the heirs of François Bougère, disputes the correctness and opposes the allowance of the clauses hereafter mentioned and carried in the tableau filed by said executor.

1. The rate and amount of the commission which he charges against the succession.

2. McLeran's account as surveyor.

3. A draft of E. Filleul, the former executor, in favor of Levois & Jamison.

The opponent also asks that—in the proposed distribution, funds of the succession, which are deposited in a bank in France, be taken into consideration.

I.

In case of successive administrations, the commission to which each of the incumbents is entitled, must be reckoned on the portion of the estate which—at the date of each appointment—is, or remains to be administered.

When Achille D. Bougère was appointed as executor, what portion of François' estate was still subject to administration? He, then, caused an inventory to be made, and we are informed—by that inventory—that the remainder of the estate in Louisiana, was composed of a balance of funds deposited in the State National Bank, and which—with the interest thereon—aggregated the sum of $12,707 49

and of notes, including one for which the last executor is liable, amounting, together, to 12,467 46⅛

Total $25,174 95⅛

on which Achille D. Bougère claims a commission of five per cent.

The money deposited in bank was collected by the first executor, and he alone was entitled to and received a commission thereon. That money passed under the control of the second executor, subject to only a division of the same between those to whom it belonged, and the mere division of funds collected by one of the executors, and on which that one has taken the whole of his commission, does not constitute an additional administration of those funds, and justify an additional compensation to his successor.

When Achille D. Bougère was appointed dative testamentary executor of the last will of François Bougère, he was indebted unto the suc-

cession of said deceased for $2062 92½, and opponent contends that he should be allowed no commission for the collection of that amount from himself. The amount then due was evidenced by a note, and the note was one of the unrealized effects which passed under the administration of the second executor. It is included in the inventory on which a commission is charged, and no further commission can be charged for its collection.

The statute of 1870 provides that "the public administrator shall receive five per cent *on all collections* &c.; but this clause must be construed as applying to the collection of claims not carried in the inventory, or which—if carried—are therein classed as bad debts, and on which no commission has once been levied. When debts so classed are subsequently collected, the executor—on such collections—is entitled to the per centage allowed by law. If otherwise, then on the day the inventory is made, the executor might commence his administration by taking a commission measured to the amount of the inventory, take on the appraised value of notes and property, and again on the proceeds realized from the recovery of the same notes, from the sale of the same property. Such a charge is authorized neither by the Code, nor by the statute of 1870.

II.

The opposition to McLeran's account, as surveyor, though mentioned on the first page of the appellee's brief as one of the only four oppositions to be urged in this court, is not referred to in any other portion of said brief; and—were it otherwise—the disputed account is sustained by the evidence and was properly allowed.

III.

The excluded testimony of Charles F. Claiborne Esq., tending to show that Elie Bougère has no longer any interest in the funds in France—that, in 1874, he sold his interest therein to Levois & Jamison, and thus to substantiate the latter's claim and justify its acknowledgment by the executor, should have been admitted. That testimony, judging from the tenor of the bill of exception taken by the executor's counsel, was not offered to prove the existence of a debt created by either the first or the second executor, but a transfer by one of the legatees of his share of funds deposited in a bank in France. If its correctness be hereafter established by the admission of the excluded evidence, or otherwise, that claim should not be classed among the liabilities of the succession, but as a payment made to Elie Bougère and in deduction of his share.

IV.

The funds deposited in France are a part of the succession and should—by the executor—be taken into account, in the settlement of

said succession: if practicable, the legatees who are in France should be paid out of exclusively the funds deposited with the French bankers, and the legatees residing in Louisiana out of the funds in this State.

As said by this court, in Hepp et al. vs. Lafon et al., executors, "the obligations we owe to our own citizens would prevent us from sending one of them to seek in foreign tribunals for that justice which we perceive he is entitled to and we have the means of extending to him, etc."

2 N. S. 447; 13th L. R. 298; 6 A. 152; Story on the Conflict of Laws § 513; 3 Pickering 128.

V.

The last questions raised by appellee's counsel, one in his brief, the other in his pleadings, are:

1. "That this was not a case in which the public administrator could have been appointed, in his official capacity, as executor of the last will of François Bougère."

2. "That having filed his account as dative testamentary executor, he can not now gainsay what he has so alleged for the iniquitable purpose of charging extortionate commissions."

Under the law, the public administrator can be called upon or claim to administer intestate successions when there is no surviving husband or wife, or heir present or represented in the State, and testate successions when—from any cause—the executor can not discharge the duties of his office.

In this case, the executor appointed by the will was dead, some of the heirs—the second executor is one of them—were and are present in the State, and the public administrator could not have been—as such—legally appointed as dative testamentary executor of the will of François Bougère. The only evidence in the record of his appointment is a certificate from the clerk, which is in these words: "Now, know ye that Achille D. Bougère, public administrator of the parish of St. Charles, has been and he is hereby appointed dative testamentary executor to the said succession."

The qualification of "public administrator" is attached to his name, and does in no way qualify his appointment as executor. In his application to obtain that appointment, he expressly relied on the third section of act No. 87 of the regular session of the Legislature, in 1870—and that section—it is evident—provides for only those cases when—though living—the executor, from any cause, can not discharge the duties of his office. The original appointment not being in the transcript, we must presume that, though Achille D. Bougère applied for the executorship in a capacity and under a law which did not entitle him to it, that executorship was conferred upon him as an heir and under the general law. His commission was properly reduced from four to two and a half per

cent. His right to defray out of the succession the necessary expenses to be incurred for the distribution of the funds which are in France, and for his settlement—in regard to these funds—with all the interested parties, is specially reserved. R. C. C. 1682.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be partly reversed and partly amended as follows, to wit:

1. It is ordered that, in the settlement of the succession of François Bougère, the dative testamentary executor take into consideration the funds thereto belonging and deposited in France—and, as far as practicable, that the legatees there residing be paid out of said funds—and the legatees residing in Louisiana out of the funds in this State.

2. It is further ordered that said executor levy, for his own benefit, a commission of two and a half per cent on all of the assets of the succession included and described in the inventory of the same, made by Charles Theodore Soniat, a notary public, on the 18th of April, 1876, except the funds deposited in the State National Bank.

3. It is also ordered that, as concerns the question of costs incurred in the lower court, the rejection of the claim of Levois & Jamison and the order consequent on that rejection, commanding the executor to credit opponent with the four forty-eighth part of the funds in France, the judgment of the lower court is avoided and reversed, and in this case remanded for a new trial of only these two last mentioned branches of this controversy and as to the costs.

4. It is lastly ordered that, in all other respects, the judgment appealed from is affirmed, and that it is so partly affirmed, amended, and reversed, and a new trial granted, as between exclusively the parties to this appeal: the costs of the appeal to be paid by opponent.

No. 6819.

WILLIAM L. CUSHING ET AL. VS. SAMBOLA & DUCROS ET AL.

In actions to annul, and enjoin judgment, as between the parties thereto, the jurisdiction of this court depends on the amount of the judgment sought to be annulled, and not on the value of property seized under it, or the amount of damages claimed by the appellant. Thus if the judgment sought to be annulled is under $500, the appellant can not give jurisdiction to this court by setting up a claim of damages for more than $500.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

R. King Cutler and *A. T. Steele* for plaintiffs and appellants.

Sambola & Ducros and *H. N. Ogden* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. Sambola & Ducros, attorneys at law, obtained for one

O'Donnell a judgment against plaintiffs, in the Fifth District Court of Orleans.

They recorded in the mortgage office, as a privilege upon said judgment, their claim for fees, amounting to one hundred and fifty dollars.

A year or two after this recordation the plaintiffs paid the amount of the judgment in favor of O'Donnell to J. W. Gurley, another attorney of O'Donnell. Still a year or two later Sambola & Ducros took a rule on plaintiffs, as judgment debtors in the O'Donnell suit, to show cause, on seventeenth May, 1877, why a judgment should not be rendered against them *in solido* for said fee of $150, because the law allowed them a privilege on the said judgment, etc. That rule was tried and made absolute by a decree of the Fifth District Court. Thereupon, Sambola and Ducros took out a writ of *fi. fa.* and served garnishment process on the Mechanics' and Traders' Insurance Company, and others. Garnishees, however, answered that they owed Cushing et al. nothing, and nothing was seized. The present suit is brought to annul, or have declared null, the judgment on said rule, and for $1000 *damages caused by issuance* of said writ of *fi. fa.*, particularly to William L. Cushing, who alleges that he has been "annoyed, harassed, and vexed" thereby, and that his "credit and standing in the mercantile community" have been injured, and "his feelings wounded," etc. Plaintiffs also prayed for an injunction against the writ pending the suit, which upon trial of a rule *nisi* the court refused to grant. Thereupon, alleging irreparable injury to an amount exceeding $500, plaintiffs appeal.

We are met at the threshold with the objection that this court has no jurisdiction. We think the objection well taken. The very basis and foundation of this whole suit is the demand in nullity of the judgment for $150. Eliminate that, and there is no suit; for if that judgment is valid and lawful, then however much plaintiffs may have been "annoyed, harassed, and vexed," and however much their "credit" and "feelings" may have been injured, there *may be loss* but there *is no damage.* The damages claimed are the mere consequences, the incidents of the attempt to execute the judgment, and there is no other basis or cause of damage alleged. The principal demand is that of nullity.

If this court has jurisdiction in this case, one can hardly conceive of a case in which jurisdiction can not be given it. Every judgment for $100 or $200 will be enjoined on the ground that it is null and void, coupled with a claim for over $500 damages, as resulting from attempts to execute it.

The rule is well settled that in actions to annul and enjoin judgments, *between the parties thereto,* the jurisdiction of this court depends

upon the *amount of the judgment*, and not upon the value of property seized under it.

As a corollary of this, the *amount of damages* alleged as resulting from the execution of such judgment is not an element of jurisdiction in this court; for the amount of damage is generally proportioned to and dependent upon *the amount* of property seized; and as the amount and value of the property seized can not give jurisdiction, the amount of the damages claimed as resulting from the seizure of that property can not. See 12 A. 784; 14 A. 73. Besides, the claim for damages of $1000 is manifestly fictitious. It is incredible that such heavy damages could result from an abortive attempt to seize by garnishment $150.

The appeal is dismissed at costs of appellant.

DISSENTING OPINION.

DEBLANC, J. Plaintiffs allege that, on the second of July, 1870, a judgment was rendered in favor of Charles J. O'Donnell against William Durbridge for $1091. On the seventeenth of May, 1873, said judgment was affirmed by this court, and—on the tenth of May 1875, was paid in full, including interest and costs.

Messrs. Sambola & Ducros were the attorneys of O'Donnell in the Fifth District Court and in the Supreme Court. The payment of the judgment obtained by them was made to J. W. Gurley Esquire, then acting as attorney for O'Donnell. On the third of May, 1873, defendants caused to be recorded in the mortgage office their bill of fees for services rendered to O'Donnell, and—if necessary as to them, this recording was a notice to the judgment debtors, the surety on the appeal bond furnished by them, and to O'Donnell, of the existence of a special privilege in favor of said attorneys on the judgment obtained by them. Rev. St. Sect. 2897.

In May 1877, Messrs. Sambola & Ducros took a rule on Durbridge—O'Donnell's debtor—and on Cushing—Durbridge's surety on the appeal bond—to show cause why they should not be condemned *in solido* to pay them—for their professional services—a fee of one hundred and fifty dollars. This rule was taken in the suit of O'Donnell against Durbridge, and made absolute more than two years after the judgment obtained by defendants had been paid in full. However evident the right, was that the proper remedy? Plaintiffs contend that it was not, and defendants that this court can not entertain the appeal for want of jurisdiction *ratione materiæ*.

What appears to be the object of plaintiffs' suit? To have declared absolutely void the judgment for $150, obtained against them in the

rule—to recover $1000 damages already suffered, to prevent an additional and irreparable injury of over $500, and to enjoin the execution of a writ of *fi. fa.* issued on defendants' judgment.

Is this not but one, a principal action—an action for damages? It may be examined without annulling any judgment; it may be decided without *decreeing* the nullity of what the defendants are attempting to execute as a judgment. The prayer that the decision sought to be executed as a regular judgment, be declared to be an absolute nullity, is a mere surplusage: without it, the action, the only one of which we can take cognizance, would have been as complete as it is with it.

On the part of plaintiffs, it would have been sufficient to allege that—acting under the instructions of defendants and a writ issued from a proceeding which has but the form of a judgment, and which—as a judgment never had any legal existence—the sheriff—by his attempt to execute said writ, and defendants by their instructions to said officer, have already impaired and now threaten to destroy their credit, and that—unless restrained by an injunction, they—the said sheriff and defendants—would cause them—the said plaintiffs—an irreparable injury; and to then conclude their petition by merely praying to be allowed the damages already suffered by them, and for the maintenance of the injunction suspending the unlawful execution. They have done that and more: they have—without necessity—asked a declaration of the nullity of a proceeding, to the introduction of which, as evidence, they could have successfully objected on the trial, and which—if introduced—would have been, not *decreed* to be a nullity, but treated as a nullity, for the reason that, having been obtained without a previous citation, it has only the form, not the substance of a judgment. Whatever may be the nature or the insignificance of an act about to be or already accomplished, we are to look to its effects, and if those effects do threaten to cause to any one an irreparable injury and damage which would amount to more than $500, the party who has already suffered and is again exposed to suffer from the effects of the act, may appeal to this court.

Was the proceeding by rule a proper, a legal proceeding? On this point, we have been referred to several decisions of the courts of Kentucky, Georgia, New York and Maine, in which it was held, in substance, "that the attorney who obtains a judgment has a lien upon it for the amount of his costs, and that the payment of such a judgment, in disregard of the attorney's claim, is equivalent to paying to the assignor, a debt which has been assigned, after notice of the assignment."

These decisions are as just as correct; but—to enforce their claim—could defendants have legally proceeded by rule? They could not, and for two reasons:

1. Summary proceedings being departures from the rules which govern actions generally, can not be extended beyond the cases expressly authorized by law, and defendants' action is not one of those which could have been pursued by such a proceeding.

2. The right to proceed by rule or on motion implies the *pendency* of a suit between the parties, and is confined to incidental matters which may arise in the progress of the contestation, except in the cases expressly allowed by law.

C. P. 98—170—754—756. 6. R. R. 437; 3 A. 434; 12 A. 182—799.

In the case of Nolan vs. Taylor, this court held "that the fees for the services of an attorney at law, although he has acted in the relation of a tutor *ad litem*, under an appointment by the court, can not be recovered in a proceeding by rule, after the determination by a final judgment of the litigation in which he was employed.

12 A. 202.

Defendants' judgment for their fees having been rendered on a rule taken in a case which—long before—had been finally decided, and rendered without citation to, appearance or answer of the parties, that judgment was and remains an absolute nullity.

Defendants invoke the settled doctrine that an injunction can not issue to stay the execution of a judgment, on grounds which might have been pleaded in defence of a suit and before judgment. This is true, but that doctrine applies to only the cases wherein there has been a defence, and can not be extended to those in which the essential formalities prescribed by law have not been complied with.

It may be, as they allege, that plaintiffs' demand for damages is a fictitious one. That claim is supported by the affidavit required to obtain the injunction, and—until contradicted by proper evidence—the legal effect of that affidavit can not be disregarded. Had the injunction been granted and tried, and had the trial established that the action in damages is but a mask used to gain admission into this jurisdiction, we would have dismissed the appeal.

The refusal to grant the injunction leaves us in presence of the serious and as yet uncontradicted facts that plaintiffs have already been injured in the sum of one thousand dollars—that they are threatened with additional damages which, unless prevented by injunction, shall amount to more than five hundred dollars, and all this on account of an attempt, on the part of defendants, to execute a judgment which has no legal existence. To avert what they consider as an impending and irreparable injury, plaintiffs have tendered bond as required by law and applied for writs of injunction. Their application should have been granted.

Were we called upon to affirm, amend or reverse the judgment obtained by defendants, to *decree*, instead of declaring its nullity, this court would be without jurisdiction in the matter: but this is not the case presented by the pleadings. We are called upon to decide whether plaintiffs have suffered damages in the sum of $1000, and whether—unless they be allowed the injunction applied for—they shall suffer an irreparable injury and other damages. If any part of the demand could have been dismissed by the lower court, or can be dismissed by this court, on the ground relied upon by the defendants, it could have been or can be but that branch of the demand which relates to the declaration in nullity? Curtail the action of that branch, and there would still remain before us—in substance and in terms—a complete action in damages, one exceeding $500.

The rule is well settled, and I adhere to it, that no appeal lies from the decree dissolving an injunction taken to arrest the execution of a writ, when a merely voidable judgment on which said writ issued is for less than five hundred dollars, although the value of any property seized, and the amount of damages claimed, be each more than that sum—and this, for the very plain reason that, to relieve the property from seizure, and to determine the party's liability for damages, this court would be compelled, not merely to enquire into the validity of the judgment sought to be executed, but—in reality—to indirectly affirm or reverse that judgment.

The rule invoked is the invariable rule applicable to every case wherein there is a judgment, though it be one of those which may be annulled for any of the causes prescribed by law, when those who seek to appeal from the decree dissolving the injunction were parties to the suit in which the original judgment was obtained.

In the case now pending in this court, taking as true, as we must—the allegations of plaintiff's injunction, he is not resisting the execution of any decree, but the unlawful acts of parties acting under a judicial order, which has but the form and none of the elements of a decree, and the nullity of which can be urged by any interested party, in a direct action or otherwise.

Had plaintiffs' demand been allowed and defendants condemned to pay them the amount which they claim as damages, can there be any doubt that said defendants would have been entitled to an appeal, not because of the amount specified in the judgment, but because of that specified in the pleadings? Is this an appealable case, but only so far as defendants are concerned? I believe not—and, on that account, respectfully dissent from the opinion read.

No. 7006.

SARAH F. BRADFORD VS. A. D. LAFARGUE, COLLECTOR, ET AL.

The purchase by the State of property sold on account of unpaid taxes, extinguishes the debt and all liens arising from those taxes.

Lands belonging to the State are exempt from taxation, and hence one who purchases lands from the State takes them free from all liens and obligations springing from taxation.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Yoist*, J.

Irion & Thorpe and *Henry C. Miller* for plaintiff and appellee.

L. J. Ducoté and *A. & W. Voorhies* for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. On the twenty-ninth of October, 1873, a plantation, the property of George Wilson, was sold by the tax-collector of Avoyelles for taxes assessed against Wilson. The plantation was bid in by the collector for the State, under the act of March 14, 1873. In December, 1875, the collector sold the same by authentic act to J. A. Boyer, under the first section of Act No. 105 of 1874, which provides "that the tax-collectors throughout this State are hereby authorized and required to sell and transfer by public act, passed before a notary and two witnesses, any property which shall have been purchased by the State at tax-sale to any person who shall tender and pay to said collector the amount of the State and parish taxes due on said property, with all penalties and costs."

Boyer sold to the present plaintiff. From October, 1873, to December, 1875, the ownership of this property was vested in the State, and therefore not liable to be assessed for taxes. R. S. 3233. Notwithstanding these proceedings, the property was, during this time, continued on the rolls and assessed in the name of Wilson, the former owner.

By this transfer to the State all taxes existing on the property at the time were extinguished by confusion, and the sale by the State to Boyer passed the property to him unincumbered by any tax-liens. The present collector finding these taxes assessed in the name of Wilson upon this property, unpaid and delinquent, proceeded to seize the plantation in plaintiff's possession to satisfy them. Plaintiff enjoins the sale, and demands that the property be decreed exempt from said taxes and that the mortgages resulting from the registry of the delinquent rolls be decreed null and void and that the recorder be directed to cancel them. There was judgment accordingly, and defendants appeal.

There is no error in the judgment. Property of the State is exempt from taxation, and the act of 1874 above referred to authorized the sale by the collector "to any person who shall tender and pay to said col-

lector the amount of the State and parish taxes due on said property, with all penalties and costs." These words can only refer, therefore, to taxes levied before the State bought. This view is strengthened by the fact that by the revenue act of 1877 it is specially provided, for the first time, that lands sold to the State can only be redeemed by paying in addition to those named in the act of 1874 all taxes on the land for the years that the State owned it.

The judgment is affirmed with costs.

No. 6844.

THE STATE VS. JOHN G. BRISCOE.

The mere fact that the prosecuting attorney in a trial for murder, read to the jury a definition of malice, from a manuscript he refused to allow the attorney for the accused to see, will not authorize a verdict to be set aside, when the accused does not allege that the said definition of malice was incorrect, and when it appears that the judge instructed the jury not to regard what was thus read from the manuscript.

When it is shown that a wound which might be fatal has been inflicted by the accused with a murderous intent, then the burden of proof is on him to show that the death of the deceased resulted from malpractice, or culpable neglect of the attending surgeon, or from some other cause other than that of the wound.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea*, J. Jury trial.

H. N. Ogden, Attorney General, for the State.

W. F. Kernan and *T. J. Kernan* for defendant.

The opinion of the court was delivered by

EGAN, J. The accused was indicted for murder, found guilty of manslaughter, and sentenced to ten years imprisonment at hard labor in the Penitentiary. The case comes before us upon an assignment of errors upon grounds presented in two bills of exception taken on the trial. The first is to the reading on the trial by the counsel for the State from manuscript what purported to be a definition of malice by Judge Story, "to which counsel for the accused objected and asked the court to instruct the jury not to consider said manuscript authority. The court so instructed the jury, but the counsel for the accused objected that this proceeding was wholly irregular; yet the court ruled that, having instructed the jury they were not to consider said manuscript opinion unless the authority was shown to the counsel for the accused, which was not done, he excepted."

It was certainly very improper for the attorney for the State to withhold from the counsel for the accused any authority he might refer to

or use in the argument or on the trial of the cause, and we should without hesitation set aside the verdict and sentence and remand the cause if it were even stated in the bill that the definition of malice so read to the jury was incorrect, as however it does not; while it does appear from the bill that the judge complied with the request of counsel, and instructed the jury not to consider the manuscript authority; and it does not appear that he asked that the trial be suspended and the jury discharged, or that any thing else be done which ought to have been and was not done. We can not, therefore, sustain this ground of error. In overruling it, however, we must remark that the State wishes no unfair advantage taken, even in the smallest matter, of any one prosecuted for crime in her courts. The remedy in such matters as that here complained of is in the hands of the district judge, and should be promptly applied. We do not understand this to be a case of the mere reference to a memorandum of counsel as to an authority not produced. Nor do we wish to be understood as expressing the opinion that an attorney is required to produce and read every authority upon which he relies in argument; to do so would be a great abuse of the patience of intelligent courts.

The second ground of error assigned is, that the judge charged the jury "that if death ensues from a wound given in malice but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it, but he will be held guilty of murder unless he can make it clearly and certainly appear that the maltreatment of the wound or the medicine administered to the patient, or his own misconduct, and not the wound itself, which was the sole cause of his death."

The judge says the above is only a part of the charge given by the court and extracted from the decision of Justice Spofford in State vs. Scott, 12 A. 274, and that the court quoted in his charge all that portion of the decision found on page 275, which reads as follows:

"It is sometimes impossible to procure skillful surgical aid. If a person dies from a wound inflicted with murderous intent, whose life might have been saved by the skill of a surgeon, whom it was impossible to procure, the crime is none the less murder. The true point is, did the party die of the wounds inflicted by the accused? If he did, the facts that he had no surgeon or an unskillful one, or a nurse whose ill-appliances may have aggravated the original hurt, can not mitigate the crime of the person whose malice caused the death. To do that it must plainly appear that the death was caused not by the wound but only by misconduct, malpractice, or ill-treatment on the part of other persons than the accused." In support of this view the opinion then cites 1 Hale's P. C. * 428; Wharton's Law of Homicide, 241; 1 Russel, 505; and Greenleaf's Evidence, vol. 3, sec. 139, which is in almost the exact language of the charge complained of, with the addition "for if the

wound had not been given the party had not died. So if the deceased were ill of a disease apparently mortal, and his death was hastened by injuries maliciously inflicted by the prisoner, this proof will support an indictment against him for murder; for an offender shall not apportion his own wrong." We understand the court to mean that when a wound from which death might ensue has been inflicted with murderous intent, and has been followed by death, the burden of proof is upon the party inflicting the wound to make it appear to the satisfaction of the jury that the death resulted not from the wound but from some other cause, such as malpractice, want of skill, misconduct, or culpable neglect, without which death would not have resulted. In other words, that the State having first shown the existence, through the act of the accused, of a sufficient cause of death, followed by death, the death is presumed to have resulted from the injury or wound inflicted, unless the accused can rebut that presumption by showing that the death was reasonably attributable to another cause and not to this wound so inflicted by him.

It is difficult, indeed impossible, to lay down a general principle on this subject which shall be equally applicable to the facts of each case, varying as they are. Hence much discretion is necessarily left to the judge before whom the case is tried in expounding those principles of law which will enable the jury to arrive at a correct verdict. Those facts are not before us, and with them we have nothing to do. It is not therefore our province to determine whether the law given in charge by the court below was applicable to the facts proved in the particular case. We can only determine whether what the judge does charge is good law. For this purpose it must be remembered that from the very nature of the duties assigned to him the district judge must necessarily consider the facts proved in his hearing in order that he may give an appropriate charge. It is not correct then to say that he has nothing to do with the facts because he is restrained from charging upon them. Neither is it true to say that because the judge charged that "if death ensued from a wound given in malice," as stated in the bill of exceptions, it results that he in effect charges either that a wound has been inflicted by the accused or that it was given in malice, any more than it can be said that he assumes the existence in the particular case of sufficient proof of any other state of facts pertinent to the crime charged, because he finds it proper in his judgment and in the exercise of the discretion and function assigned him to charge the law applicable to them if proven. The charge given in the present case was certainly a vigorous one, but it seems to be supported by eminent authority, and it is not for us to say that it ought not to have been given under the facts of this particular case. Nor does it appear that the charge complained of stood alone; on the contrary, it was qualified by the other language quoted

from the Twelfth Annual case, and that part of it in relation to giving a wound in malice does not seem to have affected the verdict of the jury unfavorably to the accused, as notwithstanding the charge they brought in a verdict for manslaughter only. While the enunciation of the law embodied in the charge complained of is certainly a very strong one, and goes to the extreme limit of the law in this country, it is too well supported by authority to be pronounced error, when qualified, as it was in the case at bar, by other portions of the charge given. Neither do we consider it as thus qualified as militating against the general doctrine of the presumption of innocence and of reasonable doubt in favor of the accused, and still less of that in relation to the presumption of malice from an act deliberately committed with a deadly weapon, and of the intent to be drawn from all the evidence in the case as laid down in the standard modern authors and in the current decisions of other States to which we have been copiously referred in the able argument of the counsel for the accused.

It is therefore ordered that the verdict and sentence appealed from be affirmed.

No. 6815.

SUMMERS & BRANNANS VS. JAMES S. CLARK. S. L. BOYD, GARNISHEE.

A judgment creditor who seizes under execution leased property belonging to his debtor, and held by the lessee under a lease *not recorded*, becomes entitled to, and may exact from the lessee all the rents thereafter accruing from said property; and the fact that the lessee has executed and delivered to the debtor his negotiable promissory notes covering the rent to become due for the whole of the unexpired term of the lease, will not exonerate him from liability to the seizing creditor, for the rents accruing subsequent to the seizure.

A seizure under *fi. fa.* of property bearing rents includes a seizure of the rents.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

D. C. Labatt for plaintiffs and appellees.

Kennard, Howe & Prentiss for garnishee and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs having obtained judgment for large amount against Clark, seized under execution a house and lot on Canal street, belonging to their debtor. This house was occupied at time of seizure by S. L. Boyd, under a lease from Clark, at $375 per quarter; for which quarterly rents Boyd had delivered to Clark his negotiable promissory notes. At the date of seizure one of those notes for quarterly rent was part due and had been paid. The plaintiffs, upon seizing the house and lot, served process of garnishment on Boyd, and propounded interroga-

tories to him, touching his indebtedness for rent. Boyd answered, stating that he held the house and lot under a notarial lease from Clark, and that he had delivered to Clark for the rent, falling due quarterly, negotiable promissory notes. That if Clark held these notes he was his debtor, otherwise not. That he did not, however, know who held them. Plaintiff moved for judgment against the garnishee, as on confession. No legal principle is better settled than that an indebtedness, evidenced by negotiable promissory notes, can not be seized by garnishment of the maker. The notes themselves must be taken into actual custody by the sheriff. But there are other legal principles which may modify or vary this rule. Thus when a contract gives rise to several successive obligations to be performed at different times, it may happen that one or more of these obligations, at the time of performance, are due to other persons than the original contracting creditor. Contracts of lease are of this character. The rents and fruits of an immovable belong primarily to its owner; but the ownership may be transferred from one person to another pending the lease.

As rents are considered to accrue day by day, and as being due by successive obligations, it may well happen that the rents of *to-day* are due to A, and those of *to-morrow* to B, though the lessee hold under one and the same contract all the while. In principle, therefore, *where the right to receive the rents* has passed from one person to another, the tenant can not plead, against the latter's demand for rent, payments he may have made, by anticipation, to the former.

A tenant who has given negotiable promissory notes for future rents ought to be considered in a position similar to one who has paid his rents in advance. The question, therefore, presented for our decision is, when rents to accrue in the future have been paid in advance by cash or negotiable notes, does a seizure of the leased immovable by a judgment creditor of lessor operate a seizure of rents accruing after the seizure?

As the lease in this case was not recorded in the conveyance office, the question is not affected by the registry laws. "All sales, *contracts*, and judgments affecting immovable property which shall not be so recorded, shall be utterly null and void, except between the parties thereto." C. C. 2266. See also C. C. 2264, which provides: "No notarial act concerning immovable property shall have any effect against third persons," unless recorded in the conveyance office. These are negatives pregnant with affirmatives to the effect that contracts "affecting" or "concerning" immovables (and therefore leases thereof), will have effect against third persons, if duly recorded; just as sales, mortgages, etc., affect them when recorded. It would seem that where a lease of real estate has been made in good faith and duly recorded, a creditor of

the lessor, seizing the property, will take it subject to the rights of lessee under the contract, unless the seizing creditor have a mortgage or privilege anterior to the registered lease. If, in such a case, the tenant have paid his rents in advance for the whole term, either in cash or in negotiable notes, the seizing creditor, having no anterior mortgage or privilege, can not, nor can any subsequent purchaser, exact rents until the expiration of the term. But, as we have stated, the tenant Boyd holds under an unrecorded lease, and any payments of rent which he may have made by anticipation, to Clark, are without effect as against creditors or subsequent purchasers of Clark. But it is contended by the counsel of Boyd that until the seizure made by plaintiffs ultimates in a sale of the property they can not take the rents; that it is only by title of owner, and after that title is acquired, that rents can be demanded. It is true that the right to take rents must be *derived from or through the owner;* but it is not true that the person exercising this right of the owner must be the owner himself. His creditors may exercise that right, and may even do so in cases and under circumstances where he could not himself do so, as we shall see hereafter. The law undoubtedly gives the creditor the right to seize the debtor's property; and article 466, C. C. declares that: "The fruits of an immovable * * produced while it is under seizure are considered *as making part thereof*, and inure to the benefit of the person making the seizure." Article 656, C. P., provides: "When the sheriff seizes houses or lands, he must take at the same time *all the rents*, issues, and revenue which this property may yield." How, in the face of these provisions, can it be maintained that the seizing creditor can not as such, and through the sheriff, demand and take the rents of the seized premises? The distinction, therefore, attempted to be drawn between the effects of a seizure and those of an actual sale under the writ is more seeming than real. The law does not more clearly or explicitly give the right of taking the fruits to the owner, than it does to the seizing creditor of the owner. Both rights are unquestionable, for both are positively given by the law. This distinction, too, when pushed to its legitimate results leads to legal absurdity. Thus A, being a judgment creditor of B for $100, seizes an immovable producing a monthly rent of $500. The law commands the sheriff to take those rents in satisfaction of the writ, and declares that they inure to the benefit of the seizing creditor. Before a sale of the immovable can possibly be effected, the rents satisfy and therefore extinguish the writ. But it is argued that these rents can not be taken and applied to the writ *until after the sale*, which can not be made because there is nothing due under the writ!

But it is urged in the second place that the seizing creditor, under garnishment process, can have no other or greater right than his debtor.

In our opinion, under the facts of the case before us, the process of garnishment was unnecessary, and constituted simply *another seizure* of what was *already under seizure.* The rents and fruits of an immovable under seizure "are considered as making part" of the thing seized—C. C. 466—and the sheriff is required "to take them." C. P. 656. But, if unnecessary, it was a convenient form for testing the tenant's liability. The proposition that the rights of a seizing creditor, in garnishment process, are *precisely measured* by those of his debtor, must be taken *cum grano salis,* and is not absolutely true. Garnishment under a *fi. fa.* is simply *a mode of seizing* incorporeal, intangible things. There is no philosophic reason for distinguishing between the rights of a creditor seizing *by garnishment intangible* things, and those of a creditor seizing, *by the hand of the sheriff corporeal or tangible things.* And, in point of fact, both classes of creditors often exercise other and greater rights than their debtors have or can exercise. The debtor *may have so divested himself of rights as to prevent his exercising them,* without having done it so as to debar his creditors from exercising them. Thus, in the sale of movables and incorporeal rights, delivery in one case, C. C. 1922, 1923, and notice to the debtor in the other, C. C. 2642, 2643, are essential to bind and give effect against creditors, though the debtor himself, who sold, *is bound* without delivery or notice. In either case the creditor may sieze directly or by garnishment, as the case may be, and exercise rights therefore which the debtor himself could not exercise. In the very case before us it is clear that Clark, having received in advance the rents for the term of the lease, could not do what we think his creditors have a clear right to do, to wit: compel the tenant, Boyd, to pay the rents from and after the date of the seizure into the hands of the sheriff. This is because the payments made by anticipation under an unrecorded lease though binding on the lessor are not so on his creditors. Nor are these principles more inequitable when applied to a lessee than when applied to a purchaser of immovables without registry, or movables without delivery. If a vendee in such case can, by seizure, be deprived of possession and enjoyment under his purchase, why not a lessee? If, in such case, it is no defense that the vendee *has paid the price,* why should it be that the lessee *has paid the rent?* The principles involved in the two cases are the same, and by no means novel. The judgment below condemned the garnishee to pay the rent after seizure, and we think it is correct.

It is therefore ordered and decreed that the judgment appealed from be affirmed with costs.

ON APPLICATION FOR REHEARING.

In the opinion heretofore rendered in this case we held that under articles 2264 and 2266 of the Revised Civil Code an unrecorded lease of real estate was "*without effect*" "*null and void*," as against subsequent *bona fide* purchasers and creditors of the lessor. These articles were incorporated in the Code of 1870 for the first time, though there was in the Acts of 1855 a statute to the same effect as article 2264. Article 2266, as it now exists, is substantially new legislation, and appears in the Code of 1870 for the first time. We do not think these facts warrant or sustain the assertion made by the counsel that we have "*suddenly introduced into our jurisprudence a doctrine at war with the settled views of half a century.*" As we have seen, article 2266 is but eight years old, and if the jurisprudence were settled differently a half-century ago, we do not feel at liberty to adhere to doctrines which would be in direct conflict with a later provision of the Code. But as we are not referred by the counsel to any of the cases which establish his views, and knowing of none ourselves, we are dispensed from its further notice. It may be that the rule of article 2266 is a harsh one. If so we are not the proper authority to change it.

But the counsel says that we declare the lease from Clark to Boyd without effect and null and void as to Summers and Brannins, and yet proceed to enforce it against Boyd. In response to this we have only to say, that when Mr. Boyd's enjoyment under the lease was disturbed by the seizure he had the perfect right to abandon the premises, and proceed against Clark for restitution of the rents he had paid *in advance* (by negotiable promissory notes). But if he elected to continue his possession after the seizure, with the sheriff's consent, and without changing the terms, there was, as it were, a tacit reconduction or attornment, and the seizing creditor properly measured his claims by the agreed rents.

We made no reference to "Maduel vs. Mousseaux," 29 A. 231, because we did not then and do not now consider that case as in conflict with our views in this. That case announces correctly the general rule as to the liabilities of garnishees. This case rests upon wholly different principles, and is based upon exceptions to that rule. We do not share the counsel's fears as to the disastrous consequences which are to follow our ruling in this case. On the contrary, we think that the rule of article 2266 is a very salutary one, and in perfect harmony with the theory of our constitution and laws on the subject of registry. If you will not give effect to a sale, or a donation, or a grant of usufruct, or mortgage, or privilege as against third persons, without registry, why should the rule differ for leases, which may be for long series of years?

There is no doubt that the general rule is "that no one can transfer a greater right than he himself has; except (says article 2015 C. C.) where *the neglect of some formality required by law has subjected the owner of the real incumbrance*" (such as *servitudes, leases*, etc.) "to a loss of his right, in favor of a creditor or *bona fide* purchaser." That is precisely the case here. Boyd neglected a formality required by law for the preservation of his rights against creditors of Clark.

This article 2015 fully sustains the other proposition maintained in this case, to wit: that when a lease of real estate has been preserved by the formality of registry, and is made in good faith, without fraud, it is good against subsequent purchasers and creditors, without precedent, mortgages, or privileges, and rents paid in advance by the tenant can not be demanded again or his enjoyment disturbed.

We see no reason to doubt the correctness of our decree in this case, and the rehearing is refused.

No. 6962.

JOHN O'CONNOR ET AL. VS. SHERIFF ET AL.

Matters that could have been urged by way of defense, on the original trial of a case, and on appeal from the judgment in the case, afford no grounds for enjoining the execution of that judgment.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Herron & Bird and *Beal* for plaintiffs and appellants.

Jno. H. Lamon, District Attorney, for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. In June, 1876, affidavit was made against Brown, Tennant, and others, charging them with shooting on sixteenth June, 1876, one James Ellis, with intent to murder.

Warrants issued and the parties were arrested and committed.

Brown and Tennant applied, on fifteenth July, for preliminary examination and the district judge granted an order therefor. An order was also granted fixing the bonds of accused at $500 each, to appear and answer the charge "of shooting with intent to kill."

On August 12, 1876, Brown and Tennant, as principals, entered into bond with O'Connor and others (plaintiffs herein) as sureties, in the sum of $1000, for their appearance in the Fifth District Court on seventh November, 1876, pursuant to said order.

At the March term, 1877, the grand jury found an indictment against

Brown, Tennant, and others for the murder of one James Ellis on the sixteenth June, 1876.

On April 7, 1877, judgment was rendered forfeiting said bond and giving judgment against the principals and sureties therein *in solido* for $1000.

The sureties took a devolutive appeal from this judgment of forfeiture, which is now pending in this court.

A writ of *fi. fa.* having issued on this judgment of forfeiture, the sureties bring this suit to enjoin the sale of their property seized thereunder, and to annul the judgment, for the following reasons:

1. That "there is no such bond ordered. It does not appear, and the fact is no such bond as the one forfeited, and on which execution has issued, was ever ordered by any competent authority."

2. "That at the time of the forfeiture there was no such charge pending against the principals as that mentioned in the forfeited bond."

3. "At the time of signing said bond there was no charge pending in the Fifth District Court against said principals."

4. "There never was and never has been in said court any charge against them for shooting with intent to kill."

5. "There is no such offense known in Louisiana as that described in the bond."

6. That petitioners had no opportunity before judgment to urge these defenses.

The defendants in injunction filed sundry peremptory exceptions, and, among others, that the grounds alleged could only be urged as matter of defense in the court below, or on appeal from the judgment in the proceeding for forfeiture, and could not be set up by way of injunction and action of nullity against that judgment.

The court below dissolved the injunction and rejected plaintiffs' demands. They took a suspensive appeal, but failing to prosecute it, the attorney for the State has procured and filed the transcript and prays for affirmance of the judgment, with an amendment, allowing general and special damages.

We think the exception above stated was well taken. All the grounds alleged by plaintiffs were matters determinable by the record of the proceeding in the case of the State vs. Tennant et al., in which the judgment of forfeiture was rendered. It is well settled that matters which can be urged by way of defense, and on appeal, afford no grounds for an injunction. This case is not distinguishable from that in 13 A. 111. See 14 A. 656; 25 A. 538; and 26 A. 34. We do not think this a proper case to award damages.

We see no error in the judgment appealed from, and it is therefore affirmed with costs.

No. 6873.

H. W. HAMLIN ET AL. VS. THE BOARD OF LIQUIDATORS. ISIDORE NEWMAN, INTERVENOR.

In the absence of proof to the contrary, it must be assumed that in the issue, and negotiation of certain State bonds nearly twenty-five years ago, the Governor and Treasurer, who were charged with their issue and negotiation, fulfilled the trust confided to them in accordance with the terms of the law which authorized the issue of the bonds.

Where bonds of the State, payable to the order of a certain payee, and indorsed in blank by the payee, are offered and received in evidence without objection, the indorsements will be deemed sufficiently proved to establish in the holder, a legal title to the bonds.

Under the plea of general denial, in a suit brought to enforce the funding of certain State bonds, evidence is not admissible to prove an adverse title to the one declared on by the holder of the bonds.

In suits between holders of bonds and the Board of Liquidation, (under the funding acts of 1874 and 1875) the only question that can be put at issue is the validity of the bonds, as obligations of the State. The issue of the *ownership* of the bonds can not be raised, save by a rival claimant, intervening and setting up an adverse title.

The mere fact that a certain bond of the State belongs to one of the issues declared by the act of 1875 to be questioned and doubtful, will not authorize the holder of that bond to intervene in a suit brought against the Board of Liquidators by the holder of bonds belonging to *another* of the questioned and doubtful issues.

Bonds of the State that appear to have been issued according to law, and to have had a lawful consideration, are valid obligations of the State entitled to be funded.

The costs of a suit brought by the holder of bonds to compel the Board of Liquidators to fund his bonds, must be paid out of the treasury of the State, if the Board is cast in the suit.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Kennard, Howe & Prentiss, for plaintiff and appellee.

H. N. Ogden, Attorney General, for defendants.

The opinion of the court was delivered by

MARR, J. Plaintiffs, assignees of the Exchange Bank of Canandaigua, allege that they are the lawful holders and owners of five bonds, Nos. 13, 14, 15, 16, 20, of the State of Louisiana, issued to the Baton Rouge, Grosse Tête, and Opelousas Railroad Company in accordance with Acts Nos. 179, 231, 271, of 1853, in exchange for stock of said company, indorsed by said company, and purchased by their assignees in open market, in the city of New York, in good faith, for value, without notice.

That they desire to fund said bonds, under the provisions of Act No. 3, of 1874; but the Board of Liquidation refuse to fund them, alleging they are forbidden to do so by Act No. 11, of 1875, extra session.

That said bonds were issued in strict conformity to law, and not in

violation of the constitution of this State, or of the United States, and for a valid consideration; and that they are entitled to be funded.

They pray that it be decreed that these bonds were issued in strict conformity to law, and not in violation of the constitution of the United States, or of this State, and for a valid consideration; and that they ought to be funded.

Isidore Newman intervened, alleging that he is lawful holder and owner for value and in good faith, of one bond of the State of Louisiana, issued under the act for the relief of the State treasury, approved April 30, 1853, to the order of the State Treasurer, and by him indorsed, being No. 605 of said issue.

The other allegations and the prayer correspond with those in the petition of plaintiffs.

The Attorney General appeared for the Board of Liquidation, and answered the demands of plaintiffs and intervenor by general denial. He afterward filed amended answers, alleging that the bonds in question are not valid obligations in the hands of relators; that the Act No. 81, of 1872, so far as it authorized the re-issue of the said bonds, is void; and that the State has received no valid consideration for them.

The judgment of the district court was in favor of plaintiffs and intervenor, as prayed for; and we are called upon to review that judgment.

By the constitution of 1845, article 113, the Legislature was forbidden to "pledge the faith of the State for the payment of any bonds, bills, or other contracts or obligations, for the benefit or use of any person or persons, corporations, or body politic whatever."

Works of internal improvement, considered to be of great importance to the public interest, were projected, for the prosecution of which the aid of the State was deemed essential; and one of the chief objects of calling the convention of 1852, was to remove the restrictions on the legislative power to contract, imposed by the constitution of 1845. We are indebted to this convention for the constitution of 1852, article 109 of which gave power to the legislature "to grant aid to companies or associations of individuals, formed for the exclusive purpose of making works of internal improvement wholly or partially within the State, to the extent of one fifth of the capital of such companies, by subscription of stock, or loan of money, or public bonds."

Article 114, of the constitution of 1845, provided that "the aggregate amount of debts hereafter contracted by the Legislature shall never exceed one hundred thousand dollars, except in case of war, to repel invasions or suppress insurrections, unless for some single object or work, to be distinctly specified therein."

Article 110, of the constitution of 1852, fixed the limit of liabilities

that might be incurred at eight millions of dollars; and article 111 required the Legislature, in the law creating a debt exceeding one hundred thousand dollars, "to provide adequate ways and means for the payment of the current interest and of the principal, when the same shall become due."

The Legislature of 1853, the first that met under the constitution of 1852, exercised freely the power conferred by that instrument. Act No. 179, the sole object of which was "to grant the aid of the State to the Grosse Tête and Baton Rouge Plank-road Company," made it the duty of the State Treasurer, within ten days after the passage of the act, to subscribe, on behalf of the State, for two thousand shares, of twenty-five dollars each, of the stock of the company, that being one fifth of the whole number of shares, representing one fifth of the entire capital.

The object of Act No. 231, as declared by the title, was "to provide for the manner of giving the aid of the State to railroad and plank-road companies." It authorized the issue of bonds of the State, each for $1000, having forty years to run, bearing six per cent interest, to the order of the company, to be delivered to the company, at par, in payment for stock taken and subscribed by the State, for an amount equal to one fourth of the amount actually received by the company from its other stockholders. Provision was made for the payment of the current interest and principal of these bonds; and by section two "said bonds may be transferred by the indorsement of the president and secretary of the company."

The Grosse Tête and Baton Rouge Plank-road Company was organized by notarial act, under the general corporation law of the State. By Act No. 271 of 1853 the charter was amended, and the company was incorporated under the name of the "Baton Rouge, Grosse Tête, and Opelousas Plank-road Company;" and, by section four, "with the vote of two thirds of the stock of said company, said road, or any part thereof, may, at any time, be converted into a railroad or common toll road."

The testimony of Andrew S. Herron, formerly Secretary of State, proves that the five bonds held by plaintiffs, which are for $1000 each, dated April 7, 1855, were issued to the "Baton Rouge, Grosse Tête, and Opelousas Railroad Company, in 1855 and 1856, in exchange for stock of the company subscribed by the State under and in conformity with Acts Nos. 179, 231, 271, of 1853. The railroad was at first a plank-road; but at the time of the issue of these bonds it had been converted to a railroad under its said name, under the provisions of the law."

The Auditor of Public Accounts certifies that these five bonds, "in favor of the Baton Rouge, Grosse Tête, and Opelousas Railroad Company, were issued to said company in accordance with Act No. 231 of 1853."

Act No. 277 of 1853, entitled "An Act to provide the means necessary

for the relief of the treasury of the State," authorized the Governor to issue bonds, in sums of $500 each, having forty years to run, for the total amount of $750,000. It was the duty of the Governor, forthwith, by publication for sixty days, to invite proposals for the purchase of these bonds, and to accept the best price offered, not less than par. This Act provided for the payment of the current interest and principal of these bonds.

These several acts seem to have been very carefully drawn, and to have been in strict conformity to the power conferred by the constitution of 1852, articles 109, 110, 111.

The five bonds held by plaintiffs, and the bond held by intervenor, and the indorsements on them, appear by the note of evidence, to have been offered and received without objection. Those held by plaintiffs purport to have been indorsed in blank by the president and secretary of the company to the order of which they were made payable; and the bond held by intervenor purports to have been indorsed in blank by the State Treasurer, to whose order it was made payable.

The mere legal title of these bonds is in the bearer, any holder in virtue of the indorsements in blank by the payees, which, having been offered and received in evidence without objection, were sufficiently proven, and must have their legitimate effect, that is, to show title in the holders for the purposes of the suit.

The Attorney General offered certificates of the Treasurer to prove that these bonds belonged to the "free-school fund," and that they were sold as assets of that fund under act eighty-one of 1872. As they were not issued, and did not originally belong to that fund, the position thus taken by the Attorney General virtually admits the genuineness of the indorsements, by which alone they purport to have passed from the ownership and dominion of the original payees; but, independently of this, the indorsements are sufficiently proven, as already stated.

The five bonds held by plaintiffs are each for the amount and in the form prescribed by the act 231 of 1853. They were transferred by the indorsement of the president and secretary of the company to which they were issued, as authorized by that act; and they were issued and delivered to the company in payment for stock taken and subscribed by the State, in accordance with acts 179, 231, 271, of 1853, in conformity to articles 109, 110, 111, of the constitution of 1852.

The bond held by intervenor is one of the series each for $500, which the Legislature, by act No. 277, of 1853, authorized the Governor to issue in aid of the treasury of the State. It was proper to make these bonds payable to the order of the Treasurer; and the bond in question was legally transferred and made payable to bearer by the official indorsement in blank of the payee.

In the absence of proof, or even suggestion to the contrary, it must be assumed that what the Governor and the State Treasurer did, nearly a quarter of a century since, in virtue and in execution of a power and trust conferred by special law, was done in accordance with the terms and requirements of that law; and that the bond held by intervenor, one of those issued for the relief of the State treasury, was negotiated to the highest bidder at not less than par, after proposals had been invited, as required by the act. Indeed, the attempt of the Attorney General to prove that this and the bonds held by plaintiffs belonged to the free-school fund necessarily pre-supposed that they were valid obligations of the State, and that they passed lawfully as such to that fund, in virtue of transfers sufficient to divest the title of the original payees.

It will be observed that neither the original nor the amended answers set up any title or claim to the bonds in question. When the Attorney General offered proof that they had belonged to the free-school fund, and that they were sold under act eighty-one of 1872 at certain rates per cent, counsel for plaintiffs and intervenor objected on the grounds:

First—That the answer is a general denial; and it is not competent for the Attorney General to make the proof sought to be made.

Second—That the bonds on their face do not indicate to any third person or *bona fide* holder their value, or any adverse ownership of any kind.

The amended answers were filed nine days after this testimony had been offered and admitted; but if they had been filed at that time they contain nothing which would have made it admissible, if it was not admissible under the general denial. If the testimony tended to show that these bonds had belonged to the free-school fund, it tended equally to show that the State had received a valuable consideration for them twice, once when they were issued to the original payees and holders; and again when they were put upon the market in 1872.

The judge of the district court considered the objections as going to the effect not to the admissibility of the testimony; and he overruled them on that ground. We think the testimony was not admissible to prove an adverse title, because no such title was set up in the answers. It was not alleged that these bonds had belonged to the free-school fund, nor that they were re-issued by authority of act eighty-one of 1872.

The difference between these bonds and those held by Durant is manifest. These bonds on their face are negotiable, and they purport to have been negotiated by the original payees. The bonds held by Durant were issued under act 182 of 1857, and were payable to the free-school fund. On their face they were not negotiable; and they were not originally designed to be negotiated. They were given as evidence of

the amount of money due by the State to the free-school fund; and they could not have been lawfully negotiated or put upon the market. 29 An. 77.

By act No. 3 of 1874, provision was made for funding the outstanding valid obligations of the State. By act No. 11 of 1875, the Board of Liquidation created under the Funding Act of 1874 was forbidden to fund certain bonds and warrants, "the legality of which has been or may be questioned, until such bonds or warrants shall first, by final decree of the Supreme Court of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the constitution of this State, or of the United States, and for a valid consideration."

The second section of this act specifies certain bonds, among others, those issued to the Baton Rouge, Grosse Tête, and Opelousas Railroad Company, amounting to $30,000, and those issued for the relief of the State treasury, amounting to $65,000; but it establishes no fact touching their validity, except that it is questioned, and therefore the Board of Liquidation is forbidden to fund them until that question has been finally passed upon by this court, as provided by the first section.

The funding act of 1874 authorized the holders of bonds to bring suit against the Board of Liquidation to enforce their asserted right of funding; but neither that act nor the act No. 11 of 1875 provided the means of litigating and determining questions between the holders and those claiming to be owners adversely to them. No such legislation was necessary, since the general laws are amply sufficient for all such purposes. The suits provided for and authorized by these two acts are to be brought against the Board of Liquidation alone, for the single and specified purpose of testing the legality and validity of any questioned bonds or warrants, particularly the bonds mentioned in the second section of the act of 1875. It does not concern the Board to inquire whether or not the holder, who presents a bond for funding, is the real owner. The question which interests the State, the question which the act of 1875 intends to have determined contradictorily with the Board of Liquidation, and in the last resort, is whether the bond which the holder seeks to have funded is a valid obligation of the State, and, as such, entitled to be funded. Any controversy or question as to the actual ownership would be wholly foreign to the issues which the act intends shall be submitted to this court for determination. It may be that the real owner might intervene, and assert his title against the plaintiff, in a suit brought under this act by the holder claiming to be owner; but if any such question could be entertained in such a suit, the adverse title must be set up plainly and distinctly by the person claiming against the appar-

ent owner, the holder; and it can not be proven incidentally in a suit in which the holder and the Board of Liquidation are the only parties.

The act of 1875 provides that suit may be brought by tax-payers, and that they may intervene in any suit brought against the Board of Liquidation, to test the legality of any warrants or issue of bonds; and it authorizes the holder of such securities, the legality, validity, or consideration of which is questioned in such suit, to intervene for the protection of his rights.

It is manifest that the intervention of Newman in this case is not authorized by this act. The bond held by him is not questioned or attacked in the suit; nor is there any thing in common between it and the bonds held by plaintiffs, except that they respectively belong to issues which are questioned, and which the Board of Liquidation is forbidden to fund, except on the final decree of this court. The case of the intervenor was put at issue and passed upon in the district court without objection; and we see no good reason why it should not be disposed of in this proceeding; but we think confusion might arise if the holders of bonds in no way connected with those which the plaintiff seeks to have funded, issued under a different law, for wholly different purposes, to different payees, are permitted to intervene, and to have their separate and distinct demands passed upon in that suit. We mention this now in order that such unnecessary complications may be avoided.

Plaintiffs and intervenor in their answers to the appeal ask that the judgment appealed from may be so amended as to decree that the costs be paid from the State treasury; and we think they are entitled to this relief under the first section of act No. 11 of 1875.

We find and declare, and we intend that our decree shall not extend beyond this, that the five bonds held by plaintiffs, each for $1000, Nos. 13, 14, 15, 16, 20, issued to the Baton Rouge, Grosse Tête, and Opelousas Railroad Company, indorsed in blank by the President and Secretary of the company, and the bond held by intervenor for $500, No. 605, issued for the relief of the State treasury, indorsed in blank by the payee, the Treasurer, are legal and valid obligations against the State of Louisiana; and that the same were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valuable consideration; and that they are entitled as such to be funded.

If there is any adverse title or claim to these bonds, it must be asserted and litigated in a proceeding wholly different from this, and between the proper parties. The apparent legal title is in the plaintiffs and intervenor; but if some other persons are the real owners, our decree does not preclude them.

It is therefore ordered, adjudged, and decreed that the judgment

appealed from be so amended as to decree that the costs of this proceeding, as well in the district court as in this court, be borne by the State of Louisiana, and be paid from the State treasury in accordance with the terms and provisions of section one of act No. 11 of 1875, extra session; and, as thus amended, that said judgment be affirmed, with the reservation of the rights of all persons whomsoever claiming to be the owners of the bonds the subject matter of this suit.

No. 6888.

THE STATE EX REL. HERBERT GEALE VS. THE RECORDER OF THE FIRST RECORDER'S COURT OF NEW ORLEANS.

The writ of *certiorari*, issued by a superior to inferior court, lies not only in causes of which the superior court has appellate jurisdiction, but likewise in causes in which there is no appeal, and where the inferior court is of the last resort.

The only court authorized to issue a writ of *certiorari* to an inferior court, is the one to which all appeals from the inferior court are made returnable.

This court has not appellate jurisdiction of criminal cases before the Recorders' Courts of New Orleans, when the penalty imposed is not death, nor imprisonment at hard labor, nor a fine exceeding three hundred dollars, nor where a fine or penalty imposed by municipal corporation is not involved; and hence is without authority, in such cases, to issue writs of *certiorari* to the Recorders' Courts.

A fine or penalty imposed by a State law, to be exacted by the magistrates of a municipal corporation for the use of the corporation, is not a fine or penalty imposed by the corporation.

The exercise of judicial power by the Recorders of New Orleans, when not extended further than the cognizance of cases arising under the regulations for the police of the city, is constitutional. Such cases need not be tried by jury.

APPLICATION for a writ of *certiorari*.

R. Hutchenson and *Chas. S. Rice* for relator.

Jno. A. Campbell for respondent.

The opinion of the court was delivered by

MANNING, C. J. Herbert Geale was arrested upon a warrant, issued by one of the Recorders of New Orleans, for selling or otherwise disposing of a policy, combination, or device in a lottery to be drawn in this city, without license or permission of the Company now authorized by law, and in violation of an act of the General Assembly. He applied to this court for a writ of certiorari, commanding the Recorder to send up a certified copy of the proceedings in the cause then pending before him, to the end that their legality may be inquired into and determined, and also for an order injoining him from proceding further therein until this Court had acted upon the same. Provisional orders were made

accordingly, and the Recorder having answered, we have now to determine whether the relator is entitled to the relief he has sought.

The law which Geale is charged with violating is an act relative to the unlicensed sale of lottery tickets in New Orleans, and conferring on the police courts the power to suppress such sale. Acts 1874, p. 47. The petition alleges that, according to the provisions of this act, no appeal lies from a final judgment of the Recorder to this Court, or to any District court, and hence the judgment of the Recorder will be a decision of the court of the last resort, if he shall try and convict the relator upon this charge. It is then alleged that the Recorder is an inferior judge, over whom this court has immediate appellate jurisdiction—that he ought not to be permitted to take jurisdiction of the cause, or to proceed to the trial of relator, for the reason that he would be exercising judicial power which the legislature was not competent to confer upon him—that the Act, with the violation of which he is charged, is unconstitutional in so far as it attempts to confer this jurisdiction upon the police court, because it contravenes arts. 73 and 94 of the Constitution, and because it denies the right of trial by jury for an offense against the State, and is partial and unequal in its operation.

The answer of the Recorder is:—"The respondent comes in obedience to the mandate of the court and for answer to the rule says,

"1st. That the cause before him as Recorder, described in the order and mandate of the Court, under the constitution and laws of the State is not examinable in this Court in manner and form as proposed in the petition and rule, and that this Court ought not to take cognisance of the same.

"2d. That this respondent had jurisdiction of the said cause under the constitution and laws of this State, and was proceeding regularly and lawfully in the determination of the same as he might, and that this honorable court ought not to entertain any motion or proceeding to arrest him, and because that he was proceeding lawfully and regularly in a matter submitted to him by the Constitution and laws, and ought to continue to exercise the jurisdiction conferred by them, and because this honorable court is not charged with authority to suspend his proceedings, he prays judgment and that he may be discharged from further answer, and be allowed to proceed as he was proceeding."

An inquiry into the nature and purpose of the writ of *certiorari* is necessary to the proper presentation and understanding of the question submitted to our decision.

The writ has its origin in the Common Law. Blackstone assigns to it four purposes, 1. to consider and determine the validity of appeals or indictments, and the proceedings thereon, and to quash or confirm them as there is cause, 2. where it is surmised that a partial or insufficient

trial will probably be had in the court below, the indictment is removed in order to have the defendant tried in the Queen's Bench, or before the justices of *nisi prius*. The other two purposes need not be noticed. The writ, when issued to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court. Comm. book IV. p. 321. Afterwards, another purpose was assigned to it, viz to complete the records of a civil cause, and it is to effect this purpose that it is commonly invoked here, but it is also used in the common law States to remove either a civil or criminal cause from an inferior to a superior court for the purpose of inquiring into the validity of the proceeding in the lower court. In England, certiorari would lie from the Court of Queen's Bench to justices, even in cases which they were empowered finally to hear and determine. 2 Haw. P. C. 286.

That these features of the writ were intended to be preserved here, at least in part, is manifest from the peculiar provision of art. 857 of our Code of Practice;—this mandate is only granted in cases where the suit is to be decided in the last resort, and where there lies no appeal, by means of which, proceedings absolutely void might be set aside. And that it was intended to be applied to both criminal and civil causes is apparent from the instances, given by way of illustration, where the writ may be used—when the inferior judge has refused to hear the party or his witnesses—when he has pronounced sentence without having cited them to appear.

It will be observed then, that this article of the Code of Practice, so far from restricting the operation of the writ to causes of which the superior court has appellate jurisdictton, was framed expressly for those causes wherein there was no appeal, and where the inferior court was of the last resort. Then as to the source from which the writ must emanate, art. 860 provides that it can only be directed to an inferior judge by the court having immediate appellate jurisdiction over him, and by no other—not that the court issuing the writ shall be vested with jurisdiction of the cause, for the removal of which the writ is sought, but it must be the court to which appeals lie direct from the judge in such causes as are appealable.

The peculiarities of these two articles have been to all appearance very little noticed in our jurisprudence. The petition in this cause, so far from asking for the writ to bring before us a cause that is appealable, makes the fact that the cause is unappealable the foundation of the relator's right to the writ. It is because the judgment of the Recorder, when pronounced, will be a decision in the last resort, that he prays the issuance of a writ which will enable us to set aside proceedings that he claims are absolutely void.

Now if we derived our jurisdiction from the Code of Practice, we should unquestionably have the power to have the proceedings of the Recorder brought before us for examination of their validity. That Code contemplates and provides for such examination in unappealable cases. arts. 855–866. We have therefore to inquire whether we are forbidden or permitted by the organic law to take jurisdiction of this cause.

The Constitution commands that we shall have appellate jurisdiction only, except in cases which it alone shall designate, and it has designated but one, i. e. the power to issue writs of *habeas corpus* in cases where we may have appellate jurisdiction. The cases to which this jurisdiction shall extend are enumerated and classified, and among them are those in which the constitutionality or legality of any fine, forfeiture or penalty imposed by a municipal corporation shall be in contestation, whatever may be the amount thereof. In criminal cases the jurisdiction is of questions of law only, whenever the punishment of death, or imprisonment at hard labor, or a fine exceeding three hundred dollars is actually imposed. In civil cases, the matter in dispute must exceed five hundred dollars. art. 74.

All the previous constitutions of this State had similar provisions except that of 1812, which simply conferred appellate jurisdiction and applied it to all civil causes involving a specified sum. art. IV. sec. 2. The constitutions of 1845 (art. 63) and of 1852 (art. 62) are like that of 1868 in this respect, except that the latter provides that an appeal will lie to this court direct from a judgment for a fine, forfeiture, or penalty imposed by a municipal corporation, whatever may be the amount thereof. The adjudications of this court upon these corresponding articles in the earlier constitutions are therefore authority in the interpretation of the one now in force.

The objection of invalidity, because the relator is deprived of the right of trial by jury by the Act in question, may be disposed of with the remark that the contrary has been long held to be a sound construction. State v. Gutierrez, 15 Annual, 190. So also, the argument on the part of the respondent's counsel, that the issuing of the writs applied for by relator is not allowable, because of the uniform decisions of this court, that writs of mandamus, prohibition, etc. will only be issued in aid of its appellate jurisdiction, does not apply here. Art. 857 contemplates, and in terms provided for, a writ of certiorari, specially adapted to such cases as are not appealable.

Considered as a civil cause alone, our jurisdiction does not attach to the proceedings of the Recorder, because the matter in dispute is only twenty-five dollars. Considered as a criminal cause, we have not jurisdiction because the penalty imposed is not death, nor imprisonment at

hard labor, nor a fine exceeding three hundred dollars. There remains for inquiry whether the case falls within the definition of a fine, or penalty imposed by a municipal corporation.

Two acts were passed by the General Assembly on the same day relative to the sale of lottery tickets. The first enacts that any person who shall within the city of New Orleans sell a lottery ticket without license of the company now authorized by law, shall be liable to pay a fine of twenty-five dollars to the City, one half of which shall be for the benefit of the informer, and imposes upon any police officer the duty of arresting such person, and of taking him before the police court of the district, wherein the violation may have occurred, which court shall condemn the offender to pay the fine, or in default of payment, to imprisonment for five days. Acts 1874, p. 47.

The second makes the same act of any person, done any where in the State, a misdemeanor, punishable by imprisonment of not less than ten days nor more than a month, and a fine of not less than fifty nor more than two hundred dollars, one half of which is for the informer and the other for the parish wherein the offense was committed. *Idem*, p. 48.

The thought in the mind of the legislator evidently was that the act denounced and punished by the first law was not an offence against the State, for if it had been, its operation would have been made to extend through the whole State, and the second act would have been superfluous. The relator in his petition denominates it a State offense. But if he has correctly denominated it, then it is not an act for which a fine or penalty has been or can be imposed by a municipal corporation, and our jurisdiction would fail on that ground. Fines, forfeitures, and penalties are imposed by municipal corporations for violations of their ordinances. But the power of the State to impose fines and penalties for the same act that is punishable by a municipal ordinance is well established. The fact that the State has conferred upon a corporation the power to pass ordinances and impose penalties for the regulation of any specified subject does not necessarily supersede the State law on this same subject, but the State law and the City ordinance may both stand, if not inconsistent. Thus in New York, the legislature imposed a penalty of one dollar for servile labor on Sunday, and the corporation of the City of New York imposed a penalty of five dollars for the same offence. Both were held good. Cooley says, the same act may constitute an offence against both the State and the municipal corporation, and may be punished under both without violation of any constitutional principle. Const. Lim. 199. So also Dillon;—The State may, and as to local matters often does except municipal corporations from the operation of its laws, and either provides a special law for them, or authorizes them to make spe-

cial regulations for themselves. * * Hence the same act is sometimes forbidden by general statute, and by the ordinance of a municipal corporation, each providing a separate and different punishment. Munic. Corp. § 301.

The fine impending over the relator is not imposed by an ordinance of the City, and hence we have not here the case of an act twice forbidden by distinct and several authorities, viz the State law and the municipal ordinance. But in principle it is the same. A corporation has no power to pass any ordinances whatever except in so far as that power is actually delegated to it by the State, or is imparted to it by implication, as flowing necessarily from the grant of a general power to regulate its administration. The State need not grant a corporation the power to make any ordinance whatever, but may reserve to itself the entire and exclusive control of the administration of each city or town within its limits, but convenience and necessity have always prompted the delegation of those powers to the corporation. As the corporation derives the power to pass ordinances from the State, it follows that the State can enact a law for the corporation, and accordingly the State in 1874 did pass on the same day the two laws already mentioned. The fine or penalty provided by these acts is in neither case imposed by a municipal corporation. The first makes a police regulation for the government of a particular city, and confides its enforcement to the police magistrates of the city. The second makes the same act an offence against the State, punishable by the State courts, and it is only when the fine or penalty is imposed by a municipal corporation that we have jurisdiction. New Orleans v. Blanc, 1 Annual, 385. Travers' case, 3 Annual 693.

And this brings us to the consideration of the last objection of the relator, i. e. that the legislature could not constitutionally confer judicial power upon the Recorder.

The judicial power of this State is vested in a Supreme court, in district courts, in parish courts, and in justices of the peace, (Const. art. 73) and no judicial power, except as committing magistrates in criminal cases, shall be conferred on any officers other than those mentioned above, except such as may be necessary in towns and cities, and the judicial powers of such officers shall not extend farther than the cognisance of cases arising under the police regulations of towns and cities in the State. art. 94.

We are met on the threshold here by the well settled jurisprudence of this State, that no appeal will lie to this Court from a judgment for less than the sum mentioned in the constitution, rendered by a mayor or police magistrate of a town for an alleged infraction of an ordinance of the corporation, where the only question raised is the constitutionality of an act of the legislature vesting judicial power in the officer

who rendered the judgment. Donaldsonville v. Richard, 4 Annual 83. Municipality v. Corning, *idem* 407. Albert v. Brewer, 9 Annual 64. State v. Rebassa, *idem* 305. Penn v. Municipality, 4 Annual 13.

The case of Lafon v. Dufrocq, 9 Annual 350 is cited as authority for the want of power of the legislature to confer judicial power upon the police magistrate of a town, but that decision was based on the constitutions of 1845 and 1852, which did not contain any provision similar to art. 94 of the present Constitution, which, as we have seen, makes special mention of the 'judicial powers' that are permitted to be conferred upon such officers as may be 'necessary in towns and cities.' We therefore hold that the exercise of judicial power by the recorders of New Orleans, when not extended further than the cognisance of cases arising under the regulations for the police of the city, is not unconstitutional.

Even without this delegation of a partial and limited judicial power to a police magistrate, it has been elsewhere held that the power could be exercised because it was not in the strict sense judicial. Thus where the power of the mayor of Hagerstown to try and fine under an ordinance imposing a fine for an offense was disputed, and the same offense was punishable by the State as a misdemeanor, and the constitution of Maryland was like our own in respect to the courts wherein judicial power was vested, it was said;—the argument that the mayor could not try and fine under the ordinance, because the exercise of such power is judicial, which by the Constitution is confided to certain classes of persons, would be entitled to great weight, if we thought the power exercised by the defendant was, in the sense of the Constitution, a part of the judicial power. But we entertain no such opinion. We regard it as but a part of the police power, as contradistinguished from the regular judiciary powers of the State. From time immemorial, a distinction has been observed between the two, both in England and this country. * * * We regard the power, conferred on the corporation of Hagerstown, to summarily punish persons of the description of appellant, as falling directly within the definition of a police regulation. She was punished for an offense against the decency and morals of the town, and not against those of the State. This did not wipe out all responsibility for the offense to the dignity and sovereignty of the State. Shafer v. Mumma, 17 Md. 331. See also Floyd v. Eatonton, 14 Ga. 354 on this point, and also on that of non-trial by a jury.

We have therefore arrived at the conclusion that we can not grant the relator the relief by a writ of certiorari to bring up the proceedings of the Recorder, to the end that inquiry of their validity be made, because of our want of constitutional power to exercise the jurisdiction. We readily concede, and have endeavored to demonstrate, that the Code of Practice intends that the writ shall issue in an unappealable case,

wherein the judgment is of the court of the last resort, but that Code is not the source of this court's jurisdiction, and its provisions relative to the issuing of that writ under the circumstances of this case are inapplicable to this court, because the Constitution has in express terms limited its original jurisdiction to the issuance of the *habeas corpus*, and in all other causes has conferred appellate jurisdiction alone. Shalor's case, 9 Annual, 522. Taenzer's case, 15 Annual, 120.

We are urged to interpose to prevent the infliction of a grave and flagrant public injury. But it would be a graver injury if this court should overstep the bounds set up by the organic law, within which it must move, for the purpose of correcting any evil, however flagrant.

It is adjudged and decreed that the writ of certiorari is refused, and the restraining order, heretofore issued to the Recorder, is cancelled and annulled at the costs of the relator.

No. 6977.

STATE OF LOUISIANA VS. RICHARD SMITH, ALIAS DICK SMITH.

In putting questions to witnesses in a criminal trial it is not permitted to assume as true, facts which have not been proved, and which the jury alone are charged with finding.

One witness can not testify in a criminal trial as to what another witness said on the examination before the committing magistrate, when that other witness is present in court, and not disqualified, and when it is not sought to contradict him.

The mere fact that an accused when under examination before a magistrate does not rise up and contradict the witnesses who testify against him, does not warrant the implication that he thereby confesses the truth of their statements.

To make the declarations of others evidence against an accused, when made out of his presence, it must be first shown that there was a conspiracy between him and them.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Duncan*, J.

H. N. Ogden, Attorney General, and *J. H. Muse* for the State.

Jas. M. Thompson and *E. F. Russell* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendant was indicted, tried, and convicted on a charge of murdering one Eliza Whittington; was found guilty and sentenced to death. He appeals, and presents for our consideration various grounds for reversal of the sentence.

The first and second bills of exception present substantially the same questions, and may be considered together.

The district attorney asked a State witness the following question:

"Leaving out of view the delusion that you were first under, when you saw an individual at and going round the house in which the murder was committed on the evening of Friday, March 16, that it was the brother of the deceased; and taking into consideration the description which you have heretofore given of the person of the individual whom you there saw, and supposing that the hat now exhibited to you, and which has been shown to have been worn by the accused on the day on the evening of which the murder was committed, had been worn by him (the defendant) on the seventeenth March when he appeared before the coroner's inquest, and, also, the shirt which he now has on, in an unwashed state, and also the pants which he now has on, would you, on that occasion, have had any doubt of the identity of the accused with the person above described and referred to?" Defendant's counsel objected to this question, on the grounds that it presents a "supposititious" case; that it is an attempt to elicit the opinion of the witness on a state of facts not established, and to elicit the witness's conclusions from a supposed state of facts—functions belonging exclusively to the jury. The objections were overruled and the witness allowed to answer. We think the court erred. This question is doubly objectionable. It assumes as true, and as already proved, two important facts, to wit: that the witness's first impression (that the person he saw was the brother of deceased) was a delusion; secondly, that the identical hat exhibited had been worn by the deceased on the day of the murder. In the next place, it is an attempt to identify a person upon a supposed state of facts, and that by the opinion of the witness. The witness had evidently testified that he took the person seen going round the house where the deceased was shot to be her brother. The question requires him to ignore this impression as a delusion, then proceeds to dress up and exhibit to the witness a man of straw, and then solicits the witness's opinion whether he *would have* entertained any doubt of the identity of that imaginary man with the accused. It was the province of the witness to state facts, and of the jury to draw inferences, opinions, and conclusions from those facts. In asking a question it is not permissible to assume as true facts which the jury is alone charged with finding. Thus, whether the witness's first impression was or was not a delusion, whether the hat exhibited was or was not the one worn by accused on the day of the murder, were questions to be determined by the jury, *upon the facts sworn to by the witnesses*, and not upon the assumption of the counsel.

Greenleaf, in Part 3, chapter 3 §434, says: "The interrogatory *must not assume facts to have been proved which have not been proved*, nor that particular answers have been given which have not been given.

The witness, except in certain cases hereafter to be mentioned, is to be examined only as to matters of fact within his own knowledge, whether they consist of words or actions; and to these matters he should, in general, be plainly, directly, and distinctly interrogated. Inferences or conclusions which may be drawn from facts, are ordinarily to be drawn by the jury alone, except where the conclusion is an inference of skill and judgment; in which case it may be drawn by an expert, and testified by him to the jury."

The third bill of exception was taken to the ruling of the court permitting a State witness to testify to the statements made by another witness, Esther King, on her examination before the committing magistrate and in presence of the accused. The defendant objected, on the ground that Esther King was alive and present in court; that the evidence sought is hearsay, and not the best evidence. The court admitted the evidence of these statements, because "the testimony of Esther King had not been taken down in writing" by the committing magistrate.

It is difficult to perceive upon what principle of law A is permitted to testify as to the statements made by another witness, B, when B is present in court, and in no way disqualified, and when it is not sought to contradict or discredit B.

It was argued that this evidence was offered in order to show an implied confession by the accused—inasmuch as these statements of Esther King were made in his presence and not contradicted by him. Even if a confession could be implied under such circumstances, still Esther King's own oath was the best evidence of what she had previously stated. But it is manifestly a misconception of the law to hold that because an accused, undergoing an examination in court, does not rise up and contradict each witness, that he thereby tacitly confesses the truth of their statements. The accused is not only under no obligation to do so, but in no properly conducted trial would be permitted to do so. Greenleaf says, part II. chapter XI. par. 197, note 3: "To affect a party with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence; *for if they were given in evidence, in a judicial proceeding*, he is not at liberty to interpose when and how he pleases though a party, and therefore is not concluded."

In Archbold's eighth edition, page 380, we find the following: "*Where a man, at full liberty to speak, and not in the course of a judicial inquiry*, is charged with a crime and remains silent, that is, make no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury."

The fourth bill of exceptions was taken to the admission by the

court of testimony going to show the declarations of an unnamed third person of his purpose to use money to have the deceased removed from the neighborhood, and going to show that the accused was a frequent visitor at the house of said unnamed person. The defendant objected that the declarations offered were those of unnamed and, to him, unknown parties; that until a conspiracy had been shown between him and such unnamed party the declarations of the latter were inadmissible against him. The court overruled the objections as going rather to the effect than to the admissibility of the evidence. The court erred. No principle is better settled than that to make the declarations of others evidence against an accused when made out of his presence, it must be shown that there was a conspiracy between him and them. Besides, it was unfair to conceal or withhold the name of the party whose declarations were sought to be offered. They should have been excluded. It is unnecessary to notice the other bills.

The verdict and sentence must be set aside and the cause remanded for a new trial according to law, and it is so ordered.

No. 6950.

SUCCESSION OF S. M. HYAMS.

When a parish judge is recused in any case on the ground of personal interest, he can not appoint a lawyer to try the case in his stead.

The fact that the wife of the judge is one of the parties to the suit is sufficient to recuse him on the ground of personal interest, whether she be separate in property from him or not.

APPEAL from the Parish Court of Natchitoches. *Breda*, J., special judge.

Chaplin, Cunningham & Chaplin and *Morse & Dranguet* for succession and appellant.

J. M. B. Tucker for opponents.

The opinion of the court was delivered by

MANNING, C. J. The succession of S. M. Hyams is insolvent and is administered by Lemée as syndic, who filed the final account of his gestion in August, 1877. The Laplace heirs, claiming to be judgment creditors of the deceased, opposed its homologation. The parish judge is the husband of one of the opponents, and recused himself because of interest, and selected a lawyer to try the case, who accordingly heard and determined the contestation. Exception was made to the right of the parish judge to select a lawyer to act as judge *ad hoc*, when the ground of recusation was personal interest. The exception is good.

The judge selects a lawyer to try a case in which he may be recused, when he is not personally interested in the matter in contestation. Const. art. 90. When the wife of the judge is a party to the cause, he is personally interested sufficiently to deprive him of the power to select a lawyer to try it. And we do not choose to put this inability on the ground that the legal presumption of a community of acquets between the spouses exists, for it would be the same if the judge and his wife were separate in property, but rather on the ground that if the phraseology of the constitution left the question doubtful, we will in construing it incline to the side of good morals and decency, and hold that the constitution did not intend that a shadow should be thrown over the fair face of justice by interposing a suspicious object between it and the light of impartial truth.

The whole proceedings now before us are *coram non judice.* Therefore

It is ordered and decreed that the judgment appealed from is reversed, and the cause is remanded for trial, the appellees paying costs of appeal.

No. 7015.

J. P. SMITH VS. THE PARISH OF MADISON.

The police jury of a parish have no power to issue its warrants, or paper of any kind, negotiable or otherwise, for any purpose, unless specifially authorized to do it by the Legislature, and the means of paying the debt are provided for in the ordinance creating it.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough*, J.

Seale & Morrison for plaintiff and appellant.

Isaac H. Crawford for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff is the holder of ten warrants on the parish treasury of Madison, drawn in this way;

DELTA LA. Sept. 29 1869

Treasurer of Madison Parish La. pay to Walter B. Brockett or order the sum of one hundred dollars with eight per cent. interest from date, payable annually, to be paid out of the first funds coming into the parish treasury. JOHN P. EDEN, Pres. Police Jury.

Attest; JOS. A. HEBERT, clerk police jury.

They were endorsed.

The allegations of the petition are, that these warrants were drawn on funds provided to be raised by the police jury, by an estimate of

necessary expenditures duly published, for the purpose of erecting needful public buildings, and that an assessment of taxes was made therefor, and the taxes were collected and paid into the parish treasury, and were diverted to other purposes.

There was an exception to the sufficiency of the allegations to shew a cause of action, and also to the legality of the service of citation, but we prefer to settle the question of the validity and binding force of the warrants at once, without dealing with these preliminary matters.

The defendant pleads want of authority in law for the emission of the paper. The plea is good.

On Sept. 10, 1869, the police jury passed an ordinance authorizing its president and clerk to issue scrip to the amount of fifteen thousand dollars in sums of one hundred dollars each, to bear eight per cent. interest, and to be applied to the erection of public buildings, and appointed a committee to dispose of the scrip at a discount not exceeding ten per centum, and directing the scrip to be paid out of any money coming into the treasury before all other claims. On the first of the same month, the jury had directed the assessment of a tax of five hundred per centum upon the amount of all the taxes assessed by the State for 1868, for the purpose of defraying the necessary expenses of the parish, and a further assessment of fifty per centum upon the same sums for bridges and roads.

The police jury is without authority to issue its warrants or scrip, or paper of any kind, negotiable or otherwise, for the purpose of providing a fund for building or for any other purpose, unless specially empowered thereto by an act of the General Assembly, and without providing in the ordinance creating the debt the means of paying it. The plaintiff's counsel state that the ordinance does comply with this last requisite. We are unable to discover how any provision is made for the payment of the debt by the simple declaration that the scrip shall be paid out of any money coming into the treasury.

The police jury appear to have wanted fifteen thousand dollars of money, and it therefore issued negotiable paper for discount, and ordained that the first funds coming into the treasury shall be used to take it up. The powers of police juries are limited. They can not exercise any others than those specially delegated to them, and all persons dealing with them are bound to ascertain the extent of their authority, and there can be no better illustration of the wisdom of that rule of law than the present instance. The taxable property within a parish can not be burthened by the obligation to pay for the redemption of paper or bills, emitted by its police jury, without special authorization in the form and manner designated by law. There was no authority of any kind in this case.

Judgment affirmed.

No. 6971.

SUCCESSION OF D. P. JACKSON. OPPOSITION OF HEIRS TO PROVISIONAL ACCOUNT OF ADMINISTRATRIX.

The decree of the lower court will not be disturbed on the ground of its alleged non-conformity to evidence not submitted to the inspection of this court.

Where it appears that the services of an attorney in settling up the complicated affairs of a succession have been long continued, wisely directed, and valuable, this court will be guided as to the money value of his services (in the absence of special agreement as to his fees, and of specific evidence as to the extent of his services) by the opinion of the local bar to which he belongs.

APPEAL from the Parish Court of Tensas. *Cordell*, J.

Wade R. Young for opponents and appellants.

St. Vincent Reeves for administratrix and appellee.

The opinion of the court was delivered by

MARR, J. May E. Wood, James Jackson, and Kate A. Bailey, children and heirs of Dempsey P. Jackson, opposed the provisional account of the administratrix, their mother. The parish court maintained their opposition with respect to the amount claimed for fees of the attorney for the succession, which was reduced $300; and the account was homologated as rendered in all other respects. The heirs appealed; and the administratrix asks in her answer that the judgment be so amended as to allow the full amount charged in the account.

Before proceeding with the case we think it proper to say that a paper styled the protest of the heirs was filed in the parish court, and is copied in the transcript, which the parish judge should not have allowed to be filed. It could not have been written by or under the advice of a lawyer; nor would any respectable lawyer have sanctioned it. The counsel for the heirs asked us not to notice it; and he repudiated it as soon as he was employed in the case. It is couched in such terms and manifests such temper and spirit as should not be tolerated in a judicial proceeding, and should not be permitted to pass unrebuked. The parish judge should have reprimanded any member of the bar who would have ventured to offer and file such a paper; and he should have stricken this paper from the files of his court.

The opposition to the other items of the account rest upon the allegation that they are in excess of the amounts actually paid by the administratrix, as evidenced by the vouchers. The vouchers are not copied in the transcript; and we can not question the sufficiency of testimony not submitted to us which was submitted to the parish judge. We must presume that the judgment was in accordance with the vouchers which were exhibited; and that it is correct, so far as the items in question are concerned.

Dempsey P. Jackson lived in Adams county, Mississippi, where he died in 1874. He had owned a plantation in Tensas, which, some time before his death he conveyed to his wife in payment of her paraphernal claims, amounting to $13,664. The immediate cause of his making this conveyance was the pressure of certain large debts, on which suits were threatened. The conveyance was made under the advice and with the assistance of Messrs. Reeves and Farrar, who were then partners. Mr. Farrar testifies that he considered the conveyance to be valid; but he has no doubt that Jackson made it in view of the threatened suits. Jackson informed Mr. Farrar, some time after the conveyance was made, that he had settled these claims.

The title to the entire property was in Mrs. Jackson at the time of her husband's death; and the conveyance was recorded in Tensas parish. There was no retrocession; nor is there any proof of the existence of any counter letter or other similar writing.

Jackson was largely indebted at the time of his death; and, among others, he owed H. S. Buckner, of New Orleans, some $7000. There was reason to apprehend that suit would be brought to set aside the conveyance to Mrs. Jackson, and to subject the property to the claims of Jackson's creditors. It was, therefore, deemed advisable to have the property administered as belonging to the succession of Jackson; and the whole was inventoried as if the title had been in him at the time of his death. The appraisers state in the inventory that it was represented to them that the property belonged to the community.

Mrs. Jackson qualified as administratrix; and it was through the influence of Mr. Reeves that a responsible citizen of Tensas parish became her surety on the bond required of her. She and her children, the heirs of her husband, joined in a mortgage to Buckner; and it was by the agency of Mr. Reeves that this arrangement was consummated, by which the apprehended suit was avoided.

Precisely how or upon what theory the property was brought back into the succession we are not informed; and Mr. Farrar, who assisted in making the conveyance to Mrs. Jackson, frankly confesses that he does not know how that was accomplished. As between Jackson and his wife, during his life, the conveyance was conclusive against him, in the absence of a counter letter, or some equivalent writing; and after his death his heirs were equally concluded.

Perhaps, after the death of Jackson, Mr. Reeves had an opportunity to examine papers left by Jackson, and to obtain information of which he was ignorant at the time the conveyance to Mrs. Jackson was made, which satisfied him that a suit by the creditors of Jackson to subject the property could not be successfully resisted; and to avoid the scandal of a litigation, based upon the fraud of the deceased and his widow, whom

the heirs describe as "our aged and infirm mother," it was wise in Mr. Reeves to advise, and wise in Mrs. Jackson to consent, that the conveyance to her should be ignored, and that the property should be administered as belonging to the succession, without respect to a title which neither Mr. Reeves nor Mrs. Jackson was willing to rely upon as against Jackson's creditors.

The age, experience, and reputation of Mr. Reeves preclude the theory that he advised Mrs. Jackson to abandon to the succession and to the creditors of her husband property which she held by a just and legal title. As we do not know what trouble, labor, and skill were necessary to enable Mr. Reeves to advise Mrs. Jackson properly, in view of his duty and obligation to protect her interests as well as the interests of the succession, we have no standard by which we can estimate the pecuniary value of this part of his services. His position was one of delicacy and of responsibility; and if he erred it was to the prejudice of Mrs. Jackson, not to the injury of the succession or of the heirs. The succession was benefited to the extent of the value of the property thus restored to it; and the heirs will be benefited to the extent of the residue which will fall to them after the payment of the debts. Surely the heirs have no right to complain that this large property was brought back into the succession by the voluntary act of their mother under the advice of her counsel.

In the last year of Jackson's life, he had, by contract in writing, leased the plantation in question to colored laborers. After the death of her husband Mrs. Jackson considered the contract as abandoned; and she made a verbal contract with the laborers, the effect of which was to give her a larger share of the crop than she would have had under the lease granted by her husband. Some eight or ten suits were brought by persons claiming liens on the crop for supplies furnished the laborers under the lease granted by Jackson. There was much complication in the affair; but the whole was compromised and settled through the agency of Mr. Reeves; and the succession had the benefit of the crop in accordance with the verbal contract with Mrs. Jackson.

There was a suit brought by the administratrix against Dreyfus for four bales of cotton, which was decided against her; and there was a suit brought by Muldoon against the administratrix which resulted in a judgment in his favor for some $300. Mr. Reeves represented the administratrix in both these cases.

It was proven that Mr. Reeves assisted in the taking of the inventory; and that he made a compromise with Watson, a creditor, by which $500 were saved to the succession. It seems that Mrs. Jackson cultivated the plantation in 1875, and that she met with heavy losses. By the advice and with the assistance of Mr. Reeves, she leased the prop-

erty for three years, by authority of the parish court, at $4000 for 1876, and $5000 for each of the years 1877, 1878; and Mr. Reeves believed that this arrangement would enable the administratrix to pay the debts of the succession, and to save the property.

It was agreed by Mrs. Jackson and Mr. Reeves, in writing, to leave the amount to be paid him for his professional services to the opinion of the members of the St. Joseph bar. They agreed upon $1200, as proper compensation for his services to date, January, 1876. Mr. Reeves testified that he considered the fee in the Muldoon case included in this award. Subsequently, in January, 1877, he prepared and filed the provisional account, for which it is proven that $100 would be a proper fee; and it is also proven that $50 would be a reasonable fee for the services of Mr. Reeves in the Dreyfus suit, in the parish court, and in the district court on appeal; making total for fees $1350. Mrs. Jackson paid $500 on account, after the award of the members of the bar, leaving balance of $850, the amount put down in the account.

The account shows that Mrs. Jackson received from the crops and other sources the sum of $11,423 09; and that she had disbursed $11,431 12. According to this account there remained unpaid $5571 79 to Buckner, and $850 to Reeves, making total unpaid $6421 79. No part of the rent money figures in the account; nor does it include the $500 paid to Mr. Reeves, nor any charge for the commissions of the administratrix. There is nothing in the record to create a doubt as to the payment of the rent; and if it be paid there will be a large surplus after discharging the debts put down in the account as not paid.

It is evident, therefore, that the services of Mr. Reeves have been valuable, and that his management was wise and most beneficial to the succession. The proof shows that Mrs. Jackson consulted him very frequently. She lived in another State; and much of the details of the administration must have devolved upon him. He made the negotiation with Mr. Buckner, and visited New Orleans for that purpose, probably more than once. If there had not been a satisfactory arrangement with Mr. Buckner there would probably have been an expensive litigation, of a very disagreeable character, the result of which might have been the forced sale of the property, for cash, at a sacrifice, and the loss of the whole to the heirs.

There are standards by which the fees of attorneys for the management and conduct of suits, the collection of money, and the recovery of property, etc., can be fixed; but for such services as the greater part, and by far the most important, responsible, and valuable of these rendered by Mr. Reeves, there can be no certain standard; and for which it is difficult for any others than the attorney and the client to make an accurate and satisfactory estimate. In such cases the compensation is

usually the subject of special agreement. In this case, as there was no such agreement, the reference to the members of the local bar was eminently proper. There is nothing in the record in conflict with, or that tends to diminish the value of their testimony on this subject; and they had some means of knowing the nature and extent of the services rendered by Mr. Reeves. Mr. Reeves says: "My time was more engaged, and I was more taxed in the management of that succession than any that I have ever had in thirty years practice. It is utterly impossible for me to state the full services that I have rendered that estate."

We are not at liberty, if we were inclined, to disregard the testimony in the cause, which is the only means of information which we have touching the matter in controversy. The amount allowed does not seem to be beyond a just and reasonable compensation for the services as detailed by the witnesses; and we think the parish judge erred in deducting from it three hundred dollars.

It is therefore ordered, adjudged, and decreed that the judgment of the parish court be so amended as to reject and dismiss the opposition of May E. Wood, James Jackson, and Kate A. Bailey, heirs of Dempsey P. Jackson, to the provisional account filed by Maria J. Jackson, administratrix; that the said account be homologated as rendered and filed; that the balance due S. V. Reeves for his services as attorney for the succession of Dempsey P. Jackson the sum of eight hundred and fifty dollars, as set down and charged in the said provisional account, be allowed as a privileged claim against the said succession, and be paid in due course of administration, with interest at five per cent per annum from the twelfth day of January, 1877, until paid; that the said opponents, heirs of Dempsey P. Jackson pay the costs of their opposition in the parish court, and all the costs of this appeal; and that the said judgment as thus amended be affirmed.

On Application for Rehearing.

Egan, J. We have been pressed with great earnestness to grant a rehearing of this cause. The opponents certainly can not complain that they have not been faithfully and zealously represented by their counsel before this court. The chief cause of complaint against the opinion and decree rendered we have no doubt has grown out of the fact that the judge who prepared it, out of regard for the zeal of counsel and following his example, entered into a dissection of the case sometimes important but not necessary to the determination of the issues presented in this record.

It is impossible to follow up or detail every distinct piece of service

rendered or counsel given in the course of an administration running through several years. The occasion for both in such a succession as that now under consideration is constantly recurring, and it would be both unjust and unreasonable to expect a rendition of account of services by the attorney like the items of a merchant's account. Enough has been shown by positive evidence, independent of the opinions of witnesses, as to value to satisfy us that the amount set down for counsel fees in this succession is very reasonable for one of the size and character. We do not share in the apprehensions of counsel of danger to the jurisprudence of the State from allowing reasonable fees to competent counsel of high character and professional standing, especially where the services have resulted so well as in this instance. We do not think any thing in the opinion already read could be construed into censure of the counsel who represented opponents before us. We very cheerfully say, however, that any strictures contained in it were elicited by a paper in the record for which he is in no wise responsible.

For the reasons given the rehearing is refused.

No. 6988.

SUCCESSION OF E. H. LEPPELMAN. ON OPPOSITION OF THE WIDOW.

The question of the widow's right to the marital fourth may be raised and passed on in her opposition to the executor's account, when there are no heirs here, or claiming an interest, and when the universal legatee is present, and the account of the executor exhibits the proposed settlement of the succession.

Before a widow can rightfully claim the marital fourth from the succession of her husband she must show that her husband was rich, and left her in necessitous circumstances. If she fails to prove *either* of those essential facts her claim to the marital fourth will be rejected.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Brame*, judge *ad hoc*.

Kernan & Lyons for executor and appellee.

Wedge & Moore and *Thos. J. Semmes* for opponent and appellant.

The opinion of the court was delivered by

MANNING, C. J. The executor of E. H. Leppelman filed the final account of his gestion, the homologation of which is opposed by the widow of the deceased on various grounds. The sole question for determination is the opponent's claim to the marital fourth.

The executor objects to the consideration of this question upon the pleadings now before us, for the reason that an opposition to an account is not the proper form for its legal presentation, and that the widow must be remitted to her action against the heirs. That is true as a gen-

eral proposition. Harrell's case, 17 La. 374. Vasser v. Dupre, 8 Annual 488. But it will be presently seen that under the facts of this case the reason of that rule ceases, since there are no children, nor other heirs here or claiming any interest, and the universal legatee is present, is a witness on the trial, and the account filed by the executor exhibits the liquidation, or proposed settlement of the succession, so that we should be merely driving the widow to new costs if we should sustain the objection of the executor, and without any substantial good to be obtained by any party.

Leppelman removed to this State from Ohio in 1869, where he had married three years before. He owned property there, and it is proved that his purchases here were made with funds derived from his separate estate there, so that the community is largely indebted to his separate estate, and is absorbed by that debt. The wife brought nothing into the marriage. Her father lives in Ohio, and is rich, his property in that State being worth two hundred thousand dollars or more, besides owning property in this State worth about fifty thousand dollars. Mrs. Leppelman, as heir of her deceased mother, owns one third of her property in Ohio, which is however burthened by the life estate of her father. The husband, who is a father, is by the common law tenant by the curtesy of his deceased wife's lands. Her father is near seventy years old, and her interest in her mother's Ohio land, affected by the life estate of her father, is estimated by some witnesses as worth four thousand dollars, by others, eight hundred dollars. She said she would take from her father two thousand dollars for it.

Mr. Leppelman, died in Dec. 1875 after an illness of several months. During the earlier part of that illness his wife lived under his roof, and seems to have taxed her ingenuity to increase his misery by adding mental distress to his bodily ailments. He feared she would poison him. Her outbursts of temper appear to have impressed him with the belief that she was insane, and in August before his death, he instituted a suit for her interdiction, which however was not pursued. It is not surprising that in his feeble condition he should have mistaken for insanity what a less enfeebled man would have understood was only the exacerbation of a malignant temper that had become uncontrollable because habitually uncontrolled. As a foil to his suit for her interdiction, she instituted a suit against him for divorce. Death drew a curtain over this disgraceful spectacle, but the warfare was renewed over his grave by her claim for the marital portion from his estate. It will be for us to close the melancholy drama by a decree that shall silence the only remaining contestant.

Art. 2359 of the Civil Code gives the right to a surviving spouse to take out of the succession of the deceased one fourth of the succession

in full property, when as in this case there are no children and the wife brought no dowry, provided the decedent died rich and the survivor is left in necessitous circumstances. new no. 2382. In Gee v. Thompson, XI Annual 657 it was held that a decree of separation from bed and board does not preclude the surviving wife from claiming the marital fourth, and where the husband was worth thirty-one thousand dollars and the wife had but little over one thousand; the former was held to have died rich, and the latter to be in necessitous circumstances. And on the other hand, it was held in Armstrong v. Steeber, 3 Annual 713, that a wife who had abandoned her husband to live in concubinage with another can not be said to have been left by his demise in necessitous circumstances, within the reason and spirit of the law.

The wife in this case, as in Gee and Thompson, was legally in a position to fulfill the requirement as to her status, and although there is testimony in the record of her immodest deportment, it does not at all place her in the position of the wife in the Armstrong case. The inquiry is, did Leppelman die rich, and is she necessitous.

The community property was inventoried in Nov. 1875 in her suit for divorce at $5640, and in the succession proceedings shortly thereafter, the husband's estate including the community is inventoried at $11,050. The community is indebted to the separate estate of the husband for over $12,000, a sum exceeding its value. After the sale of the movables and the payment of the debts, there remains twelve hundred and seven dollars in the executor's hands. The land is not sold, but was inventoried at $5250. The husband died worth less than eight thousand dollars, even if the land brings considerably more than its appraised value. The widow's separate estate, i. e. her interest in her mother's succession, is worth $2400 if we take the mean value between the opposing estimates of witnesses—she would sell it to her father for $2,000. The deceased left his property to Alice Farley, the niece of his first wife, who had lived with him in Ohio, and also here, and who superintended his household and nursed him. The executor proposed to deliver to Miss Farley the residuum of the estate, and refused to recognise the widow's claim to the marital portion, and the court sustained him.

The marital portion had its origin with Justinian, and is found also in the Partidas. Gregorio Lopez, commenting on the latter, puts a question pertinent to our present inquiry—what if a wife should have a rich father, from whom she could demand alimony, could she sue for the marital fourth? He cites two preceding commentators as holding the negative, because a daughter who has a rich father can not be called poor, and because the daughter may compel her father to support her, and thus her wants may be supplied, which is more just than that she

should receive assistance from the fortune of her deceased spouse. tom. 111, p. 218.

So Merlin asks—La femme qui a été mariée sans dot, mais qui a un père riche, peut-elle demander la Quarte comme pauvre? Lebrun répond que non—la loi (dit-il) n'entend pas parler d'une femme qui ait un père riche, car si le père qui n'a pas doté, etait opulent, la plupart des docteurs estiment que, comme il est obligé de doter et de nourrir sa fille, le cas de la Quarte cesse. Repertoire, *verbo*, Quarte de conjointe pauvre.

The interest of Mrs. Leppelman in her mother's estate is worth one fourth as much as the estate of her husband, and her father's property in this State alone is worth more than six times the latter. Rich is a relative term. Property which would make a person in one condition of life rich, would be inadequate to supply the wants, albeit they are artificial, of one in another condition of life. A woman whose father is worth a quarter of a million with only three heirs, can not be said to have had a rich husband, if he is only worth eight thousand dollars. Leppelman did not die rich, nor is his wife left by his death in necessitous circumstances, and both conditions must be fulfilled before a surviving spouse can legally claim the marital portion.

Judgment affirmed.

No. 6989.

WARRICK TUNSTALL VS. THE PARISH OF MADISON.

An order of a district court of the State granting the removal of a case to the Circuit Court of the United States may be appealed from.

When an application for the removal of a suit from a State to a Federal court is made, the State court has jurisdiction to determine the question whether the applicant has brought himself within the provisions of any act of Congress authorizing the removal. But in considering this question, the court should only allow such allegations of fact to be put at issue, as are material to its determination.

In an application for the removal of a suit from a State to a Federal court under the act of Congress of 1867, known as the "Local Prejudice Act," the applicant need not swear to his citizenship. The necessary allegation as to his citizenship, need only be set forth in his pleadings.

The affidavit required by the "Local Prejudice Act," should be made by the applicant himself. The affidavit of his *attorney*, that he (the attorney) has reason to believe and does believe, etc., is not sufficient.

For the purposes of Federal jurisdiction a corporation, whether political, municipal, or commercial, is regarded as a citizen of the State in which it was created, without regard to the citizenship of its members. Thus, a parish of this State is a citizen of Louisiana.

The "good and sufficient surety" required of the party who applies for the removal of a case to the Federal court need only be *offered* in the State court by the applicant at the time of filing his petition for removal. The written obligation of such surety need only be *filed*, after the surety has been accepted by the court.

The affidavit required of an applicant for the removal of a case under the "Local Prejudice Act," may be taken before any commissioner for this State residing in another State. Such a commissioner has authority to administer the oath.

This court will presume that the seal used by one, who styles himself, without contradiction, a commissioner of Louisiana in authenticating an affidavit made before him, as commissioner, was the seal of a commissioner of Louisiana, until the contrary is clearly, and specifically shown to this court.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough*, J.

Seale & Morrison for plaintiff and appellee.

Geo. J. Bradfield, District Attorney *pro tem.*, and *Isaac H. Crawford* and *J. Tyson Lane* for defendant.

ON THE MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. This is an appeal from an order of the district court of Madison parish removing the cause into the circuit court of the United States. Plaintiff, appellee, moves to dismiss the appeal on the ground that this court is without jurisdiction; "the jurisdiction of the State courts having ceased on filing the application and obtaining the order of removal."

In Goodrich vs. Hunton. 29 An. 372, we held that an appeal would lie from the order of removal from the State court into the circuit court, and we see no reason to doubt the correctness of that decision.

The motion to dismiss is, therefore, overruled.

ON THE MERITS.

Warrick Tunstall, describing himself to be a citizen of the State of Missouri, residing at the city of St. Louis, brought this suit against the parish of Madison, to recover some thirteen thousand dollars for professional services as attorney and counselor. He describes the parish of Madison as "a body corporate, civil and politic, of and in the State of Louisiana, represented by the police jury of said parish."

Defendant appeared by counsel and pleaded prescription as to part af the demand, and that the petition shows no cause of action against defendant.

Pending these issues Tunstall filed a petition for removal into the circuit court of the United States, under section 639, third paragraph Revised Statutes of the United States, page 113, the original of which is the act of 1867, known as the "Local Prejudice Act." This petition states fully and in detail all that is requisite for the removal; and refers to the precise law under which it is claimed. It states, also, that peti-

tioner has filed his affidavit, as required by that law; and that he "offers herewith his bond executed by himself and H. R. Morrison, of Madison parish, Louisiana, surety, in the penal sum of $250, conditioned as by said act of Congress required."

The affidavit filed with the petition states: "That I have reason to believe and do believe that from local prejudices and local influence I will not be able to obtain justice in said State court."

This affidavit was subscribed and sworn to by Tunstall before C. D. Greene, Jr., styling himself "Commissioner for Louisiana, at St. Louis, Missouri;" and to it a seal is affixed.

Defendant excepted on several grounds:

First—That no bond was filed with the petition.

Second—That no proper affidavit has been made, the alleged or pretended commissioner of deeds having no authority to administer oaths in such cases, "and the pretended affidavit not being authenticated by seal purporting to be a seal of a commissioner for Louisiana; that said pretended affidavit does not set forth the citizenship of plaintiff; and that there are other defects and irregularities apparent on the face of the papers."

Another petition for removal was filed, with tender of a bond, with Morrison as surety in the penal sum of $500. The affidavit was made by one of the attorneys of plaintiff in the suit.

Defendant again excepted, on the grounds:

1. That the former application had not been ruled upon or in any manner disposed of.

2. That of the two bonds filed on the same day one is insufficient in amount and the other is not signed by plaintiff.

3. That the affidavit does not show, nor does it appear *aliunde*, that plaintiff is a citizen of a State other than this.

4. That the affidavit is not made by plaintiff, but by his attorney, and does not comply with the law in such cases made and provided.

5. That this is not and does not purport to be a suit between a citizen of the State in which it is brought and a citizen of another State, but is a suit between an individual on the one part and a civil corporation on the other.

The extracts from the minutes show that the "exception" to the petition for removal was taken up, tried, taken under advisement, overruled, and the removal ordered as prayed for; but there is nothing to show whether the court passed upon the first set of exceptions, or the second, or both. The order of removal recites that the plaintiff, Warrick Tunstall, filed his petition, and having verified it by oath, and furnished bond in pursuance of the act of Congress, etc., Rev. Stats., etc., section 639, subdivision three, it is ordered, etc.

When an application for removal is made the State court must determine whether the applicant has brought himself within the terms and requirements of the act under which he claims the right, or at least as we intimated in Goodrich vs. Hunton, 29 An. 372, within the provisions of some act of Congress authorizing the removal. We do not think the State court should permit a fraud to be practiced, or its jurisdiction to be divested, by the false allegation of a material fact, such, for instance, as the citizenship of the parties, respectively; and, therefore, we think the party against whom the removal is asked for may put at issue in some form such allegation of fact. We do not think, however, that it is proper to allow the right of removal to be impaired by pleas and exceptions which are not simply denials of material allegations of fact, or which go beyond the bringing to the notice of the court the specific question of the sufficiency of the application, as a matter of law apparent on the face of the papers.

The petition of plaintiff sets out the amount of his demand and the citizenship of himself and of the defendant distinctly and sufficiently to have given jurisdiction to the circuit court originally. The petition for removal contains all the allegations that would be required under the act of March 3, 1875, except that it does not appear that it was filed before or at the term at which the cause could be first tried, as required by section three of that act. As the plea of prescription and exception of no cause of action were filed at the May term, and the petition for removal at the November term, the plaintiff probably preferred to assert his right under the local prejudice act, because of the apprehension that it was too late to apply under the act of 1875.

The act of 1867, the law under which the removal is asked for in this case, does not require the applicant to swear to his citizenship. It requires him to make and file in the State court, at any time before the trial or final hearing of the suit, an affidavit stating "that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

Where the proceedings show that the suit is between a citizen of the State in which it is brought and a citizen of another State, and that the amount in controversy exceeds the sum of $500, exclusive of costs, the right of removal, at any time before the trial or final hearing, is absolute if the party entitled, the citizen of the State other than than that in which the suit is brought, will make and file the affidavit prescribed by the act; and when this application is made, and sufficient surety offered, as required, the State court is divested of jurisdiction, and must proceed no further in the cause.

We think this affidavit should be made by the applicant, because, although the attorney might have reason to believe and might believe

that his client, from prejudice and local influence, of which the attorney might be even better informed than his client, could not obtain justice in the State court, he could not know what impression had been made upon the mind of his client, nor what his client really believed. In this case the attorney swears that he has reason to believe and does believe, etc.; but he has not undertaken to swear to the belief of his client. We are not prepared to say that, under no circumstances, this affidavit could be made by an attorney, but the letter of the law requires the affidavit to state that the applicant has reason to believe and does believe, and we think the spirit of the law requires that it shall be made by the applicant in person.

The exception as to the citizenship of the defendant is without legal warrant or foundation. The settled jurisprudence of the Supreme Court of the United States is that a corporation "for the purposes of Federal jurisdiction, is regarded as if it were a citizen of the State in which it was created; and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive." Louisville R. R. Co. vs. Letson, 2 How. 497; O. and M. R. R. Co. vs. Wheeler, 1 Black, 286; Insurance Co. vs. Francis, 11 Wallace, 210; R. R. Co. vs. Harris, 12 Wallace, 82; Sewing Machine case, 18 Wallace, 553; in which all the parties were corporations; and they were held, for purposes of Federal jurisdiction, to be citizens of the States, respectively, in which they were created.

In all these cases the corporations might have been composed in part of persons who were not citizens of the States, respectively, in which they were created, but the political corporation, Madison parish, is composed entirely of citizens, residents of the parish: and the reasoning applicable to trading and manufacturing corporations, with respect to citizenship and Federal jurisdiction, applies with so much the more force to this corporation.

In the celebrated Topeka case, 20 Wallace, 755, the plaintiff was a corporation created in Ohio, and defendant was a municipal corporation in Kansas. It did not occur to the learned counsel, or to the Supreme Court of the United States, that the plaintiff, the Loan Association, was not a citizen of the State of Ohio, nor that the defendant, the city of Topeka, was not a citizen of the State of Kansas, within the meaning and intendment of the Constitution and laws of the United States, for the purposes of Federal jurisdiction.

There is nothing in the cases of the Phœnix Insurance Company vs. Pechau, and Amory vs. Amory, recently decided by the Supreme Court of the United States, relied on by defendant, in conflict with this established jurisprudence. Pechau sued the Phœnix Insurance Company, in one of the courts of the State of New York. There was nothing in the

pleadings to indicate the citizenship of plaintiffs. The Insurance Company filed a petition for removal, under the judiciary act of 1789. The company was a Connecticut corporation, and there was no doubt about its citizenship. The suit was commenced on June 1, and the petition for removal was filed June 11. It stated that plaintiff *is* a citizen of the State of New York, but it did not state that he *was* a citizen of that State at the time of the commencement of the suit. The court held that the act of 1789 requires the citizenship which authorizes the removal to exist at the time of the commencement of the suit; and an affidavit or proof of citizenship that did not relate to that time would not suffice.

In Amory vs. Amory, it seems the plaintiffs were executors under appointment in the State of New York. They brought suit in their official capacity against a citizen of New Jersey. He filed a petition for removal under the act of 1867, on the ground that plaintiffs, "as executors, are citizens of the State of New York." The court held that it is the personal citizenship, not the "official" citizenship, if there could be such a citizenship, which authorizes the removal, and for all that appeared the executors, although appointed in the State of New York, might have been citizens of New Jersey, as was the defendant.

It will be observed that the act of Congress does not use the word "bond." It requires that the applicant for removal shall, at the time of filing his petition, "offer in said State court good and sufficient surety," etc.; and it is the duty of the court to accept not a "bond," but "the surety." The surety must bind himself in writing: the bond is the most convenient form of writing for that purpose; and hence it is in general use in judicial suretyship.

In his petition for removal plaintiff offered a bond, in the penal sum of $250, conditioned as required by law, with a surety whom he designated by his name and residence; and the surety, on that day, annexed to the bond his affidavit of his sufficiency. The bond was ample in amount; and there was no occasion for actually filing it until the offered "surety" had been accepted by the court.

The earnestness manifested by counsel for defendant in a printed argument of eleven pages has, seemingly, imposed upon us the necessity of expressing our views on matters which we think too well settled to admit of doubt or question now; and we proceed to the remaining objections, which depend upon the laws of our own State.

As we have seen, the affidavit of plaintiff was sworn to and subscribed by him, at St. Louis, before a Louisiana commissioner. All the requisites for removal sufficiently appear of record, by the distinct allegations of the original petition, except the cause of removal, the prejudice and local influence, which the act requires to be sworn to, and

which is embodied in the petition and affidavit, in the words of the act. The objections to this affidavit are two-fold:

First—That the commissioner had no authority to administer the oath.

Second—That the affidavit is not authenticated by seal purporting to be a seal of a Louisiana commissioner.

First—The act of 1855, p. 44, re-enacted in Revised Statutes of 1870, p. 117, authorizes the commissioners appointed by the Governor to take acknowledgments and proof of deeds, etc., "or other writings, to be used or proved in this State, before any court or public officer, and to *administer an oath* or affirmation for like purposes to any person desirous to make the same." Sections 597, 603.

We think this language is broad enough to confer power to administer an oath, in verification of any writing or affidavit to be used or proved before any court of this State, in any civil suit or proceeding.

Second—The affidavit shows on its face that the commissioner styled himself, and professed to act in the capacity of "commissioner for Louisiana, at St. Louis, Missouri;" and it is authenticated by his signature and by a seal. Our attention has not been called to any special defect in the seal itself; and it is not denied that Greene was a commissioner for Louisiana, at St. Louis, Missouri, as he professed to be and signed himself, nor that the seal was affixed by him. The specific objection is that the affidavit is not authenticated by seal purporting to be a seal of a Louisiana commissioner. The seal could not have been affixed by any other person without forgery; and we must assume that it was affixed by him, because we can not presume that a crime has been committed. If it was affixed by him, it must have been his official seal as commissioner, because he had no occasion to use any other; and no other seal would have authenticated his official signature in the capacity in which he professed to act. The affidavit bears a seal; and that seal does not purport to be any other than that of the commissioner who administered the oath.

A *fac-simile* of the seal is hardly to be expected of an ordinary penman; and, as is usual, a scrawl with the word "seal" written in it, supplies the place of the seal itself in the transcript. If that had been the seal used by the commissioner, that specific objection would have been made either in the pleadings or in the argument. In their printed argument counsel for defendant say, referring to the first petition for removal: "A sort of affidavit was annexed, but no bond was filed." The affidavit contains all that the act of Congress requires; and we can not undertake to reverse the judgment of the district judge, who had the original impression of the seal before him, without having that impression or an accurate description of it before us. If the seal itself

was not such as the law requires, the defect should have been specifically pointed out and brought to our notice; and the appellant should have exhibited to us either the original impression affixed to the affidavit, or a *fac-simile*, or a correct description of it, so that we might have ascertained for ourselves the force of the objection. No such specific defect having been pointed out as indicated, we must hold that the authentication is sufficient.

The first petition and bond, and the affidavit made by plaintiff at St. Louis, in our judgment, made it the duty of the district judge to order the removal, and to proceed no further in the cause. The second petition, bond, and affidavit made by the attorney were not necessary, nor did they constitute an abandonment of the first application for removal. We incline to the opinion that the attorney can not make the requisite affidavit where, as in this case, no circumstance is shown which prevented the making of it by the applicant himself; but it is not necessary to pass upon this affidavit, because that made by plaintiff at St. Louis suffices.

The judgment appealed from is, therefore, affirmed with costs.

No. 5400.

LEWIS BURTON AND WIFE VS. O. BRUGIER AND SHERIFF.

Where the succession of a deceased husband, which is wholly composed of his half of the community property, the other half of which belongs to his surviving widow, is entirely free from debts, or only owes such trifling debts as she offers to pay, the appointment of an administrator of his succession is unnecessary, and illegal. The surviving widow has the right to take possession of the whole property and exclusively administer it, as the owner of one half of it, and as the usufructuary of the other half.

The Probate Court has no authority to order a sale of the surviving wife's half of community property at the instance of an administrator of the husband's succession, illegally appointed by that court, in order to pay debts of the succession wrongfully created by the administrator.

An order of court to sell the property of the husband's succession to pay its court costs and law charges, does not authorize the sheriff to sell the widow's half of the property.

A sheriff, who without warrant of law, or order of court, ejects the rightful possessor from property, and substitutes a wrongful possessor, is liable jointly with the wrongful possessor for whatever damages the ejectment caused.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J. Trial by jury.

O. N. Ogden and *Ogden & Hill* for plaintiffs and appellees.

James and *Jos. Brewer* and *Alcée J. Ker* for O. Brugier, defendant.

Hornor & Benedict and *E. Evariste Moïse* for sheriff, appellant.

The opinion of the court on the original hearing was delivered by MANNING, C. J., and on the rehearing by SPENCER, J.

MANNING, C. J. This suit is for five thousand dollars as damages for the forcible dispossession of the plaintiffs from their dwelling, and the injury to and partial destruction of their furniture and other movables. The petition alleges that they were in the peaceable possession of several lots of ground in an outlying part of this City, and of the buildings erected thereon, when on May 10, 1873, the sheriff's deputies and Octave Brugier entered their dwelling with violence, ejected both of them from it, removed their furniture and other effects in the street, broke or destroyed portions of them, occasioned the loss of their money and jewelry, and that Brugier has ever since kept possession of the premises. Judgment was prayed against him and the sheriff jointly.

The defence of Brugier is that he purchased the property at a judicial sale, and that the acts complained of were neither participated in nor authorized by him, but that the sheriff was bound to put him in possession of the property purchased, which was done on that day. The sheriff pleads that whatever was done was merely in the performance of his official duty, and in obedience to an order of court, and that Brugier is bound to hold him harmless, whom he calls in warranty.

A jury rendered a verdict awarding two thousand dollars damages, and the defendants appeal.

Mrs. Burton was formerly the wife of Peter H. Oldis, and at his death in August 1870, remained in possession of the community property, which consisted of the lots and dwelling already mentioned, the furniture, and some other movables. Neither of the spouses, nor the community, owed any debts. The widow paid the expenses of her husband's last illness, and of his burial. They were childless, and the heirs of the husband were a surviving brother and the children of a deceased brother. The widow owned one half of the property, the whole of it being of the community of acquets, and she was the usufructuary of the other half.

Two weeks after the death of Oldis, his surviving brother applied for and obtained letters of administration upon his estate, and the property was appraised at twenty-one hundred and sixty-eight dollars, of which two thousand dollars was the appraisement of the lots and buildings. Five weeks thereafter, the administrator represented to the court that it was necessary to sell the movable and immovable property of the deceased to pay the funeral and law charges, and the order of sale was made. On 10th. of October of same year, the widow applied for a hearing, and at her instance the order was rescinded, and on the 14th. she shewed for cause why the property should not be sold, that there were no debts of the deceased or of his succession, one only excepted, and that was due herself for paraphernal funds used by her husband—that there was no legal cause for burthening her and the suc-

cession with the costs of an administration—and after declaring her acceptance of the community pure and simple, prayed that, if the court considered there were any legitimate claims against the succession, that she be allowed to pay them, which she was ready and willing to do.

Confronted by this answer, the trial of the rule to shew cause why the property should not be sold was postponed indefinitely by consent of counsel of the administrator. This was in 1870.

On the 8th. of February 1871, the administrator presents to the court what he calls the final account of his administration, and prays publication of the notice of its filing. He does not pray for its homologation. Upon one side of this so-called account is the sum total of the inventory. Upon the other is the sum paid by the widow for the burial of her husband, and there stated to have been paid by her—eight dollars for priest and graveyard—and then follow the fees of clerk, sheriff, notary, appraiser, lawyer, and administrator. Nothing else appears on it.

On the twenty-fifth of same month, the court homologated the account, and in March the administrator, alleging that part of the funeral and all of the law charges on the account were due and owing, and there were no funds to pay them with, and that it was necessary that sufficient property should be sold to pay them, obtained an order that the widow should shew cause why she should not advance the funds as usufructuary that were needed to pay these charges, or in default of payment, why sufficient property should not be sold to pay them. This paper is filed in the same suit wherein already lay the widow's prayer for permission to pay whatever charges the court thought were legitimate, filed the previous October. The widow made no appearance, and the rule was made absolute on 26th. of April. All this took place before our learned brother, who now presides over the Second Court, occupied that bench.

A writ of *fieri facias* issued on 2nd of May—an anomalous and extraordinary writ with which to sell the property of a succession—under the following instructions;—"Meinert Oldis adm. asks for *fi. fa.* vs. Johanna Oldis widow in community and usufructuary of Peter H. Oldis. Sheriff will seize six lots of ground specified in the inventory." The sheriff did seize, and even recorded his seizure, and proceeded no further under it.

On the 25th. of May 1871, the administrator presented a second petition, praying the sale of the movables and so much of the immovables as were necessary to pay the charges on his account, and an order of sale was then made. Nothing appears to have been done under it then. It slept nearly two years.

It would have been well for all parties if its repose had never been

disturbed. The papers presented to the court by the administrator himself shewed on their face the truth of the widow's allegation that there was no need of an administration. A solitary charge of eight dollars is all that could be pretended to be legitimate against the succession, and the widow had in the same judicial proceeding in which that charge is made, offered to pay it. She was the undoubted owner of one half of the property, the sale of which was prayed, and her usufruct of the residue had not terminated. She married her present husband a year after the date of the order.

In March 1873 the administrator applied for a new appraisement of the immovable property, which was accordingly made at one thousand dollars, and on 14th. of that month the sheriff advertised its sale under the order of May 25th. 1871. No movables were advertised for sale. The return of the sheriff was not made until March 18, 1874, in which he recites that he did advertise the sale of the movables for 27th. June 1871 on which day at five P. M. he went to the premises for the purpose of making the sale, and found the doors locked and no one there, and that subsequently, i. e. nearly two years thereafter, he advertised the realty for sale, and failing to obtain bidders, re-advertised it and on April 12, 1873 adjudicated it to Arthur Brugier at a bid of three hundred dollars on twelve months credit, but that the purchaser paid cash. A deed of the sheriff, purporting to have been made on the day of sale, recites that the bid was made by Arthur for Octave Brugier, and the conveyance is to the latter.

On the 10th. of the following month, the deputies of the sheriff came to the plaintiff's dwelling between five and six o'clock in the evening, accompanied by two policemen, and had all their furniture moved in the street. Arthur Brugier was present, and Octave was half a block off under a shed waiting the completion of the work. The plaintiffs were turned out of doors, and the keys delivered to Octave Brugier, who has retained them ever since. Burton and his wife remained in the street all night watching their furniture, and on the next morning rented a house, and moved their effects in it, where they have since remained.

It did not require the eloquent ardor of the youthful advocate who presented the case for the plaintiffs to us in oral argument with such felicity of diction, to impress us profoundly with the injuries inflicted upon his clients. It will require an exhibition of abundant warrant of the defendants in law to protect them from liability for the acts which have entailed such serious consequences upon the plaintiffs.

It is said by the counsel for the sheriff that upon the husband's death, it became necessary that the community should be liquidated by the probate court, and the residuum equally divided between the heirs

of the husband and the surviving wife—that the wife could not prevent this action of the court—that it was not only legal and proper, but it was the duty of the administrator to cause the property to be sold in order that the rights of the heirs might be liquidated.

This is true only of those successions where debts are to be paid. The succession of Oldis owed no debts, nor did the community of acquets owe any. Upon his death, his heirs become *eo instanti* seized of his moiety of the community property, subject to the surviving wife's right of usufruct. There were no creditors to be represented by an administrator. There was no residuum to be ascertained, for there was nothing to be deducted from the mass of the succession. The administrator, as such, instead of protecting the property from unjust claims, was creating and fostering them. The only ground upon which an administration could be legally demanded was that there were debts to be paid. He finds none, hears of none—asks for an administration, and afterwards creates the debts, whose prior existence was essential to the legality of his own appointment.

The appointment of an administrator is not a matter of course. Our succession system differs from that of the common law in strongly marked contrasts. In that, the heir has nothing to do with the personalty. An administrator must be appointed. In ours, the heirs may take possession both of realty and personalty, and if of age, may divide both among themselves without the appointment of an administrator, or the intervention of the probate court. If there are creditors, they may require an inventory and security, and if the security be not furnished, they may have an administrator appointed. Succession of Ducloslange, 1 Annual, 181. Civil Code, art. 1005 new no. 1011. Story's Suc. 3 Annual, 502.

When it is the succession of a deceased husband or wife, and the only property is community, and there are no creditors, the case is stronger. The surviving spouse has an absolute right to the possession of the property—of one half as owner, of the other as usufructuary—and an administrator can not be appointed. Pratt's Succession, XI Annual, 201. 12 Annual, 457. In this last case it was held, that where no creditor is shewn to desire an administration, the widow offering to pay or assume the debts which are small, and the property is community, no administration will be allowed. In the present case the deceased owed nothing, and the widow had paid all the legitimate claims against his succession, unless the charge of eight dollars for "priest and graveyard" may be excepted, and had offered to pay all others that the court should deem legitimate. It is urged that she should have answered the rule to shew cause why property should not be sold after the so-called account was filed. She had answered a rule of the same

party, taken in the same case, to sell the same property for the same purpose, and had put on record then and there her offer of payment and assumption of all the debts. The court was without authority to order a sale upon such a record. Burns v. Van Loan, 29 Annual, 560.

Put the case in the most favorable light for the defendants. The order directed the sale of the succession property of Oldis. It is true the administration of the succession of a deceased husband involves with it the administration of the community, and the administrator may rightfully cause the community property to be sold for the purpose of paying the debts of the succession. Suc. of McLean, 12 Annual, 222. But that is where there are debts. In this case nothing could be sold under the order but Oldis' half of the property. The widow was absolute owner of the other half, and her ownership was not divested by the sale. She was ejected from her own property without any effort on the part of the purchaser of the husband's half to obtain a partition, and the very movables which were first amenable to the payment of the succession debts were removed from the premises before the eyes of the purchaser by the officers who put him in possession. A feeble attempt is made to account for the failure to sell the movables. The officers who could get possession of the movables on the evening of the 10th. of May, for the purpose of putting them in the street, need not have offered the same violence to have obtained possession of them before when they were wanted, and the display of a tithe of their determination to do their duty then would have accomplished their purposes.

Brugier urges in his defence that he had nothing to do with all this. He tells his story with a *naïveté* which deserves transcription. "I was half a block from there. They sent for me but I would not go any nearer, because whenever I went near there she (Mrs. Burton) commenced talking to me and crying out. * * * I told him (his brother Arthur) to see the sheriff when it was about time to deliver the house, so he went to see the sheriff. The sheriff told him the day before, 'to-morrow evening you will get it.' Then the next day when my brother came home he said to me, 'this evening you will get it.'" He stood under a shed with his face turned to the house, and saw all that was done. His cupidity mastered his sensibility. The spectacle of the forlorn woman, sitting as it were within the shadow of her own roof, but forbidden to enjoy its shelter through his instrumentality, did not prevent his receiving the key which fastened the door against her entrance, and he went to his home undisturbed by the knowledge that she was to pass the night, a weary watcher over the scanty furniture which, though inexpensive, had been sufficient for her simple wants.

Much less provocation has unhappily in other instances been the

cause of bloodshed. We may encourage the peaceable submission to outrage by shewing that the law vindicates the object of it, and punishes the perpetrator.

The judgment of the lower court is affirmed.

ON APPLICATION FOR REHEARING.

SPENCER, J. Oldis died in August, 1870, in community with his wife, the plaintiff. Neither Oldis nor the community owed a dollar at his death. All the property was community. Two weeks after the death of Oldis his brother was appointed administrator of *his estate.* A few weeks later he applied for an order to sell property to pay the *funeral and law charges* of the succession. The widow came into court on tenth October, 1870, and represented that she had accepted the community, and that there were no debts, and no need of an administration, offering to pay any legitimate claim against the succession, of whose property she was usufructuary.

In February, 1871, the administrator filed his account which, *upon its face,* shows that there was not one cent of indebtedness against Oldis or the community at his death. The widow had expressly accepted the community on tenth October, 1870. She thereby became the absolute and unqualified owner of one half of the property. There being no debts of the community, no demands against it in favor of any body, the administration of the husband's estate did not and could not embrace her half of the property. Her half of the property could not be sold to pay the funeral and law charges due by the estate of her deceased husband. They were not charges against the community. The order of the court of twenty-fifth May, 1871, directing the sale of "sufficient property of said succession" to pay said funeral and law charges, can not, *in law or fact,* be construed as embracing the widow's half of said property. If the sheriff undertook to sell her interest in said property under said order, he transcended *its terms* as well *as the law.* But it seems that he *did advertise* the whole of the property in question, and adjudicated it to the defendant, Brugier, on twelfth April, 1873. By his deed of same date, however, he sells "all the rights and titles which the said succession had in or to the said property," etc. At most the husband's half of said property passed by said sale.

After making this deed, the next step was an order, of date May 10, 1873, from "J. F. Dicks, deputy sheriff," to "Charles Moret, deputy sheriff," instructing him "to eject the occupant of the premises sold in succession of Oldis, and place purchaser, Mr. O. Brugier, in full possession of the place; should it become necessary to break down doors, bar-

riers, or any kind of obstacles to execute your writ, or *this order*, do so; and if any one disturbs you, have them arrested," etc.

We consider this a very high-handed and lawless proceeding on the part of the sheriff. In selling succession property under an order of sale the sheriff has no other or different powers than the administrator or any auctioneer would have in doing the same thing; he only acts in the capacity of auctioneer. The law never contemplated or authorized that a sheriff or administrator or auctioneer, in selling succession property should seize it, as is done under a writ of *fieri facias*. In fact, in this case the sheriff's return shows that he did not pretend to have seized before making the sale. What right had he then, *a month after he had made the sale and deed*, to direct his deputies, *without any order of court to that effect*, to put the purchaser into possession by force of arms, "by breaking down doors," etc.? A moment's reflection would have convinced any body that such a proceeding is lawless. I am the owner of a house and lot in New Orleans which has been (perhaps unknown to me) inventoried as part of somebody's succession. An order for its sale is obtained in a proceeding to which I am no party. It is advertised and sold without disturbing my possession. The sheriff or the administrator or the auctioneer, as the case may be, comes with his posse and ejects me from the premises; and I wake up to find my property sold and myself and family turned out of doors, without warning or hearing. Such is not the law. The authorities referred to relative to the liabilities of sheriffs in execution of writs are all well recognized and known, but they have no application to a case like this, for neither the order of the court nor the law directed or permitted any such proceeding. As to Brugier, it is a full answer to him to say that he did and could only acquire, if any thing, title to Oldis's half, which by no means justified his taking forcible possession of the whole property.

In the application for rehearing on the part of the sheriff it is stated that "the sheriff, to whom the order of sale was directed, became *functus officio* before its execution." We do not understand what the counsel mean by this statement. If they mean that Wm. P. Harper, the sheriff sued, was *functus officio*, and therefore not liable for this lawless trespass, it is strange that he makes no such defense in his answer, which was filed twentieth June, 1873, a month after this suit was brought. He is the sheriff who signed the deed, and there is nothing to show that he was *functus officio* at the time his deputies invaded the plaintiff's premises. In our former opinion we affirmed a judgment condemning the defendants to pay damages as trespassers. We have carefully reviewed this record. That judgment meets our approval. The rehearing is refused.

No. 6983.

B. & A. SOULÉ VS. NORWOOD, ADMINISTRATOR, ET AL.

Sureties who have formally admitted that their principal is dead, and that his succession is insolvent, can not afterward set up a demand for a discussion.

The prescription, (of two years) of suits against a sheriff and his sureties for money collected by the sheriff and not accounted for, does not begin to run until the first demand for the money has been made on him by the plaintiff, and the sheriff thus put in default for non-payment.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Wedge*, special judge.

W. F. Kernan for plaintiffs and appellants.

D. C. Hardee for defendants.

The opinion of the court was delivered by

EGAN, J. This suit is against the sureties of A. S. Norwood, late sheriff of the parish of East Feliciana, to hold them liable for moneys collected by him as such and not paid over to the judgment creditor. The defendants answered and pleaded the prescription of two years under article 3546 of the Revised Statutes of 1870 and the benefit of discussion. We will dispose of the latter first by simply saying that the defendants admitted of record that Norwood is dead and his succession is hopelessly insolvent, and that proper demand has been made on his administrator and no payment made.

It is unnecessary for us to decide whether or not the prescription pleaded applies to moneys collected by sheriffs and not accounted for. Although the judgment on opposition whereby the plaintiff was decreed entitled to the funds in the hands of the sheriff was rendered on the twenty-first of February, 1868, he was not in default for not paying them over until "the first demand made" by the plaintiff for their payment. C. P. 766. This was on the fifth of July, 1868. This suit was filed May 23, 1870, with service already accepted by the administrator of Norwood and Perkins, one of the sureties, while service was regularly made by the sheriff upon Robins and Jackson, the other sureties, on the second of June, 1870, all less than two years from the default of the sheriff. From that date only prescription began to run. See Fuqua, Administrator, vs. Young & Knighter, 14 An. 216. See, also, 3 R. 297; 23 An. 299. No action lay against the sheriff until he was put in *mora* for non-payment of the moneys collected by him. Hence the general and perfectly correct principle announced by Justice Spofford as the organ of the court in Hardee vs. Dunn, 13 An. 361, that "prescription commences to run from the moment the right of action accrues," is without application here. The obligations of the defendants are solidary. The judgment below was in their favor and against the plaintiff in the plea of prescription. It was erroneous, and is therefore avoided and reversed. And

It is now ordered, adjudged, and decreed that the plaintiff do have and recover from L. G. Perkins, Thomas W. Robins, and Jared R. Jackson, sureties upon the official bond of A. S. Norwood, sheriff, *in solido*, the sum of eight hundred and eighty-six dollars and ninety cents, with five per cent per annum interest thereon from July 5, 1868, and that said defendants pay costs of both courts.

No. 6929.

OPHELIA G. BURBANK, TUTRIX, vs. WILLIAM HARRIS.

Where the former lessee of property is sued by his former lessor, for damages to the property alleged to have been caused by the fault of the defendant during the term of the lease, the defendant may contest the former lessor's title to the property; and to recover in such a suit, the plaintiff must prove that he was the owner of the property.

Where in an action for damages on account of injury done to certain property, the decree of this court merely declares that the defendant is responsible for certain damages, it does not amount to a judgment for the amount of those damages in favor of the plaintiff, who has neither alleged, nor proved that he was the owner of the injured property. In such case the defendant is entitled to allege, and to introduce any pertinent evidence to prove the nature, and limitations of the plaintiff's rights in the injured property; and in no event can he be held for a greater proportion of the damages than the nature and extent of the plaintiff's rights in the property would equitably entitle him to claim.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Bérault*, judge *ad hoc*. Trial by jury.

Fellowes & Mills for plaintiff.

Breaux, Fenner & Hall and *J. D. Augustin* for defendant.

Wm. Reed Mills for Samuel Burbank, tutor.

The opinion of the court was delivered by

DEBLANC, J. In March 1865, the Fashion plantation, then belonging to Richard Taylor, was—by the decree of a Federal court, condemned as forfeited to the United States, under an act of Congress approved on the seventeenth of July 1862, and—on the twelfth of May 1865, sold under said decree and adjudicated to Daniel Christie for nine thousand dollars. That plantation measured over two thousand arpents of land, with a front on the Mississippi river: the buildings which were on the same at the date of said sale and up to the twenty-ninth of October 1872, had nearly all been erected prior to 1853, and—as many other estates located as this was, had been almost abandoned during the war.

On the tenth of October 1871—for the promised sum of two thousand dollars which was to be paid on the first of October 1872, Samuel N. Burbank, as under tutor of the minor children of Ophelia G. Burbank, leased the Fashion plantation to William Harris—the defendant—

for the space of one year, commencing on the first of January and ending on the thirty-first of December 1872.

Harris's rights, as a lessee, were limited by three clauses of the contract of the tenth of October 1871.

1. He was not to cut any wood or timber on said plantation, except that required for his own use and the use of his employees, in cultivating said plantation.

2. S. N. Burbank could—during the lease—remove any and all the machinery there was on the place.

3. He had also reserved the right to rent or sell, to the N. O. Mobile and Texas Railroad Company, a portion of the land not exceeding ten acres.

Less these three reservations, the lessee was fully authorized to enjoy the rented premises, according to the use for which it was intended by the lease, and that was to cultivate rice.

On the twenty-ninth of October 1872, a portion of the buildings on the place so leased was destroyed by fire, and—on the twelfth of March 1873, plaintiff—as natural tutrix of her children—brought this suit to recover against Harris the sum of eight thousand dollars, on the ground that it was through his illegal, improvident and careless acts that said buildings and the machinery therein contained had been destroyed and damaged.

On the first trial of this case in the lower court, judgment was rendered in favor of defendant, and—from that judgment—plaintiff appealed.

The decision of the Supreme Court on the first appeal is in these words: "It is, therefore, ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that this case be remanded to be proceeded in according to law, and in accordance *with the views herein expressed.*"

What views are so referred to? We transcribe, from the decision, those which we consider as manifestly linked to, inseparable from and forming a part of the decree; they are expressed in the last paragraph of the opinion of the appellate court: "The damages which we think Harris responsible for are the value of the cane-shed, the damage done to the sugar-house, the contents therein and the engine, and to any other building, caused by the fire."

On the second trial in the lower court, after the case had been remanded, a verdict for $500 was returned in favor of plaintiff. From the judgment based on said verdict plaintiffs have appealed and defendant has joined in the appeal.

This suit—as we have already said—was brought by Ophelia G. Burbank, in no other capacity but as natural tutrix of her minor children, and—as such—what does she claim?

1. Damages alleged to have been suffered by the destruction of buildings and machinery attached to the Fashion plantation, leased to Harris—and neither in the pleadings, nor in the act of lease, have we found even the naked averment that said plantation belongs to the children in whose name this suit was brought.

2. Damages for the loss of scales, wagons, carts and lumber belonging to petitioner—that is to Ophelia G. Burbank, and which—it is charged—was illegally taken, carried away and used by Harris.

Ophelia Burbank died after the institution of this suit, which is now prosecuted by Samuel N. Burbank, as tutor of the children of said deceased.

As lessee, Harris has complied with at least two of the obligations of his contract: he has paid the price agreed upon and returned the plantation. As lessee, and as concerns any conventional obligation between him and plaintiff, he is no longer liable. Is he otherwise liable? If so, to whom and for what amount? He is liable; but, when in March 1873, this action was filed against him, he had ceased to be a lessee. Under these circumstances, can plaintiff successfully invoke against him the indisputable doctrine that a tenant can not contest his lessor's title, that the former's possession is that of the latter? We believe not.

Were Harris sued for the rent or possession of the place, he would not be allowed to avoid the payment of the rent, or refuse delivery of the place, on the ground that those from whom he leased are not the owners of the leased property—and why? Because—as is specially provided in our Code and as was so often decided by this court, the lessee holds from and for the lessor, and because ownership is not essential to the validity of a lease, for one who lets out the property of another, warrants its enjoyment against the claim of the owner, and whilst the lessee retains the undisturbed possession of the premises, he can not enquire into his lessor's title.

Rev. C. C. 2682. 17 A. 153.

It is different, however, when—after the expiration of the lease, when after the relation of lessee and lessor has ceased to exist, the party who once was a lessor, claims from one who once was a lessee, the value of property destroyed or injured during the lease, through the alleged negligence and carelessness of the former lessee. In such a case, against that former lessee, as against a mere trespasser, the claimant—in order to recover—must show a *prima facie* title.

19 L. R. 397. 5 R. R. 510.

Here, as they did in the lower court, plaintiffs contend that the judgment heretofore rendered by this court is final as to defendant's liability for damages, and that this case was remanded to the district court for the exclusive purpose of ascertaining the amount of the

incurred damages. The judgment referred to does declare that defendant is liable for the destruction of the buildings and their contents, and for the injury done to the machinery. After that declaration by the court, it pronounced the reversal of the judgment appealed from, and remanded the case to be tried according to law and in accordance *with the views* expressed in its opinion. Every line, every word of a decree has a legal value, and the decree already mentioned, when compared and applied to the declaration that defendant is liable for the damages sustained, closes the door as to any enquiry relating to the already determined liability.

"Il ne faut pas confondre la certitude de l'objet qui fait le sujet de la condamnation avec sa liquidité. Pour ne pas être liquide, la chose peut n'en être pas moins certaine, et il suffit—pour que le jugement fasse en force de chose jugée, qu'elle soit susceptible d'une liquidation ultérieure: Tel est le jugement qui, sans en contenir la liquidation—condamne à des restitutions ou à des dommages et intérêts qui doivent être plus tard liquidés."

Larombière, vol. 5, p. 214.

"Mais le jugement passe en force de chose jugée, si l'objet de la condamnation est expliqué et déterminé avec certitude par quelque act auquel le dépositif se réfère. Il y a donc chose jugée, lorsque le jugement condamne à payer les causes de la demande, en ce qui a été demandé par l'acte introductif d'instance, bien qu'il n'exprime point précisement la montant de la condamnation."

Larombière, vol. 5, p. 214.

Defendant is not condemned, by the decree of this court, to pay a specified amount of damages, but that he is liable to some one for damages which resulted from the destruction of buildings on the Fashion plantation, is a fact passed upon and determined by the aforesaid decree, and that judicially ascertained and published fact constitutes a judicial verity which can no longer be contested by any of the parties to this litigation. Of itself, that fact did not justify a verdict in favor of plaintiffs, as it is not alleged, nor does it appear that they are the owners of the property destroyed by fire on the twenty-ninth of October 1872.

Though in neither the pleadings nor the lease, plaintiffs are alleged to be, or recognized as the owners of said property, it may be that, on the first trial, they have established that fact, to the satisfaction of the jury and of the district and appellate court, but this they may have thought useless to do and did not do on the second trial, and we can not supply both the omitted averment and the omitted proof of plaintiff's title.

Defendant attempted to show the character and extent of any title which plaintiffs may have acquired to the Fashion plantation, and—for

that purpose—offered to introduce the pleadings and judgment of condemnation of said plantation to the United States. The evidence so tendered was excluded by the court. In this, there was error—for, of the plantation thus condemned, all that could be acquired or sold, was Richard Taylor's right in and to the same, and the right so acquired is a limited one, which terminates with the life of the party, for whose acts the property was seized. 9 Wallace 350. 18 Wallace 160.

If—as seems probable—the Fashion plantation has passed to plaintiffs, they hold it subject to the rights which existed thereon at the date of its condemnation, unless those rights have been relinquished or lost —18 Wallace 156—and subject also to the now suspended title of the legal representatives of Richard Taylor to said plantation. It is evident, then, that the damages sustained must be measured—not to any absolute title, not to any unconditional ownership, but to the uncertain duration of plaintiff's possession.

This is a difficult task, and—with the too incomplete information imparted by the record—it is a task which can not now be accomplished. To undertake and perform it, jurors and judges shall have to be guided by the light of statistics and presumptions, to learn what is the General's age, his health, his constitution, his habits, his infirmities, count the days he has lived, and with the assistance of those who have calculated the chances of life and death, guess how near he may be from the inevitable grave. This done, to then determine and fix—by the presumed proportion of what remains of that life, the presumed proportions of plaintiff's possession, and the benefit which — in that uncertain space of time, they might have realized from the possession of which they have been deprived. To reach any reasonable conclusion, jurors and judge will have to also consider whether it is probable that those who possess under such a title, would have been disposed to make to the destroyed buildings and before their destruction, the repairs which they needed, and how long—without those repairs—the buildings would have been in a condition to be used with advantage by any one, proprietor or tenant.

In the interest of the parties, we are compelled to remand this cause, with instructions to the lower court to admit the evidence of the origin and character of the title which may be held by the plaintiff, and —besides—any evidence tending to establish the nature, duration and value of the possession of the destroyed property.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is avoided and reversed—the verdict on which it is based annulled and set aside, and this case remanded to be proceeded in according to law and the views expressed in our opinion: the costs of the appeal to be paid by plaintiffs.

No. 6974.

MRS. ALPHA P. NUGENT VS. MRS. DORA L. STARK ET AL.

Before a mortgage created by an alleged agent can be enforced, it must be proved that the alleged agent was specially authorized to make the mortgage.

A wife, although separate in property, can not be held on her mortgage note, when the holder of the note fails to show that she was authorized by the judge to make the mortgage, and fails to show that her pretended agent, who made the mortgage was empowered by her to do it, and also fails to show that the consideration of the note inured to her separate benefit.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Yoist*, J.

Oliver O. Provosty for plaintiff and appellee.

Irion & Thorpe, Thos. Overton, and *C. E. Frith* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the twenty-seventh of March 1874, T. O. Stark, the husband of defendant, appeared before Théodore Guyol, a notary public of the city of New Orleans, and then and there representing himself as the agent of his wife, by virtue—as he alleged—of a special power of attorney, annexed—as declared by said notary—to an act passed on that day before that officer, acknowledged that his wife was indebted unto Richard Nugent in the sum of ten thousand dollars, amount of a loan which he asserted he had obtained *and received* for her, and to evidence which his wife had—on the twenty-first of March 1874, subscribed four notes to her own order and endorsed by her, one for fifteen hundred, one for two thousand and two for three thousand two hundred and fifty dollars.

To secure the payment of the notes thus subscribed by defendant and delivered to Richard Nugent by her pretended agent, the latter gave a mortgage on the Dora plantation, which—it is admitted—belongs to his wife, who—by marriage contract—is separated in property from him. That mortgage was given in favor of said Nugent, or any holder of any of the notes delivered to him.

This suit is brought on one of said notes, transferred to plaintiff after its maturity. Two petitions were filed by her counsel: in the first, she proceeds on exclusively the note and the mortgage—in the second, she charges that the note sued upon was given for defendant's benefit, and that she was duly authorized by the judge to give it. In her answer, defendant denies every allegation of both the original and supplemental petition, avers the firm of Nugent & Co. acted as her factor, and that she consigned to it more produce than sufficient to pay all she ever owed it, or Richard Nugent.

The act of mortgage from defendant's husband to Richard Nugent,

read as it is written, does not appear to have been passed to secure advances *to be thereafter made*, but to secure an actual, an acknowledged claim, a loan obtained *and received*. The facts that such a loan was obtained and received, and that the note sued on was subscribed for money which enured to her benefit, are expressly denied by defendant, and—under no rule of law or jurisprudence—can we construe as a judicial admission of those denied facts, the vague and indefinite averment that "she has consigned to her factor more produce than sufficient to pay—not the note, the consideration of which she impugns and assails, but—in her own words—"all she ever owed that factor."

To the enforcement of the mortgage granted on the twenty-seventh of March 1874, by defendant's husband and on her separate property, there are not less than three fatal objections:

1. It was not shown that Mrs. Stark empowered her husband to contract any loan, acknowledge any debt, incumber or hypothecate her plantation. The only reference to that disputed agency is found in the testimony of Mr. Provosty, who said: "that, to the best of his belief, the power of attorney declared to be annexed to the act, was not with the copy of the act sent to Mr. Henderson Taylor, plaintiff's leading counsel in this case, who—owing to infirmities of age, and sickness was unable to be present at the trial." That declaration, howsoever true it may be, and we do consider it as true, does not establish even the existence, much less the extent of an indispensable power, one without which the mortgage is invalid and lifeless. R. C. C. 2997.

2. In order to more effectually bind the wife—at least we so presume—her pretended agent was made to acknowledge that the note was given and the mortgage granted for an indebtedness which—at the date of the act—had already been incurred, for a loan which—then—had already been received—and, on the trial, plaintiff attempted to establish the consideration of the note, the validity of the mortgage, by the production of accounts, on which the first item was charged on the twentieth of May 1874, more than fifty days after the mortgage was granted, and the last item in May 1875.

3. In the act of the twenty-seventh of March, the husband of defendant declared that she was authorized by the parish judge to grant the mortgage, and the notary that the certificate to that effect is attached to the act passed before him. In that instance, the parish judge was incompetent to examine and authorize the wife, and—had it been otherwise—his certificate is not in evidence, and—as a witness—he could not recollect when she was thus authorized, but only remembered that it was during the term of his office as parish judge of Avoyelles, without mentioning when he was commissioned and acted in that capacity.—R. C. C. 127.

The record contains the written approval of Mrs. Stark and her husband of the application of the proceeds of a crop, as credited in three accounts rendered, one in December 1874; the others, in January and February 1876. It may be that Mrs. Stark is liable for the balances charged in these accounts against the Dora plantation, but plaintiff's action against her is based on exclusively the note of the twenty-first, the mortgage of the twenty-seventh of March 1874, the consideration and validity of which—if they did or do exist—have not only not been established, but successfully contested.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is avoided and reversed, and plaintiff's action on exclusively the aforesaid note and mortgage rejected at her costs in both courts.

It is further ordered that any right or action growing out of the several accounts herein referred to, is specially reserved.

No. 6951.

WM. H. BOULLT VS. JEROME SARPY ET AL.

The signer of a promissory note which reads that "we promise *in solido*," etc., will be held bound as a solidary debtor on such note, unless he proves that he has been legally released from his obligation.

A verbal acknowledgment of, and promise to pay a promissory note, made by one of its solidary makers before its prescription, will interrupt prescription as to all of the makers.

APPEAL from Seventeenth Judicial District Court, parish of Natchitoches. *Pierson*, J.

W. H. Jack for plaintiff and appellant.

Wm. M. Levy and *Chaplin, Cunningham & Chaplin* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 4th of December, 1869, a lot of ground and the improvements thereon belonging to the succession of Mrs. Desirée Hertzog, were adjudicated to William H. Boullt for $1610, payable one half cash, the balance in twelve months from the date of the sale. For that balance, the adjudicatee furnished his note to the order of the defendants, as syndics of the creditors of the aforesaid succession. That note is signed by Wm. H. & D. H. Boullt *in solido*, and its payment secured by the vendor's mortgage and privilege.

On the 11th of October, 1877, the syndics obtained an order from

the judge of the 17th District, commanding the seizure and the sale of the property subject to the vendor's mortgage and privilege, to satisfy the balance due on the price of said property. The execution of that order was enjoined by Wm. H. Boullt, on the ground that the note on which it is based was extinguished by the prescription of four years.

Defendant's answer to the injunction is that the prescription invoked was interrupted by repeated acknowledgments of the said Wm. H. & D. H. Boullt. On this issue, the case was tried, the parties' evidence heard and plaintiff's injunction dissolved. He appealed from the decree of the district court, and contends that the evidence adduced to establish the interruption of prescription is inconclusive.

Wm. M. Levy, defendant's attorney, testified that, "between the 1st of November 1872, and the commencement of 1873, he had a conversation with D. H. Boullt, who was then the tax collector for the parish of Natchitoches, and that—during the conversation referred to—said Boullt told him he would pay the note after his settlement with the State. That Wm. H. Boullt came to his house to see him in regard to an adjustment of the individual accounts between him—the said Levy—and D. H. Boullt, and stated that he and his father desired him to assume, in the settlement to be had between them, the payment of said note, which they acknowledged to be due. The note was not shown to D. H. & Wm. H. Boullt, but its amount and character were fully stated and discussed, and they knew what note the witness referred to, as he never held but one note from them."

Wm. H. Boullt was sworn in his own behalf and positively denied that he was ever spoken to by Col. Levy, or that he ever spoke to him in regard to said note, except within two or three months from the trial of this case. As to D. H. Boullt, he did not remember having had any particular conversation with Col. Levy respecting that note—and was very positive that he did not acknowledge or promise to pay it, after its maturity.

Plaintiff's counsel seems to doubt that D. H. Boullt can—in a legal sense—be considered a solidary obligor. That doubt ought to have been dispelled by the form and terms of the obligation: "Twelve months after date, we promise to pay *in solido* to the order of the syndics, etc." But—says plaintiff's counsel—no surety was required by the terms of the sale, and he signed the note inadvisedly.

He does not pretend that he was induced to sign the note through error, fraud, violence or threats—but informed, as he must have been, by the advertisement of the sale, and the auctioneer's proclamation of its conditions, that no security was required, he—nevertheless—signed the note as such, and as signatures to an obligation are not mere ornaments, he can not justly expect to be relieved from the effects of his

own act, on the ground "that he does not know now why he signed that note."

When he acknowledged and promised to pay the note, his acknowledgment and promise did interrupt the prescription both as to him and as to William H. Boullt, even admitting that the latter's proposition to Col. Levy does not amount to and constitute an acknowledgment.

To defeat the effects of those acknowledgments, plaintiff relies on the opinions of this court reported in the 9th and 11th A., and delivered—the first, in the case of Lackey vs. Macmurdo, the other in the case of Pearson & Hume vs. John F. Harper, executor, etc. In the first, the court said: "As, therefore, the alleged interruption practically affects the rights and obligations of the parties to a contract, it is reasonable to require, then, the proof of an assent to such a change on the part of the debtor, should be clear and unequivocal. It is not indeed necessary that the assent should be express; it may be inferred; but the circumstances should be such as to justify a reasonable presumption that the debtor was willing so to change his position for the creditor's benefit.

9th A. 15.

In the case of Pearson & Hume vs. John F. Harper, executor, the evidence was that, when the prescription had already accrued, an offer was made by the debtor to the creditor, to give him in payment on discharge of his claims, a tract of land, provided the creditor would give him one hundred dollars to boot. This offer was declined, and the court properly decided that there had been no interruption of the prescription—much less did that conditional and rejected offer amount to a renunciation to the previously acquired prescription.

11 A. 184.

In this case and according to the sworn declaration of Col. Levy, there were really two acknowledgments of, and one promise to pay the note sued upon, and those acknowledgments and that promise were made before prescription had accrued. That they did interrupt the prescription, and that such an interruption can be established by parol evidence, there is no longer any doubt, either under the law or the jurisprudence.

Act of 1858, sec. 4; R. C. C. 2278, No. 4; 21 A. 179—190—748. 28 A. 449—607.

The testimony is conflicting, but the district judge, who saw, heard, and—it may be—knew the witnesses, concluded that the invoked prescription was interrupted, and—considering how said witnesses' interest might be affected by the result of this litigation, we believe and conclude as did the district judge.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 7042.

THE STATE, AND TOWN OF PLAQUEMINES, VS. CHAS. RUFF.

The Legislature may constitutionally confer on the officers of a municipal corporation the right to take judicial cognizance of cases arising under the police regulations and laws of the corporation.

An act of the Legislature authorizing a municipal corporation to sue for and recover, before its mayor, a fine for the breach of one of its police regulations, does not authorize the arrest and criminal prosecution of one who commits such a breach.

APPEAL from the Mayor's Court, Town of Plaquemines, *Caneza*, J.

Charles O. Lauve and *George Wailes* for defendant and appellant.

E. B. Talbot for plaintiff.

The opinion of the court was delivered by

DEBLANC, J. In conformity with the regularly expressed wishes of a majority of the legal voters of the town of Plaquemine, its council passed an ordinance commanding the closing—on Sundays and within the limits of said town—of all places of business and amusement.

In disregard of that ordinance, and after its promulgation, the defendant did—on a Sunday—open his drinking saloon and retail liquor within the aforesaid limits. An affidavit was made asserting that fact and a warrant issued ordering his arrest. He was arrested, brought before the mayor, and—to the proceedings filed and partly executed against him, he excepted on the grounds:

1. That the Legislature could not—without violating the seventy-third article of the constitution of 1868, delegate any judicial power to the mayor of Plaquemine.

2. That, under the circumstances, if any action can or could be brought against him, it is exclusively a civil action.

Act number 30 of the Legislature of 1875 provides "that the mayor and selectmen of the town of Plaquemine shall have power to make, ordain and impose such fines or penalties for a breach of their by-laws, rules and ordinances, as they shall think proper, but not to exceed the sum of fifty dollars for a single offence, *to be sued* for and recovered before the mayor."

That delegation of power was fully authorized by the first part of article 94 of the Constitution, which enjoins that "no judicial powers —except as committing magistrates in criminal cases—shall be conferred on any officers other than those mentioned in this title, *except such as may be necessary in towns and cities;* and the judicial power of such officers shall not extend further than the cognizance of cases arising under the police regulation of towns and cities in the State."

The law of 1875 is—however—as clear as the constitutional clause referred to, and directs that any fine so imposed shall be recovered, not by a criminal prosecution, but by suit. It does not appear that the question presented by defendant's exception was raised in the case of the State vs. Thomas, in which this court said: "We have in the record the essential forms of proceeding for the recovery of the penalty, and may lay aside as useless the indictment, arraignment and trial." Here, laying aside the affidavit and the warrant, which can be considered but as the elements of a criminal prosecution, there remain none of those indispensable forms which constitute the foundation of a civil action.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed, and plaintiff's prosecution dismissed at its costs in both courts.

No. 7035.

MARIE PERKINS EVANS AND HUSBAND VS. PAYNE & HARRISON.

A judgment reviving a judgment does not render valid that which is invalid, and does not cure radical nullities in the judgment revived.

An acceptance of service, and waiver of citation authorize a judgment of default to be taken before the expiration of the ordinary ten days delay from the service of citation.

When a party has made no declaration of residence, as provided for in article forty-two of the Civil Code, the proof of fact and intention, as regards the question of domicile, is left to the circumstances of each case.

Where a defendant resides alternately in different parishes, without having made a declaration of residence, he must be cited where he appears to have his principal establishment or habitual residence. If his residence in each parish appears to be nearly of the same nature, he may be cited in either parish, as the plaintiff may elect.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge, *McVea*, J.

W. C. Flower for plaintiffs and appellants.

Herron, Bird & Beal for defendants.

The opinion of the court was delivered by

EGAN, J. This suit is brought to annul and set aside a judgment obtained by the defendants against S. D. Linton, in the district court of East Baton Rouge, on the thirteenth of March, 1862, and also a judgment reviving the same, rendered March 25, 1872. This suit was filed in October, 1876, by the plaintiff, former wife and universal legatee and testamentary heir, as she describes herself, of Linton. The grounds of nullity of the original judgment set up are, that the court was without jurisdiction, Linton's domicile being at the time in Rapides parish; and, second, that he had no notice of the suit and no citation.

Those urged against the judgment of revival are, that the first judgment being a nullity that of revival is also null and without effect; and, second, that it was rendered prematurely on default before the legal delay had expired from the date of service of citation.

We will dispose of the objections to the judgment of revival, except as they may be considered in the discussion of the original judgment, by saying, first, that we held in McStea vs. Rotchford Brown & Co., 29 An. 69, that a judgment of revival does not make valid that which is invalid, and does not cure radical nullities in the judgment revived; and, second, that we agree with the district judge that although the time had not elapsed to authorize default between the service of citation and default there appears of record and was proved in this case an acceptance of service and waiver of citation by the administrator of Linton which authorized the default. As to the original judgment of March 13, 1862, service was made on the eleventh of May, 1861, on S. D. Linton, as the sheriff's return (p. 13 R.) shows, service being made by delivery to Ackley Perkins, residing at defendant's domicile, in the parish of East Baton Rouge, defendant being absent.

Judgment by default was regularly made final on Friday, the seventh of March, 1862, and the judgment signed on the thirteenth of March, 1862. (Judgment, p. 17 R.) Notice of judgment is found in the Record, p. 171, but no return of service. Ex-Sheriff Babin testifies that he finds by reference to his fee-book a charge for mileage for service of notice of judgment on Linton; from that fact is satisfied service was made. (Babin's testimony, p. 8, R.)

The testimony relative to Linton's residence at the time service of citation was made shows that in 1854 or 1855 he married the daughter of Jehu Perkins, residing on the Richland plantation, in East Baton Rouge, and from that time till the breaking out of the war in 1861 he passed most of his time in East Baton Rouge.

Dr. Henry Perkins and Mrs. Julietta Perkins, the uncle and mother of plaintiff, establish a state of facts which, under the article 166, Code of Practice, authorized suit against Linton in East Baton Rouge. Dr. H. Perkins (p. 31 R.,) says: "He resided temporarily during the time, from 1855 to 1863, in this parish (East Baton Rouge), New Orleans, Pass Christian, and in Paris, France; but always claimed his domicile in Rapides parish; was tenacious of preserving his domicile in Rapides, and upon one occasion went up there to vote, etc.;" "Had large property in Rapides; did not know of his owning any other property than in Rapides, etc." "In 1862, I think, the Richland plantation belonged to Mrs. Evans, the plaintiff in this suit. Mrs. Evans had control of the Richland plantation, and not her husband, in 1862."

Mrs. Perkins says: "This residence and domicile was in Rapides.

parish, where he owned a plantation, etc. I never knew him to claim a domicile anywhere else, although after his marriage he spent most of his time, as my guest, on the Richland plantation, in this parish. The Richland plantation belonged to Mrs. Linton at that time, although the property (the Richland plantation) in the parish of East Baton Rouge belonged to Mrs. Linton, it was the house and home of myself and husband, and Mr. Linton was my guest whenever staying upon said plantation." "Mr. Linton and witness returned from Europe in the fall of 1860 to Richland plantation, where he, Linton, remained until they went to New Orleans, as above stated, except a few weeks spent by Mr. Linton on his plantation in Rapides." "During the time from the marriage of Mr. and Mrs. Linton until 1862 Mrs. Linton went to Rapides parish probably as many as five times, remaining each time from ten days to two and three weeks. Mr. Linton visited Rapides parish as often as two or three times each year, never remaining over a week when his wife was not with him."

A. L. Gusman says: "I first became acquainted with Mr. Linton in 1855 or 1856, and knew him until the commencement of the war. I knew Mr. Linton but slightly, but his wife very well. Mr. Linton stayed a good deal in this parish (East Baton Rouge) but I was a member of the Democratic Parish Convention in 1857, and the committee made a census of the voters of the parish and they did not put Mr. Linton down as they did not consider him a voter of this parish. I am satisfied that he did not become a voter after this time. When we were raising funds for the Creole guards in 1861, the officers went to the prominent and wealthy citizens to get contributions, and I, as one of the officers, although I considered Mr. Linton able and a friend, did not go to him (as we did not consider that he belonged to this parish and would contribute elsewhere.")

On cross-examination he says: "After Mr. Linton's marriage and up to the time I left Baton Rouge, in April, 1861, Mr. Linton was here very often and remained sometimes months at a time. Mr. Linton was a man of wealth and traveled a great deal. Mrs. Linton was Mrs. Perkins's only child." Dr. J. N. Williams says: "I was acquainted with him (Linton) from his marriage up to his death. I know he owned a plantation in the parish of Rapides from my first acquaintance with him up to the war. He had negroes on that plantation. The plantation was being cultivated by him until the war. He always spoke of that as his home. *He used to go to the plantation once or twice a year for a short time.* Mr. Linton spent a part of nearly every winter in New Orleans, and nearly every summer in the north or in Europe." H. V. Babin says: "I was acquainted with Duncan Linton, former husband of Mrs. Evans. *Mr. Linton was on the Richland plantation, in this parish, most of his time*

from the time of his marriage, which took place in 1854 or 1855, up to the war. He was abroad occasionally during that time. I was acquainted with Ackley Perkins (the person upon whom the citation was served). He was, I think, in 1861 on the Richland plantation managing it. I was sheriff of this parish from 1851 to 1863." Mr. Granary says: "I was acquainted with Duncan Linton. I know that he married Dr. Perkins's daughter. After he was married he was here most of the time up to the breaking out of the war, on his father-in-law's plantation." It appears that Linton resided in France at the time of his death in 1867, and that his succession was opened by the public administrator in Rapides in 1868. In 1872 his sisters brought suit (see 27 An. p. 351), alleging that Linton was not a resident of Rapides, but of New Orleans at the time of his death, and that the court of probate of Rapides had no jurisdiction over the succession, and prayed to have the order appointing the public administrator set aside.

The court held: "The evidence shows that Linton resided in France when he died, and that the only real estate he owned in Louisiana was situated in the parish of Rapides.

"The succession was properly opened in Rapides."

The plaintiff claims that this decision establishes conclusively the fact that Linton had no such domicile or residence in East Baton Rouge as the law requires at the time he was sued in 1861. This by no means follows, nor is that question in any manner involved in that case even were the present defendants, who were not parties, bound by it, as they are not. He might very well have had a domicile or sufficient residence for the purpose of being sued in East Baton Rouge in 1861, and yet as the court said, have "resided in France when he died," and the court based their decision not upon the ground that his principal establishment or his domicile was in Rapides when he died, but upon the ground that he had no "*domicile or residence*" here at all at his death, but as we have seen resided in France; "and that the only real estate he owned in Louisiana was situated in the parish of Rapides." C. C. art. 935. A review of all the evidence fails to show that Linton ever actually resided in Rapides, unless we should consider his going to his plantation as many as five times from his marriage in 1854 or 1855 to 1862, and "remaining there each time from ten days to two or three weeks," as shown by his mother-in-law's evidence, as establishing the fact, which is, however, more than offset by her own statement and that of other witnesses, that after his marriage he spent most of his time on the Richland plantation, the property of his wife, in the parish of East Baton Rouge. Although there is some evidence to the effect that he claimed his residence in Rapides, and once voted there, there is none that he made the declaration of residence required by the law, C. C. article 42, and in the

absence of such declaration the proofs both of the fact and the intention are left to the circumstances of each case. C. C. 43.

It is assumed in argument, but nowhere found in the record, that Linton resided and had his domicile before his marriage in Rapides. But in any event it is provided by article 166 of the Code of Practice that if a defendant reside alternately in different parishes he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each *appear to be nearly of the same nature*, in such a case he may be cited in either at the choice of the plaintiff, unless he has declared pursuant to the provisions of the law in which of the parishes he intended to have his domicile. This we have already seen Linton did not do, or is not shown to have done. C. C. article thirty-eight defines the principal establishment to be that in which one "makes his habitual residence." This we think in the case of Linton sufficiently appears to have been on his wife's plantation in East Baton Rouge; at all events the mere visits paid by him to his plantation at distant intervals of time and for a few days or even weeks at a time are insufficient to establish the fact of residence there, which, as this court has often said, must accompany and indicate the intention in the absence of the declaration required by the law. The same article of the Civil Code last quoted (art. 38) further provides that if one "resides alternately in several places," which at most is all that is proved of Linton in this record, and nearly as much in one as in another, and has not declared his intention in the manner hereinafter prescribed, *any one of the said places* where he resides may be considered as his principal establishment at the option of the persons whose interests are thereby affected."

Under this provision and those of article 166 of the Code of Practice already quoted, Linton was properly sued in the parish of East Baton Rouge in 1861, and if so then was the revival suit also properly brought and judgment rendered.

In regard to the plaintiff's bill of exceptions, it will be perceived that we have considered the rejected portion of the evidence of Gusman without, however, its affecting our conclusions on the whole case. As to the evidence objected to by the plaintiff, we think the objection attached more to its effect than its admissibility in the absence of proof of the existence of better evidence.

Questions of domicile, such as are presented in this case, often involve great nicety of distinction, and as has been often said by our predecessors and, indeed, as is provided by the terms of the law in the absence of the formal declaration of domicile, each case must rest upon its own particular facts and circumstances. Hence we have detailed the evidence so minutely. Were the case before us on the same evidence

we incline strongly to the opinion that we should have rendered the same judgment, but most certainly at this distance of time, and after two solemn judicial inquiries followed by judgments, which are sought to be annulled purely by the parol testimony of witnesses as to a fact so material and so easily ascertained at the time, we are not disposed upon the evidence before us to annul those judgments, which were correct.

Judgment affirmed.

The Chief Justice recused himself in this cause.

No. 7026.

NALLE & CAMMACK vs. A. L. D. CONRAD ET AL.

A planter who has agreed to consign, and pay commissions on his *entire* crop to his factors, in consideration of certain promises and stipulations in his favor made by the factors, is released from his obligation to consign and pay such commission on whatever balance of his crop he may have on hand, when the factors shall fail and refuse to comply with *their* stipulations; more particularly when the failure of the factors to perform their part of the contract, disables the planter from performing his part of it.

Before the maker of a lost, or mislaid negotiable note, which was transferred before its maturity, can be made to pay it, he is entitled to be indemnified against its subsequent appearance.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Favrot & Lamon for plaintiffs and appellees.

Herron & Bird and *Beale* for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. In 1872, plaintiffs became the merchants and factors of the defendants, and—according to the former's declaration—the business relations between them were practically ended on the twenty-sixth of December 1874. The character of those relations is shown by a letter of the first of February, 1872, from defendants to plaintiffs, in which they express the desire of obtaining from the latter—for that year and in advances of money and supplies—to assist them in cultivating their plantation —the sum of five thousand dollars.

In 1874, as in 1872, it was agreed that the sugar and molasses to be made on defendants' plantation should be shipped to plaintiffs, to re-imburse a balance then due to their firm and the advances to be made by them during the current year. Under that agreement, defendants shipped to plaintiffs sugar and molasses until the twenty-sixth of December, when—as stated by the factors—their business relations were practically ended, and—thereafter—sent to another commissioner what was left of the crop of 1874.

On the twenty-sixth of March of that year, defendants—by a notarial act—had acknowledged that they were indebted to plaintiffs in the sum of $4204 68; and, to represent that indebtedness, had subscribed and delivered two negotiable notes payable to said plaintiffs or their order—one on the first, the other on the fourteenth of December 1874, both secured by a conventional mortgage on defendant's share in the plantation known as "Cypress Hall." The last maturing of said notes was endorsed by plaintiffs to the order of A. Cammack junior, and mislaid or lost in the city of New York, where it was used as collateral security.

This suit was brought to recover the balance due on the lost note, and—besides—two hundred seventeen dollars and twenty-five cents, for commission on that portion of defendants' crop shipped to another factor, after the twenty-sixth of December 1874.

We, unhesitatingly, acknowledge—as contended for in behalf of plaintiffs, that the planter's crop—every pound of sugar, every gallon of molasses, every bale of cotton, every barrel of rice of that crop, must be punctually shipped and consigned to the factor who has advanced to raise and harvest it, and that—whether so consigned or not—the factor has a right to and can justly claim a commission on every fraction of the same; unless, however, he has himself failed to comply with any of the express or necessarily implied conditions of his contract with the planter; for, one who breaks a contract, forfeits his right to compel the others to execute it.

In this case, and as late as December 1874, the most perfect understanding seems to have existed between plaintiffs and their clients. What then occurred between them? A. L. D. Conrad testified that he came to New Orleans, in the latter part of December of that year, and —on his arrival—went to plaintiffs' office. There, he met Mr. Nalle, who asked him the object of his visit to the city; he informed him that it was to settle with Mr. Gay, and that he would go and see him the next day. "That is the way you, country people, do"—replied Mr. Nalle; "go now, and tell Mr. Gay that I will accept a draft and pay the amount." The next day, plaintiffs refused to pay the draft given at the suggestion of one of them. That refusal was not—of itself—a sufficient cause to authorize the consignment to other factors of the balance of defendants' crop.

This is not all: when, the day after, Conrad went to plaintiffs' office, he there found the tax collector, who had already seized their sugar, and the man who had furnished the barrels for the molasses, to both of whom he had given drafts on plaintiffs' firm, and he was notified by both that the firm had refused to pay those drafts. This was wrong, and—on plaintiffs' part—a violation of their contract. Unless those

barrels and taxes were paid, not only the sugar and molasses could have been levied upon, sold and sacrificed, but—by their factors' course—the planters were effectually prevented from complying with the obligation of their contract. The day before, Mr. Nalle had told Mr. Conrad: "You have got plenty of money here, pay Mr. Gay"—the day before, he had promised that the cooper's and tax collector's bills would be paid. In so doing—by merely paying the taxes and the price of the barrels, they would have enabled and could have compelled defendants to consign to their house the balance of a crop, which they themselves value at $8690, more than six times the amount of their actual claim against said planters.

Pressed by the cooper, and pressed by the tax collector, who had already seized, Mr. Conrad said to Mr. Nalle: "If you do not pay the drafts held by those parties, I will have to get another merchant." "I would be glad that you would," was the answer. This was sworn to by two of the defendants and denied by plaintiffs. They did not—however—deny that they had refused to pay the last mentioned drafts. They paid—as shown by their receipt—the State taxes of 1874; but that other taxes were then due, there can be no doubt—for, the tax collector himself, the holder of one of the unaccepted drafts, swore that he had already seized sugar to satisfy said taxes—and that, when he became convinced that they would not be paid by Nalle and Cammack, he advised Conrad to go to Richard Flower and apply to him for assistance. Conrad followed his advice and Flower paid the taxes. At that date, there was to defendants' credit—in the house of Nalle and Cammack—$4654 70, which were—afterwards—applied by the latter to the partial payment of the supplies and mortgage notes due them by defendants.

Under these circumstances, it was not without sufficient cause that the planters discontinued to ship their crop to plaintiffs, whose implied obligation was to pay, if not the collector and the cooper, most certainly the cooper; and this they could have done without the least apprehension of losing a cent.

The district court refused to allow any commission on the molasses, for the reason that they had been disposed of on the plantation and there given in payment of barrels purchased for the use of said plantation—this is correct. The court allowed plaintiffs, on the sugar not shipped to them, a commission of $145 92. In this there was error.

The note sued upon and which has been mislaid or lost, was transferred before maturity and delivered in New York as a collateral security. By its own terms and the terms of its endorsement, that note was negotiable, and defendants' demand that plaintiffs be ordered to give security to indemnify them against its appearance, should have been granted. It is true that the Code provides that the judge *may*, if required,

order security to be given—but his discretion in that regard is not unlimited, and—when circumstances render it necessary—he should so order. The form of the note, that of the endorsement and the fact that it passed into the hands of third parties as a collateral guaranty, justify defendants' demand.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby amended, and plaintiffs' demand for one hundred and forty-five dollars and ninety-two cents and the interest thereon, for commission on sugar, disallowed and rejected.

It is further ordered, adjudged and decreed, that—as amended—the judgment of the lower court is affirmed, but that no execution issue thereon, until plaintiffs shall give security in an amount corresponding to that of this judgment, in principal, interest and costs, to indemnify defendants against the appearance of the note sued upon, and which is alleged to have been mislaid or lost in the city of New York.

It is lastly ordered that the costs of this appeal be paid by plaintiffs.

No. 6904.

MARIETTA J. BROWN AND HUSBAND VS. J. N. BROWN, ADMINISTRATOR.

The parish court in which a succession has been opened, and which has thus acquired control of the property of the succession, has jurisdiction of a suit brought by the heirs of the succession to enjoin and prohibit the nominal administrator of the succession from acting as such, and from executing a certain judgment obtained by him, as administrator, in the district court.

The object of such a suit is not to enjoin the judgment of the district court, but merely to prevent an alleged unauthorized person from executing it. In a suit like this the dissolution of the injunction might work irreparable injury to the plaintiffs, and other heirs and creditors of the succession, and hence, if properly issued, should not be dissolved on the bond of the defendant; more especially, when the amount of that bond is too small to protect the property of the succession from spoliation and waste.

Where it appears that the petition for an appeal from a decree of court rendered in chambers was filed in open court, on the same day, and immediately after the decree was rendered, and in the presence of the counsel of plaintiff and defendant, it will be held that the appellee was sufficiently cited.

APPEAL from the Parish Court of Red River parish. *Broughton*, J.

Joseph H. Pierson and *L. B. Watkins* for plaintiffs and appellants.

J. F. Pierson and *W. H. Jack* for defendants.

The opinion of the court was delivered by

EGAN, J. This appeal is from an order dissolving, on the bond of the defendant, under article 307 of the Code of Practice, an injunction sued

out of the parish court of Red River to restrain and prohibit the defendant from acting as administrator of the successions of the father and mother of the plaintiff, and especially from proceeding, as he was about to do, to execute a judgment of the district court for that parish, obtained by the said defendant, in said capacity, *against a sister* of petitioner, in a suit for the recovery of a valuable tract of land and several thousand dollars rents. The merits of the injunction suit or the propriety of the issuance of the injunction are not before us in this appeal. That its character may be further understood, however, as bearing upon the present appeal, it is sufficient to state that it is alleged among other things that the plaintiff and others interested had brought suit in the parish court from which the injunction was obtained against the same defendant, who was acting as administrator of said successions, to have him decreed not to be the lawful administrator thereof, because there was no order appointing, no advertisement of his application, no commission issued to him, and because he had not taken the oath of office, had not had a proper inventory taken, having only had inventoried a very small property, two or three hundred dollars in amount, and had given a bond of only $400, whereas, by his own judicial and other allegations and admissions, the property of the successions which he sought to control was and is worth between fifteen and twenty thousand dollars, and yields a large revenue; all of which, if unrestrained by injunction, would fall into his hands and be possessed and controlled by him, especially through the instrumentality and execution at his instance of the before mentioned judgment of the district court of Red River; all to the great and irreparable injury of the plaintiff and other heirs and parties interested. Besides the insufficiency of bond and other matters stated, it is further alleged that the defendant is insolvent. This injunction proceeding seems to have been sued out in aid of the suit for amotion or destitution as it is called by the plaintiff, if such it can be styled, and the prayer is that the defendant be restrained especially from attempting to control and execute the before mentioned judgment of the district court, and thus possess himself of so large an amount of property of the successions until he shall cause himself to be regularly appointed administrator, and give bond in accordance with law sufficient to cover the true value of the property.

The petition is somewhat inartificially drawn, and the particular act sought to be restrained by the injunction is the provoking by the defendant of the execution of a judgment of the district court *not against the* plaintiff, but another person, and his thereby obtaining possession and control of largely valuable assets and property of the successions. It is urged that the parish court was without jurisdiction to enjoin the execution of a judgment of the district court, and that, without passing

upon the merits of the present appeal, we should so adjudge. The proposition would be correct if the validity of the judgment itself or its execution were attacked; but such we do not understand to be the case here. It is the right and power of one whose authority is denied to contest and order the execution of the judgment as an act of administration of a succession of which he is not administrator; and the existence and attempted execution of the judgment are only alleged as they affect and bear upon the attempt of an unauthorized person to control and possess himself by that means and through that instrumentality of property of the succession, to the danger and apprehended detriment of the heirs and other parties in interest. The real object of the injunction was then to protect the property of a succession of which the parish court had jurisdiction from the unauthorized control and possession of one who claimed to administer it by virtue of authority derived from the same court, and while a proceeding was actually pending in the same court which issued the injunction to test his right to do so, or to make him take the oath, give the bond, and have the inventory taken, as required by law. To this real purpose the allegation as to the judgment and execution was merely subsidiary and incidental, and seems only to have been made as would have been the allegation of any other act or fact not involving the judgment of any court through which danger to the succession and heirs was apprehended. For this purpose, and with this view, and to this extent, the parish court had jurisdiction as a necessary incident to its power to appoint and remove administrators, and to control the administration of succession property; not to stay the execution of a judgment of the district court, for that we do not think has been attempted here, but to control and prevent the defendant, who claimed to act by its authority, from attempting to do this particular act of administration until he had first qualified himself and given proper and sufficient bond. Was this, then, a proper case for the dissolution of the injunction on the bond of the defendant? We think it was not. If the injunction were properly issued and maintainable at all, a matter not now before us, the grounds upon which it was sued out were such that its dissolution on the mere bond of the defendant in favor of the plaintiff would work irreparable injury in the sense and meaning of the law not merely to the plaintiff, one of the heirs, but to the other heirs and creditors, and to the succession itself, none of whom, except the plaintiff, are in any manner protected by the bond given in favor of the plaintiff. Again, according to the allegations of the petition, which for the purposes of this case are taken as true, the amount of bond required, $1250, is wholly inadequate to protect against spoliation and waste property to so large an amount as that alleged by the plaintiff.

The appeal was then rightfully taken, not only because it was not a proper case for dissolution on bond but also because the bond required was too small. To take any other view would be to avoid all the provisions of the law in regard to the character and amount of bond and other prerequisites to the rightful administration of estates. Any one might otherwise first apply for the administration of a succession, and then when restrained from acts of administration might proceed to administer without complying with the law in any respect by simply giving a bond to dissolve the restraining order, the effect of which would be to evade the law and enable him to deal illegally with the estate and its property.

We are asked to dismiss this appeal for want of citation to the appellee. It appears from the entries in the record that, to use its own language, "the court met in chambers on the twelfth of December, 1877, at the courthouse, in the town of Coushatta, that the defendant moved the court to 'suspend' the injunction on his giving bond, that it was so ordered, that all the papers and proceedings in the suit were filed in evidence, and immediately following that '*petition for appeals, suspensive and devolutive,* (were) *filed in open* court,' and the usual orders thereon granted, all on the same day and at the same time, and that thereupon the court adjourned *sine die.*" The judge thereupon signed officially and certified to all of the foregoing facts. The petition for appeal is then given, and then the order of appeal, which ends in these words: "Done, read, and signed during the chambers trial of said proceeding herein, on this twelfth of December, 1877. A Ben Broughton, Parish Judge of Red River parish, La."

While the manner of proceeding seems to have been somewhat anomalous, we think it sufficiently appears that all the steps taken, including the appeal, were had contradictorily with each other, and in the presence of both counsel for plaintiff and defendant, and under the peculiar circumstances of this case that the motion to dismiss the appeal for want of citation should be and it is overruled; and on the merits

For the reasons assigned, it is ordered, adjudged, and decreed that the order dissolving the injunction sued out in this case upon the bond of the defendant be and it is amended, and the injunction reinstated. It is further ordered that the defendant, J. N. Brown, pay the costs of this appeal and of the proceedings in the court below upon his application to release the injunction on bond.

DISSENTING OPINION.

MARR, J. I do not concur in the opinion and decree just pronounced. J. N. Brown, as administrator of the successions of his father

and mother, recovered judgment in the district court of Red River parish against his sister Elizabeth, declaring to be simulated the title by which she held certain real property, and decreeing the same to belong to the successions; and in the same judgment she was condemned to pay $3000 for rents and revenues.

Soon after this judgment was rendered, Marietta J. Brown, a sister and co-heir of the parties to that suit, authorized by her husband, filed a petition in the parish court of Red River, setting out various causes of injunction; and concluding with a prayer that J. N. Brown be enjoined from procuring or causing to issue "any writ of possession or execution under said judgment, and from taking possession of said property, or of its revenues, under or by virtue of said writ, until he causes himself to be regularly appointed, and gives bond for one fourth over and above the proved value of the said successions."

The general rule is that the court which rendered the judgment has exclusive authority to execute it or to arrest the execution. Code of Practice, arts. 617, 629; Olger vs. Daunoy, 7 N. S. 658; Borne vs. Porter, 4 Rob. 57; Nolan vs. Babin, 12 Rob. 533; Donnell vs. Parrott, 13 An. 252.

To this rule there is this exception, founded in necessity and recognized by jurisprudence: When a judgment has been rendered in one parish, and execution issues to another, the competent court of the parish in which it is to be executed may enjoin. Cavelier vs. Turnbull, 8 Mart. 61; Lawes vs. Chinn, 4 N. S. 390; Hobgood vs. Brown, 2 An. 323; Police Jury vs. Michel, 4 An. 84.

I can not consider the injunction asked for and granted in this case as any thing but an interference with the authority and jurisdiction of the district court, by arresting, prohibiting, the execution of a judgment rendered by that court; and in violation of the Code of Practice, arts. 617, 629, and of the jurisprudence established by the decisions just referred to, from 8 Martin, in 1820, down to 13 An., in 1858, and not since questioned by bench or bar, so far as I am informed.

The parish court had exclusive jurisdiction to appoint Brown administrator, and to remove him; and to compel him to have a proper inventory taken and to give the security required by law. It was the right of the plaintiff, as one of the heirs of her father and mother, to take such proceedings in the parish court as might be necessary to protect her interests, either for the removal of the administrator or to compel him to have a proper inventory taken, or to give bond and qualify according to law; and she might, at the same time, have gone into the district court and obtained an injunction staying the execution of the judgment of that court pending the proceedings in the parish court. The pendency of these proceedings in the parish court, which is vested with exclusive jurisdiction of such matters, would have been ample cause for

the injunction by the district court of the execution of its own judgment in favor of Brown in his capacity as administrator. I do not think the parish court had any power or jurisdiction to grant the injunction. I can not imagine any necessity for a resort to that tribunal, since the jurisdiction of the district court was complete, and, in my opinion, exclusive, to suspend the execution of its own judgment, for the alleged causes, although it had no power to deal with the causes themselves, otherwise than by refusing to proceed until these causes were passed upon and disposed of by the court having exclusive jurisdiction of them.

I think the parish court was absolutely without jurisdiction; that the entire proceeding in that court was *coram non judice* and void; and that we should so declare by our decree.

No. 6958.

WM. M. LOVELL VS. JAMES A. PAYNE ET AL.

When a certain fact put at issue by the pleadings is peculiarly within the knowledge of the defendant, such for instance as the consideration of a transfer made by him, the burden of proof is on him to show that fact.

A fixed *price* is as essential to the validity of a giving in payment, as it is to a sale.

A *dation en paiement* made by an insolvent debtor to one of his creditors is fraudulent, and may be set aside.

The return of a writ of *fieri facias* against a party, unsatisfied, is evidence of his insolvency.

Every fraudulent act of a debtor, no matter what its form, may be attacked by any creditor who has been prejudiced by it.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Favrot & Lamon for plaintiff and appellant.

J. & G. W. Burgess and *G. W. Buckner* for defendants.

The opinion of the court was delivered by

EGAN, J. This is a revocatory action to set aside certain alleged fraudulent transfers of property, rights, credits, etc., made by Payne, a judgment debtor of plaintiffs, to Mrs. Grace Timms, one of the defendants. The petition contains the usual and necessary allegations of fraud, insolvency, and injury; alleges the want of any fixed price, or price in money, for the transfers attacked. The answers admit the transfers, deny the fraud and insolvency, aver the existence of a valid and valuable consideration, and of other property belonging to the debtor, more than sufficient to pay plaintiff's debt.

The transfers were of judgments, notes, etc., amounting to many thousands of dollars, and were made subsequent to the institution of suit by plaintiff to a daughter residing in West Virginia through an attorney and agent residing in Louisiana, who admitted the possession of the property transferred, on the trial. The only evidence of any consideration for the transfers is that of Payne himself, who stated on another occasion (not on this trial) that the transfers were made on account of indebtedness to Mrs. Timms. He says: "I am largely indebted to Mrs. Timms, and made these transfers to pay her with other claims and judgments. In the case of Payne vs. Ronnseville & Elliott, 1670 district court, there was no stipulated price for the transfer. I am unable to fix the amount of my indebtedness to Mr. Timms. It is more than I am able to pay." This is the only evidence going to show any consideration for the transfers attacked, notwithstanding that was directly put in issue. The burden of proof was upon the defendants to prove facts peculiarly within their knowledge. They have not done so in this important particular. Indeed, neither Payne nor Mrs. Timms testified on the trial below, and even the existence of any indebtedness to the transferee is not otherwise shown than by the statement of Payne just recited, which was given in another judicial proceeding and introduced here by the plaintiff.

The attorney and agent who received the transfers testified on the trial to that fact and to his authority to do so, but nothing more; not a word as to any knowledge of indebtedness by Payne to Mrs. Timms. See 15 An. 509, 663; 20 An. 97, as to effect of failure to produce evidence on a material point, and especially as to proof of price of transfer in a case like this. See 12 R. 95. But were the indebtedness established beyond question, the transfers would at most be only a giving in payment, to which a fixed price is as essential as to a sale. C. C. 2655. There is no sum stipulated or shown to be due. Though it be a debt, the amount of that debt must be shown. 10 La. 151. Kleinpeter vs. Harrison, 21 A. 197. Though the consideration was really a debt due, however, it could only have been lawfully paid in money when the debtor was insolvent. C. C. 2658.

A sale to pay one creditor, even ignorant of the debtor's insolvency, is a fraud on the other creditors. 2 La. 18; 8 La. 308; 14 La. 367. It is denied that Payne was insolvent, and it was attempted to show by the evidence of two or three witnesses in the trial that they owed him more at the time of the judgment and after the transfers attacked than plaintiffs' debt, and had since paid him. This indebtedness is stated to have been for money loaned or advanced, to have been evidenced partly by note and partly by account, but how much by note and how much by account is not shown. It is hardly probable that any considerable sum

of loaned money was on mere account, or that one who was evidently transferring the great bulk of his means in view and anticipation of plaintiff's debt being put in judgment would leave these claims open to seizure. They were doubtless protected against it by the form of the notes or evidences of debt. A *fieri facias* was issued upon plaintiff's judgment, and the defendant pointed out as the only property subject to seizure an iron safe. He was assessed for no property on the tax-rolls, and after the garnishment of a debt which yielded a little over four hundred dollars, the sheriff being unable to find any thing else subject to seizure, the *fieri facias* was returned unsatisfied except as to the credit stated. This was evidence of the debtor's insolvency, or practically the same thing, that there was nothing belonging to him within reach of the process of the law. See C. P. 643 and 647 as to duty and manner of procedure of the sheriff and what may be seized. Will it be said that a transfer made in fraud of and to defeat the rights of creditors can not be set aside, because after transferring the great bulk of his property and assets to large amount, and without any consideration or in any manner recognized by law, it can not be avoided, because the debtor may control out of reach of his creditors some remnant of means when he himself confesses his insolvency. Either his statement that he owed Mrs. Timms is to be accepted as true or not. If not true, then there was no consideration for the transfers. If true, they were in fraud, besides the other reasons mentioned, because that indebtedness is confessed by himself to be more than he can pay, which itself proves insolvency. Again, he does not state that he received or had given up to him any evidences of debt, any obligations or other consideration, and it is shown by Mrs. Timms's agent that most of the notes were merely handed over to him without any formal transfer at all. We think the case is with the plaintiff, if not on the score of insolvency and injury, most certainly on the ground that there was really no valid or legal transfer at all, and that what was done and attempted was done in fraud of plaintiff's rights as a judgment creditor. No matter what the shape or form of the attempted fraud, it was open to attack by any creditor prejudiced. C. C. 1968 and 1969; 6 An. 552; 10 An. 18.

The judgment of the district court was against the plaintiff in his demand to revoke and set aside the fraudulent transfers; it was erroneous, and is avoided and reversed; and it is now ordered and decreed that the transfers and conveyances made by James A. Payne to Mrs. Grace Timms, wife of Jules L. Timms, of the promissory notes and judgments described in plaintiff's petition be and they are declared and adjudged illegal, fraudulent, and null and void in law, and that said notes, subscribed by Andrew S. Herron, Thomas J. Buffington, and R. M. & D. M. Walsh, by Mrs. Mary C. Pierce, wife of S. M. Pierce, by M. J.

Williams, by M. C. Blessing, and the judgments against Tim Duggan, Joseph L. Bernard, David Ahern, and Mrs. Miller, Nos. 2322, 2412, 2413, and 2056, described in plaintiff's petition, together with all accessory mortgages and securities, be declared to be the property of James A. Payne, and subject to be seized and sold to pay and satisfy the judgment and debt of plaintiff as such or otherwise subjected to the payment of his said debt and judgment according to law. It is further ordered and adjudged that the defendants pay costs of both courts.

No. 7012.

STATE EX REL. JOHN J. BARROW, SHERIFF, ET AL. VS. CHARLES L. FISHER, TREASURER.

Where the police jury of a parish join in an appeal from a judgment making peremptory a mandamus against the treasurer of the parish on account of alleged services rendered, and expenses incurred in behalf of the parish, no affidavit of interest is required of the police jury. The interest is patent on the face of the record.

It is the duty of the treasurer of the parish to register and he may be mandamused to register the claims of the sheriff for all expenses incurred by him on account of the arrest, confinement, and maintenance of persons accused of crime, and for *all* expenses whatever attending criminal proceedings, when the amount of such claims shall have been certified to as correct by the clerk of the court and the presiding judge thereof, and presented to the treasurer for registry within sixty days thereafter. But the treasurer is not bound to register claims for services, or expenses not rendered, or incurred in criminal proceedings, not even if certified to as correct by the clerk and presiding judge.

The sheriff of a parish can not be compelled to accept a certain sum, or sums of money in lieu of his fees of office, unless he has voluntarily contracted with the police jury to do so.

Neither the registry by the treasurer of an account against the parish, nor its indorsement by him under the statute, amounts to the issuance of scrip, or negotiable obligations of the parish.

The fact that no money is in the parish treasury when a proper claim for registry is presented to the treasurer is no reason why the claim should not be registered.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Voist*, J.

W. W. Leake for relator and appellee.

C. L. Fisher for himself.

Joseph L. Golsan, district attorney *pro tem.*, for the police jury, intervenors and appellants.

The opinion of the court was delivered by

EGAN, J. In this proceeding by *mandamus*, relator seeks to compel Charles L. Fisher, treasurer of the parish of West Feliciana, to register certain claims which he alleges are due by the parish to him in his offi-

cial capacity of sheriff, for services rendered in criminal and other matters, for which the parish, under the law, is liable. The evidences of the indebtedness by the parish to him are shown by the certificates of the clerk of the court and district and parish judges of the parish.

The defendant, the treasurer of West Feliciana, for answer why the *mandamus nisi* should not be made peremptory, represents—

First—That the accounts against the parish have never been approved or allowed by the police jury, or according to law.

Second—Denies that the claims are legal and valid claims against the parish, or such claims as defendant is required by law to register as claims against the parish.

Third—That the police jury, of which the defendant is a ministerial officer, is vested with discretionary powers to approve, allow, and pay any and all claims against the parish, before said claims have been adjudicated judicially.

Fourth—That the law affords the relator adequate relief by the ordinary means to have his demands judicially determined.

Fifth—That the police jury in making up the annual budget of expenses for 1877 exercised discretionary powers, which are not the subject of judicial inquiry.

(a.) That in said tableau of expenses the sum of $600 was appropriated to pay the sheriff for all services in criminal matters, or in cases in which by law the parish is to pay for services rendered the parish or State, including all services rendered the police jury, as a salary.

(b.) Five hundred dollars was appropriated for maintenance of prisoners, or so much thereof as may be legally due upon account of sheriff, at twenty-five cents per prisoner per day.

(c.) Six hundred dollars was appropriated, or so much thereof as might be legally issued to pay contingent expenses.

Sixth—That no other levy or appropriation was made to pay the sheriff, except the salary of $600, and what might be legally due for maintenance of prisoners, and out of the contingent fund for contingent expenses.

Seventh—That the sheriff presented no bills for approval on account of salary as fixed by police jury. *Nor has he presented any other bills to police jury for approval.*

Eighth—That the police jury, the parish treasurer, and all the other officers of the parish are expressly prohibited from *issuing* any evidences of indebtedness, or to warrant for the payment of money from and after the first day of October, 1877, except against money actually in the treasury.

Ninth—And no officer of the parish can approve or cause the issuance of paper or evidences of indebtedness in excess of appropriations.

Tenth—That the several claims presented were erroneously and illegally approved by the clerk and the district and parish judges.

Eleventh—That the treasurer of the parish is not authorized to register any such claims unless approved by the police jury.

Twelfth—That the claims for serving road notices, besides being obnoxious to the objections above, are matters with which the police jury has concern, and not the clerk and several judges.

Thirteenth—That all the claims were erroneously approved after the first of October, 1877, there being no money in treasury.

Fourteenth—That defendant could not register said claims under express provisions of a prohibitory law; that by so doing he would not only render himself liable criminally, but would thereby be the instrument of the issuance of a lot of scrip, under the sanction of his official signature, which would have the effect of creating the belief in the public mind that there was money in the parish treasury, thus causing damage to individuals and the parish.

Fifteenth—Further, that the police jury have provided in their annual budget for 1877 for the collection of a tax to pay what they admitted to be due, and the list or tableau of expenses for which they have provided contains every thing they can provide for under the general laws, *and will fully come up to, if not exceed, the limitation as to the per centum which the laws have imposed.*

Sixteenth—That relator has not been irreparably damaged.

The *mandamus* was made peremptory, and the defendant has appealed.

ON MOTION TO DISMISS APPEAL.

Before proceeding to consider the merits of this controversy we will first dispose of a motion to dismiss the appeal taken by the police jury who joined the defendant in the appeal. It is upon two grounds—

First—That there is no affidavit of interest as required by law.

Second—That they have not shown a direct pecuniary interest in the subject matter either by affidavit or otherwise.

Neither ground is well taken. No affidavit was necessary. The record discloses the interest of the parish which the police jury represents in the subject matter which is claims against the parish for alleged services rendered and expenses incurred. The interest is direct and pecuniary. The motion to dismiss is overruled.

ON THE MERITS.

Section 1042 of the Revised Statutes of 1870 provides "that all expenses incurred in the different parishes of the State and in the city of New Orleans by the arrest, confinement, maintenance, and prosecution

of persons accused or convicted of crimes, their removal to prison, the pay of witnesses, jurors, and *all expenses whatever attending criminal proceedings*, shall be paid by the respective parishes in which the offense charged may have been committed, or by the city of New Orleans, as the case may be. Such expenses shall be paid by the parish treasurer or by the city treasurer, as the case may be, *after an account* thereof shall be duly certified to be correct by the *clerk of the court* and *the presiding judge thereof*."

Section 2644, Revised Statutes, provides "that it shall be the duty of all persons having a claim against any parish which may have been allowed by the proper authorities to present such claim within sixty days from the date of its allowance to the parish treasurer. It shall be the duty of the treasurer to keep a well-bound book in which he shall make an entry describing the claim and date of such presentation, and *also indorse* his name across the back of the claim, with the day and date of such indorsement. No claim shall be received by him from any sheriff or collector of taxes which has not been so indorsed."

This is the registry which the relator sought, and the defendant refused to make for the reasons stated in his answer.

It was held in the case of Parker vs. Robertson, Auditor, 14 An. 249, at a time when, under the act of 1857, the expenses of criminal cases were paid by the State upon the certificate of the clerk and presiding judge, that the duties of the Auditor relative to accounts *for such expenses* were ministerial and imperative, and he must issue his warrant to the treasurer therefor. The same doctrine was reiterated in regard to the statute now under consideration in the case of the city of New Orleans vs. Patton, Sheriff, 27 An. 168, although the court in the latter case gave to the certificates of those officers an effect of conclusiveness for all purposes which we refused to attribute to them in the State ex rel. Houston, Sheriff, vs. City of New Orleans, not yet reported. The duty of the parish treasurer to make the registry of claims which have been allowed *by the proper authorities* is clear and imperative under the statute, but as was very properly held in the cases just cited, it would be otherwise if the certificate of the clerk and judge should show upon its face—to which we will add, if the account to which they were appended should show—that they were not within the law, in other words, that the clerk and judge were not the proper authorities to allow, approve, or certify to the correctness of the accounts.

It is clear, under the statute read, that the clerk and judge were the proper officers to certify to the correctness of the sheriff's accounts so far as they are for services and expenses in criminal cases, whether for the maintenance of prisoners in jail, or otherwise. We have, however, been referred to no law and know of none which authorizes or requires

their certificates or approval of the relator's accounts "for serving road notices" of which there are three in the record, amounting respectively to $14, $34 80, and $17 30, a matter which has no connection with expenses in criminal cases, and which, therefore, was within the province of the police jury or its officers. It is admitted by the defendant that the accounts of relator were duly presented to him for registry before filing the petition, and that the police jury did not contract with him for a salary for his services in criminal cases under the statute relied upon by the relator and the police jury, but that he has always protested against and refused to receive the salary which they attempted to fix for that purpose. It appears that the police jury did, in accordance with section 2777 R. S. of 1870, fix the fees to be paid by the local authorities, but it does not appear that the fees charged by the relator are in excess of the rates so fixed, nor that the amounts charged for the maintenance of prisoners exceed those fixed by the police jury under article 73 of 1877. Neither is it properly deducible from the power conferred upon the police juries to fix the amount of their fees, or the rate of compensation for such maintenance of prisoners, that they are the proper authorities to approve accounts made according to the standard fixed by them. The law on that subject remains unchanged. It is, however, urged that act number 30, of the extra session of 1877, which authorizes police juries to contract for fixed and determined sums of money with those officers who receive fees, commissions, and mileage in lieu of such fees, commissions, and mileage as fixed by the laws then existing, compels such officers, and among them the relator, to accept whatever amount the police jury may choose to dictate. This would indeed be a singular contract, made with an officer without his consent, and with that alone of the other contracting party. It would indeed be unilateral. Read in connection with the other statutes on the same subject matter and with the general law of contracts, we think a fair interpretation of this statute is that it enabled the parishes to make contracts with officers for specific sums in lieu of fees of office, and to enforce them when made, but by no means enabled them to compel the other party to enter into the contract. The fact that the police jury undertook arbitrarily to fix an amount without his consent by no means forced the relator to accept it. Nor can it be said that the mere registry of an account against the parish, or its indorsement by the treasurer according to the statute as evidence that such registry has been made, is the issuing of script or negotiable obligations of the parishes within the sense and meaning of the law. The object of the registry and the manner of evidencing it is not that, but to enable the parish authorities to know the extent and character of its indebtedness, that they may make provision accordingly, as well as also to identify the

claim with a view, as is evident from the latter clause of the statute, to its possible use in the payment of taxes, or its ready collection otherwise. But were it the issuance of such evidence of indebtedness as argued by the defendant, it is specifically authorized and required by the statute. Again, it is argued that, because there was at the time no money in the treasury, the registry of the relator's claims could not be made. That would be a very good reason why *payment* should not, as it could not, be made, but not so registry. Suppose that the parish treasury should, as often happens, continue empty for more than sixty days after the certificates contemplated by S. 1042 of the R. S., does it follow that the provisions of section 2644, which positively requires that all claims against the parish shall be presented to the treasurer within sixty days from their being allowed by the proper authority shall be ignored and disregarded? And yet this must be so if the defendant's position be correct. Again, the argument would apply with equal or greater force against any claim allowed by the proper officer or authority, and yet it is the right of the claimant, and the positive injunction of the law, that such allowance or certificate be given or made. Our attention has been called in the brief of defendant to two items, one of $40 and one of $104 60, for serving notices on eighty jurors and mileage in so doing, respectively. These do not come within the provisions of the statute relied upon by the relator and already quoted, nor have we been referred to any law of similar character covering them, although it would seem eminently proper that they should be covered by the same provision. It is only necessary to say of the defendant's bill of exceptions that we have considered and discussed the evidence appended to it, and thus give him its full benefit. The certificates of the clerk and judge are without legal effect in other cases, and in accounts other than those contemplated in the statute; and, as we said in Houston vs. the City of New Orleans, are not conclusive of the party's right, even in cases within the statute. They are in such cases, however, sufficient to authorize and require that the claims so certified be registered. If the parish has any valid defense against them it may be urged in another form of action. We have given it and the defendant the benefit of all which are appropriate in this proceeding by mandamus.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be amended so as to disallow, without prejudice to their enforcement according to law, the relator's demand for the registry in their present shape of the items of account for serving road notices, and for notices to jurors and mileage in serving them, and that in all other respects it be affirmed.

It is further ordered and adjudged that the relator pay the costs of appeal and the defendant those of the court below.

No. 7036.

D. R. CARROLL & CO. vs. MRS. LIZZIE HAMILTON ET AL. POST & CO., INTERVENORS.

A final judgment against an intervenor in a sequestration suit, who claims the ownership of the property sequestered, has the force of *res adjudicata* as to those questions only that were passed on by the judgment; and hence those questions can not be subsequently raised by the intervenor when pursued as a surety on the bond given to release the property from the sequestration. A judgment has not the force of *res adjudicata* as to those who were not parties to it.

The refusal of the lower court to continue a case, on the ground that a material witness was absent, who had been properly summoned, and for whom an attachment was then out, will not lead this court to set aside the judgment, when it appears that the attachment for the absent witness issued six months before the trial of the case.

The sureties on a bond given to release property sequestered, have a right, when sued on the bond, to prove that the sequestration was invalid, and illegal; and a refusal to allow them to introduce proof of this illegality, will be such an error as to justify the setting aside of the judgment below.

Sureties on the release bond have the right to prove that the property sequestered does not belong to the defendant in the sequestration suit.

Sureties on the release bond have the right to show that the plaintiff in the sequestration suit had no lien on the property sequestered, in a case where they have alleged fraud and collusion to their prejudice between the plaintiff and defendant in the sequestration suit.

Consent judgments are not binding on third persons, and therefore any third person sought to be affected by such a judgment, has a right to show its character.

A surety on a release bond who alleges a privilege on the property sequestered superior to the lien of the plaintiff in the sequestration, has a right to prove the alleged privilege.

The sureties on a release bond can not be held for more than the value of the property released from sequestration.

Where a part of the sequestered property has been released by a decree of court, the value of the balance of the property must be proved by the plaintiff in sequestration, before the liability of the sureties on the release *bond can be fixed.*

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough*, J.

Seale & Morrison for intervenors and appellees.

James T. Coleman for plaintiffs and appellees.

E. D. & W. Farrar and *E. H. Farrar* for defendants and appellants.

The opinion of the court was delivered by

EGAN, J. This suit is against the sureties on a bond given to release property sequestered. The judgment on the intervention is not appealed from. There was judgment in favor of the plaintiffs against the defendant sureties, who introduced no evidence below. The case is before us on an assignment of errors.

The answers set up fraud and collusion between plaintiffs and Bridwell, defendant in the sequestration suit, and principal in the release bond, between whom it was agreed, to the prejudice of the sureties, that

judgment be rendered for plaintiffs in that suit; that there was no valid sequestration; that the property sequestered did not belong to Bridwell, but to another, and was at the time of sequestration subject to the lessor's privilege and right of pledge to its full value in favor of one of the defendants, Mrs. Lizzie Hamilton, now wife of Thrasher; that the plaintiffs had no privilege to support the sequestration; and that the true value of the property was much less than the amount of the bond, which also included other property, as to which the sequestration was not sustained. The case is before us on assignment of errors and bills of exception, before proceeding to the consideration of which it is proper to notice a plea of "*res adjudicata*," filed by the plaintiffs against the several defenses set up. This applies only to Mrs. Hamilton, now Thrasher, and rests upon an intervention filed by her in the original sequestration suit, in which she set up the same grounds now asserted in the answers of herself and her co-defendants. There was judgment both in the court below and on appeal in favor of the plaintiffs and dismissing the intervention. It is now urged that this dismissal was on an exception and without a trial on the merits. This is no doubt true so far as the intervenor sought in that form of proceeding to question the regularity of the proceedings and sequestration as between the plaintiffs and the then defendant, Bridwell, but we do not so understand it as to all the issues raised in the intervention. It appears from the mandate in that case, filed in this, that among the grounds stated for affirming the judgment was "that no fraud or collusion were shown between plaintiffs and defendant." As to that issue, then, the plea of "*res adjudicata*" must be sustained as to Mrs. Hamilton, now wife of Thrasher. As to all the other grounds raised in the answers in this case, it must be overruled, and so, also, on all the grounds as to all the other defendants who were no parties to the litigation in which the judgment invoked was rendered. The first error assigned is to the refusal to continue the case on an affidavit of the absence of a witness for whom an attachment was then out under the order of the court and whose evidence bore upon a material issue, the value of the property sequestered. Sufficient reason existed for not granting the continuance, though from the affidavit alone it would seem the party was entitled to it. The attachment had issued six months before, and no summons appears in the case. We can not sustain it as ground of error in this court.

The second ground assigned is that the defendants were not allowed to prove that there was no legal or valid sequestration to support the bond sued on, and that the writ issued without affidavit as required by law. It does not appear that this question was ever passed upon or raised between the plaintiffs and the principal on the bond. It was not an exception merely personal to the debtor, and especially in a case like

the present, where fraud, collusion, and consent to the judgment between the plaintiffs and the principal in the bond are set up, we see no good reason why the sureties should not be allowed as part of their case to prove a fact which may have had much to do with inducing them to sign the bond of release. The execution of the bond of release did not estop the principal from moving for or obtaining the dissolution of the sequestration. 1 An. 372; 2 An. 154; 13 An. 549. Why, then, deny the right to the sureties to show the facts which would have justified such a motion, when they expressly set up that they were induced to sign the bond by representations that the proceedings were irregular and would be set aside, and when it was not done through the fraud and collusion of their principal?

The third ground assigned is that the defendants were not allowed to prove that the property sequestered did not belong to Bridwell. In the case of Quinn vs. Mays, 2 R. 510, the surety on an attachment bond was allowed to prove that the property attached did not belong to the defendant in attachment.

The fourth assignment is that defendants were not allowed to prove that plaintiffs had no privilege or lien on the property sequestered. In an ordinary case this might not be permissible after a judgment against the principal recognizing the privilege; but for the same reasons stated under another head we think these defendants should have been allowed to prove the non-existence of the privilege when, as in this case, they set up that a fraudulent judgment, one rendered by consent, is sought to be used to bind them.

The fifth assignment is to the refusal to permit the defendants to prove that the judgment was merely by consent, and therefore not binding on them. This was error. It is well settled that consent judgments are only binding as such between the parties, and have not the effect of judgments regularly rendered contradictorily, as regards third persons. See 3 An. 34; 12 An. 426; 6 An. 2; 4 An. 276; 2 An. 907; Allison vs. Thomas and Rosenfeld, 29 An. 732.

The sixth assignment is that the defendants were refused the right to offer evidence to prove that one of them, Mrs. Hamilton, now Thrasher, had a lessor's privilege and right of pledge upon the property sequestered superior to any right of the plaintiffs and more than sufficient to absorb the proceeds. We do not know that this concerns any of the defendants except Mrs. Thrasher, unless it were further shown that they were unable to return the property by reason of the assertion of such privilege or right; but as to her it was properly provable as part of her case, and more especially in connection with the other defenses urged.

The seventh and last assignment is that the liability of the sureties

is to be measured by the value of the property sequestered and which they bound themselves to return, and not by the amount of the judgment rendered in the case in which the bond is given, and that no evidence was offered by the plaintiffs to prove the value of the property in the present case, a part of which was released by the judgment. The position assumed is perfectly correct, that it is the value of the property, and not the amount of the judgment alone, which regulates the obligations and responsibilities of the bondsmen, as was decided in Barber vs. Morrison, 4 An. 372, and as is expressly provided by article 279 of the Code of Practice. The judgment may be for more or less than the amount of the bond or the value of the property. If so no more can be recovered than the amount of the bond or value of the property in the former case and no more than the amount of the judgment though less than either in the latter case. As, however, the amount of the bond is required to be fixed by the judge with reference to the value of the property and at an amount equal to that value, it would seem that the value should, *prima facie* at least, be measured by the amount of the bond, in the absence of proof of less value. In the present case, however, where a part of the property sequestered was released by the judgment of the court, it was essential for the plaintiffs to prove its relative value to that of the other property or of the whole, in order to measure and fix the liability of the sureties on the bond. This was not done, and is error. It does not, however, go to the dismissal of the action, but only to the remanding of the cause.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is avoided and reversed, and the case remanded to be further proceeded in according to law and the principles of this opinion.

It is further ordered that the plaintiffs pay the costs of appeal, those of the court below to abide the judgment which may be rendered.

No. 7039.

ANN L. SPEARS VS. W. L. JACKSON, ADMINISTRATOR.

One who purchases a claim which he knows to be in suit, and legally contested, is entitled to recover on it only what he paid for it, with legal interest from the date of its transfer to him.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Wedge*, special judge.

D. C. Hardee for intervenor and appellant.

Kernan & Lyons for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Mrs. Ann L. Spears, administratrix of the succession of

Alexander Spears, commenced this proceeding *via executiva* on a note for $3000, bearing eight per cent interest from November 30, 1868, and the mortgage by which it was secured, given by John S. Scott for the price of a plantation purchased by him of Spears. At the time this suit commenced, August 28, 1872, Scott was dead, and W. L. Jackson was the administrator of his succession.

On the sixth of November, 1872, the attorney for Mrs. Spears acknowledged receipt from the attorney of James King of $1608 48, "which, including amounts heretofore paid by James King, is in full of above mortgage claim, and I hereby transfer the same to said King, and subrogate him to all mortgages and privileges upon the same, with the understanding that the same may be continued in my name, as to conducting the proceedings for the use and benefit of said King."

The property was advertised for sale by the sheriff under the writ of seizure and sale, on the twelfth of December, 1872. The counsel for King informs us in his printed brief that the proceeding *via executiva* was changed into an ordinary action by consent of parties, to allow Jackson, the administrator, to set up any offsets he might have, without resorting to an injunction for that purpose. At what time this was done we can not ascertain from the record. We find, however, that the seizure was released on December 2, 1872, and the writ returned; and this was the end of that proceeding.

On the fourth of December, 1872, Jackson tendered to the attorney of King $1608 48, with interest and costs of court, in full satisfaction of the mortgage debt, which he declined to receive.

On the eighth of October, 1873, King intervened in the suit, alleging that he was the owner of the claim; and praying for judgment against Jackson as administrator, with recognition of the mortgage and vendor's privilege. Service was accepted by Jackson's attorney; and on the tenth of October Jackson answered, alleging that the transfer by Mrs. Spears to King was made pending the suit, and that it was the sale of a litigious right; that he had tendered to King the amount paid by him, $1608 48, with interest and costs to the date of the tender; and that King was bound to take that sum and interest in full payment. He also alleged that the sum so tendered was the only amount due on the note sued on.

There was no other pleading on the part of Jackson, and none on the part of King, except the petition of intervention, and the plea of prescription filed on the tenth of October against any and all accounts set up by Jackson as administrator, no reference to which is made in the answer.

The special judge who tried the case rendered judgment in favor of King for $1608 48, with interest at five per cent from the sixth of November, 1872, with recognition of the mortgage on the property described,

Scott's administrator to pay the costs up to the tenth of October, 1873, and King, the intervenor, to pay those accruing since that date; and King appealed.

In this court the intervenor insists that he is entitled to the full amount of the note, with eight per cent interest from the thirtieth of November, 1868, less $468 73 paid by Scott to Spears on account. Scott's administrator contends that he is bound only for the $1608 48, with interest from the date of the transfer, because that is the amount paid by King for the claim, when it had become a litigious right; and because Scott had made payments to Spears on account, which reduced the debt to that amount.

The term *litigious rights* is used in the Code in two senses:

First—With respect to public officers, such as judges, attorneys, sheriffs, and clerks, who are forbidden, under pain of nullity, to purchase *litigious rights* which fall under the jurisdiction of the tribunals in which they exercise their functions. R. C. C., art. 2447.

Second—With respect to all persons, whomsoever, against whom *litigious rights* may have been validly transferred. R. C. C. 2652.

Article 2447 does not define the *litigious rights* which it forbids public officers connected with the administration of justice to purchase; and the meaning of the term is to be sought in article 3556, which defines terms of law used in the Code, "and not therein particularly defined." No. 18 of this article says: "Litigious rights are those which can not be exercised without undergoing a lawsuit;" and the *litigious rights* referred to in article 2447 are all such rights as fall within this definition.

Article 2652 authorizes him against whom a litigious right has been transferred "to get himself released by paying to the transferee the real price of the transfer with the interest from its date." The next article furnishes the definition: "A right is said to be litigious whenever there exists a suit and contestation on the same." It is in this sense that the term is used in article 2652. See Pearson vs. Grice, 6 An. 237, 238.

It is proven in this case by the testimony of Jackson, and by that of Herndon, who was the book-keeper of Scott & Cage, of their successors, Scott & Jackson, and of their successor, John S. Scott, that Spears was indebted to Scott & Cage in the sum of $157 56 for supplies furnished up to December, 1868; that on the fourth of December, 1869, Scott paid Spears $1000 on account of the note, which was due thirtieth November, 1869; that at same date Spears was indebted to Scott & Cage, in the sum of $275 33 for advances and supplies; and that in 1870 and 1871, Scott & Jackson made advances in money and supplies, amounting to $729 25, of which Spears paid $260 52 on the thirteenth May, 1871, leaving balance on this account $468 73.

Herndon and Jackson both saw Scott pay the $1000. Jackson was in the office of Scott & Cage, and saw Scott hand the book-keeper, Herndon, a check; Herndon went out, and returned in a few minutes, and handed to Scott a sum of money, out of which Scott gave Spears $1000 on account of the mortgage note. He says the conversation between Scott, Spears, and himself was about the property purchased by Scott of Spears.

Herndon could not find the check nor any receipt for the $1000; but he found the check book, and got the stub with the memorandum on it which he had made. What appears to be a *fac-simile* of this stub is copied in the record; and it shows that the check was No. 276, date fourth December, 1869, to the order of J. S. Scott, for $1500, of which to A. Spears $1000, change $500; and that this latter sum was deposited again "as could get no small change."

He also testifies that in the spring of 1872 Spears was in New Orleans; that a statement of all the accounts of the several firms of which Scott had been a member, including the $1000, was furnished by him to Spears, and acknowledged by Spears to be correct; that Spears desired Scott to allow Herndon to go to Feliciana and indorse on the note Spears held for the price of the plantation all the credits to which Scott was entitled on these several accounts; "and it was then he acknowledged the correctness of all the accounts."

He adds that Spears died suddenly on the boat, on the trip home, immediately after this. We may well understand, therefore, why Mrs. Spears was ignorant of this business, and why the credits are not on the note in accordance with the final understanding and settlement between Scott and Spears in the spring of 1872.

Our attention is called to a bill of exceptions taken by intervenor to the verbal testimony to prove the payment of the $1000, on the ground that the check on which the money was drawn would be the best evidence. This objection is not well taken. The payment was not by check. The check was for a larger amount; and it was payable to the order of Scott. If it had been produced, it would simply have proven that Scott on that day withdrew from the Citizens' Bank $1500. The memorandum on the stub, contemporaneous history, made by the book-keeper, enabled him to tell what became of the money, which the check itself could not have done. It is only where the check is to the order of the person to whom the money is paid that it affords evidence of such payment.

The testimony offered by intervenor is exceedingly meager and unsatisfactory. Judge McVea, the only witness, was attorney for Mrs. Spears: and he is satisfied she knew nothing of any payments except as stated by King. There is proof that General Hays, now dead, then a member of the New Orleans bar, professing to represent King, as he no

doubt did, called on Jackson, after Scott's death, for a statement of Spears's account, which was furnished him. There is nothing to show the motive of King in asking for this statement, nor is it proven that he received it. It is evident, however, that he was not ignorant of the state of the accounts between Scott and Spears at the time he acquired the mortgage claim. A statement was made up of the amount due on the note, in which are credited as payments by King, on February 21, 1871, $1550, and on July 1, 1871, $150; and as a payment by Scott on March 21, 1872, $468 73; showing balance due November 5, 1872, $1608 48, the amount for which the mortgage claim was transferred to him.

Judge McVea knew nothing of payments by King except from a memorandum in King's possession. He examined the accounts, and was satisfied that no more was due on the note, and his client was willing to take the $1608 48 for that reason. He says that Mrs. Spears would have taken this from Jackson or anybody else; and he thinks the reason that neither Jackson nor King would purchase the note or pay it at first was that there was some question as to the priority of a judicial mortgage on the property in favor of King. He stated that the memorandum in the possession of King was signed by Spears; but he afterward corrected himself and said he might be in error as to that. This testimony was given in June, 1877, nearly five years after the transfer of the claim to King. Mrs. Spears accepted King's statement of the payments made by him.

It is remarkable that this memorandum was not produced, or otherwise accounted for, except that Judge McVea says it remained in the possession of King. Neither King nor Mrs. Spears, the author of his title, nor the attorney who represented him in the acquisition of the claim, and who has represented him in this entire litigation, was called to explain this business. If the accounts were properly stated and credits given as proven by Jackson and Herndon, the balance due on the note on the fifth of November, 1872, would not exceed $1608 48; it would probably be a few dollars less; and in a suit between Mrs. Spears and Scott's administrator she could not have recovered more than that amount on the evidence in the record.

We have no doubt that Jackson had manifested his intention to contest this claim and to set up payments and offsets before the date of the transfer to King. This is evident from the stipulation in the transfer that the suit might be continued in the name of Mrs. Spears for the use and benefit of King; from the release of the seizure and the return of the writ which terminated the proceeding *via executiva* shortly after the transfer was made; and from the preparation made by Jackson to prove payments and offsets by taking the testimony of Herndon, at New Orleans, before the filing of King's intervention; and from his prompt offer

to pay King the price which he paid for the claim, immediately after the release of the seizure. Indeed, the counsel for King informs us that the suit *via executiva* had been changed into an ordinary action by consent of parties to enable Jackson to make his defenses without resorting to an injunction. In the language of the Civil Code, art. 2653, there existed a suit and contestation on this claim, to the knowledge of King, at the time he took the transfer.

The evidence shows that the real price of the transfer was $1608 48. As to the payments alleged to have been made by King, they are not proven. It was his duty to have proven them: and he could have proven them by his own testimony, if he actually made them. The facts that he did not appear as a witness, and that he did not call any witness to prove that he had made these payments, are not reconcilable with any other theory than that he did not make any such payments. Scott's administrator was entitled to get himself released by paying the real price of the transfer, as provided by article 2652 of the Code; and if he had made a real tender of the amount, with interest and costs up to the date of the tender, and had deposited the money, subject to the order of King, he would have been discharged from all liability. Not having done this, the intervenor is entitled to recover the price paid by him for the claim, with legal interest from the date of the transfer, and the costs up to the date of the filing of Jackson's answer setting up the plea of litigious right, as decided by the district court.

The judgment appealed from is, therefore, affirmed with costs.

No. 6923.

SEVIN & GOURDAIN, IN LIQUIDATION, VS. THÉOGÈNE CAILLOUET.

There can be no valid pledge of a mortgage, or vendor's privilege, by mere agreement of parties to that effect, unaccompanied by an actual or symbolical delivery of possession.

Amendments of pleading will not be allowed during the trial of a case, when they will delay the trial, and change the issues.

Open accounts of merchants and factors for supplies furnished, and money advanced, are prescribed in three years.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie*, J.

Lewis Guion and *E. W. Blake* for plaintiff and appellants.

J. D. Moore and *Thomas A. Badeau* for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The plaintiffs were commission merchants in the city of New Orleans. The defendant resided in the parish of Lafourche, where

he was engaged in the year 1871 in planting, in partnership with J. K. Gourdain, a member of plaintiffs' firm at the time. It appears that the defendant had been furnishing the money used by his partnership, but that in the month of May it became necessary to arrange for advances of money and supplies for the year; that Gourdain was unable to furnish them, and that an arrangement was made by which his New Orleans firm agreed to make the necessary advances; but in order to enable them to do so that Caillouet gave his draft on them to his own order and by him indorsed for five thousand five hundred dollars payable on the first of January, 1872, with eight per cent interest from maturity, and at the same time, to secure the same to plaintiffs or any holder, executed a public act by which he declared that he did "*pledge* and give as collateral security a certain conventional mortgage, with vendor's lien and privilege, resulting from the sale by him to other parties of a certain sugar plantation in the parish of Lafourche, by act passed before J. K. Gourdain, the parish recorder, in January, 1860."

This draft was taken by the plaintiffs' firm, as was customary among commission merchants, with a view to its negotiation or use as a pledge or collateral security, in order to raise money with which to make the advances stipulated for. It was accepted and so used by them, and at its maturity, as they allege, was paid. They allege that the defendant became indebted to them "for moneys due and advanced during the year 1871," for the plantation worked by him and his partner, Gourdain, in the sum of six thousand three hundred and seventy-eight dollars and sixty-one cents, with eight per cent interest per annum thereon from the dates set forth and fully detailed in an account current accompanying this petition, "and that the before mentioned" draft and "pledge" were "executed *to guarantee*" the payment of this indebtedness. They ask for judgment for the full amount of their account, and for the sale of the mortgage and vendor's privilege claimed to have been pledged to satisfy the said indebtedness to the amount for which the draft was given, besides interest and five per cent attorney's fees as stipulated in the act of pledge. Under this state of facts we regard the present action, and indeed the plaintiffs themselves so treated it, as on an account current, into which the draft passed, was merged so soon as it was taken up by the plaintiffs. It is evident that the act of pledge, as it is termed, was designed to secure the draft and to give it currency and credit for the purpose of its negotiation so as to raise money and thus enable the plaintiffs to make the proposed advances. The draft was so used, and at its maturity was paid according to its tenor by the plaintiffs, the acceptors. The draft thus became extinct and with it the pledge or security, if, indeed, it amounted to so much.

The defendant denied all the allegations of the plaintiffs except the

signature of the draft and the execution of the notarial act of pledge of the mortgage and vendor's lien (which we may here remark was not offered in evidence), denied specially receiving any advances from plaintiffs and any indebtedness to them on account of either the draft or act of pledge, the obligations of which were conditional, and the condition had not happened; and sets up against them error, fraud, and want and failure of consideration. He avers further that they were given for the accommodation of the plaintiffs, and to enable them to raise funds to be loaned by them to their copartner, Gourdain, to aid him in his planting; that it was distinctly understood that the plaintiffs would take up the draft at its maturity, and cancel and return it to defendant, by whom it was so loaned to them as an accommodation; that respondent was not to be considered or held bound in the same, and that plaintiffs had frequently assured him that the draft was so taken up and canceled and respondent discharged therefrom. He further denies the existence, in any event, of any legal or valid pawn or pledge of the conventional mortgage, by reason of its not being susceptible of pledge or pawn, and by reason of there having been no delivery of possession. Defendant sets up a reconventional demand for over twenty thousand dollars, for money loaned plaintiffs, and crops of sugar and molasses shipped to and sold by them and not accounted for, and prays judgment rejecting their demand, and in his own favor, for the amount claimed in reconvention.

The notarial act professing to create the pledge to secure the draft recites that both are given for moneys, supplies, and provisions *furnished and to be furnished* to carry on and cultivate, during the year 1871, the plantation cultivated by the defendant and his partner, Gourdain, and contained the usual obligation on the part of both the partners to ship to the plaintiffs all the crop of sugar and molasses made on the place that year. The act was signed both by Caillouet and Gourdain. Clay Knoblock swears that he was present when the draft and notarial act of pledge were executed, and he is positive that they were given either for the accommodation of the plaintiffs, or of one of the partners of the firm, Gourdain; that he acted as the friend of both parties in this transaction and knew that Caillouet had furnished the money used so far to run the place; and that Gourdain often acknowledged that he was indebted to his commercial firm in the sum of about seven thousand dollars, of which the amount of this draft formed a part; and that he was, besides, indebted to his partner, Caillouet, to at least twenty-five hundred dollars, and was unable to pay him; another witness swears that Gourdain told him this was his debt; and the son of defendant swears that Sevin told him that the amount ought to be charged to Gourdain, but that he could not change his books. This is denied by

Sevin, as is also the substance of the defense set up. A clerk of the plaintiffs swears to the correctness of the account, but says he only knows it is correct because it is so on the books of the firm. The amount of $1498 21 only appears from the account to have been charged to the Scudday plantation, that worked by Caillouet and Gourdain; while on the thirtieth of May, 1871, that amount was transferred to the account of Caillouet and Gourdain, with whom the account was kept by Sevin and Gourdain from that date.

There is no allegation or proof that Caillouet assumed the payment of that amount, or that he is otherwise liable in any event than as a planting partner, in which capacity he is not sued. The account was not annexed or alleged to be annexed to or made part of the petition, the allegation of which is, as we have seen, that "the defendant became indebted to plaintiffs for moneys due and advanced during the year 1871." The defendant's counsel asked that the plaintiffs be confined to the proof of cash advances, and the court so ordered. His counsel excepted to this ruling, and offered to amend the petition instanter, while the trial was going on, so as to make the allegation conform to the account, which included many other charges besides cash advanced. We think the court did not err in refusing the amendment under the circumstances and at the time it was asked. It was matter of substance, would have delayed the cause and changed the issues. We are not prepared to say that the plaintiffs should not have been restricted to the proof of cash advances only. In point of fact they were, however, allowed to introduce their account current, and proof of its correctness, besides proof of the other facts alleged by them in regard to the draft and act of pledge, as well as to negative the defendant's answer and demand, so far as their evidence would enable them to do so, as indeed they did in answer to interrogations on facts and articles propounded by defendant.

Their own account and the evidence *aliunde* show the reception of a large quantity of sugar and molasses, with the proceeds of which the account is credited. We think they have not sufficiently established, by a preponderance of evidence, the alleged indebtedness of defendant, Caillouet, to them, as it was incumbent upon them to do, while there is evidence in the record which would go far to make out a substantial defense as set up. The probabilities would seem to be that the present defendant is sought to be made liable for an indebtedness which, if it existed at all, existed against their own copartner, Gourdain, for whose accommodation the draft and act of pledge were executed; and that they ceased to exist or be of force against this defendant when the draft was taken up. At all events, whatever rights were conferred by that act,

in regard to the mortgage and vendor's privilege, their sale could not be decreed, as prayed for.

There was certainly no delivery of possession, no valid pledge (see 7 An. 221), and they, from their very nature, were themselves merely accessory to a principal obligation which they were intended to secure, and which was neither pledged nor transferred, even as collateral security. The account offered in evidence is not the individual account of the defendant, nor alleged nor proved to have been assumed by him. It is neither alleged upon as, nor proved to have been, an account stated or acknowledged. The suit is for moneys advanced and due during the year 1871, while the citation was only served upon the defendant on the thirtieth of December, 1876, a period nearly sufficient to prescribe even the draft, and of course more than sufficient to prescribe against an account for moneys advanced by and due to merchants. The prescription of three years is pleaded in this court. It is sustained by the evidence, independent of the other defenses set up, and we have not been asked to remand the cause on that issue. The district judge thought that the defendant was liable for $60 12½, as his half of the indebtedness of his planting firm, after allowing the credits shown in the account, and gave judgment accordingly. He further gave judgment of nonsuit as to that part of plaintiffs' demand for supplies and moneys advanced prior to January, 1871. The defendant asks that the judgment be amended so as to make it absolute against the plaintiffs. The credits on the face of the account and the evidence offered by the defendant were properly considered by the district judge in determining the question of the fact and amount of defendant's liability, but the reconventional demand does not seem to have been otherwise considered, nor is it passed upon by the judgment. No complaint is, however, made here on that score, and as to that feature of the case we think no injustice appears to have resulted; the items covered by it for sugar and molasses sold are the same credited in plaintiffs' account. The view we have taken of this case renders unnecessary the consideration of the various questions raised by other bills of exception in the record.

For the reasons assigned it is ordered, adjudged, and decreed that the judgment of the court below be and it is avoided and reversed, that the defendant's plea of prescription be sustained, and that plaintiffs' demand be rejected, with costs of both courts to be paid by them, with reservation, however, of any right the plaintiffs may have as to the other items of account than cash advances, as not in issue in this case.

No. 6997.

SILAS H. COOPER AND WIFE VS. JNO. T. RHODES.

The emancipation of a minor qualifies him to become a surety on an appeal bond.

The parish court has jurisdiction to emancipate a minor, even when the minor is the owner of property worth more than $500.

It is not necessary that the sheriff should call on the principal on an appeal bond to point out property, in order to hold the surety on the bond, when it appears from the sheriff's return that the principal, after diligent search and inquiry, could not be found.

When it appears that the principals on an appeal bond own no property, and that the creditor has taken every reasonable step to exact payment from them, the liability of the surety on the bond will become fixed.

The surety on an appeal bond is liable for the full amount of whatever judgment the Supreme Court may render, without regard to the amount of the judgment appealed from.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *J. G. White*, special judge.

M. Ryan and *C. E. Fritz* for defendant and appellant.

Bowman & Hunter for plaintiffs.

The opinion of the court was delivered by

DEBLANC, J. Silas H. Cooper and wife brought suit in the parish of Rapides against Samuel C. Cappel et als, and obtained against them—in the district court—a judgment for one thousand dollars. That judgment was—by the Supreme Court, increased to three thousand dollars, and—on two executions thereon issued—the sheriff's returns show:

That of the sheriff of Rapides, "that he called on all the defendants, except J. D. Bass, who had left the parish; that they, failing to pay or point out property, he demanded of the plaintiffs in execution that they should point out property of the defendants, when they declared that they knew of none; he then demanded of J. T. Rhodes, the security on the appeal bond furnished in the case finally decided by this court, and the defendant in this suit, that he should point out property of the defendants in execution, and he declared that he knew of none. He held the writ for nearly seventy days and, it being about to expire, he returned it."

That of the sheriff of Avoyelles, "that he called on Samuel C. Cappel and securities to point out property liable to seizure and the said defendant and securities failing to point out any property, and after diligent search and inquiry, and not having found any property of defendant, Samuel C. Cappel, principal, and K. B. Mathews, Joseph D. Bass, Rafe Amos and Zedo Pierre, as securities, he returned the writ not executed."

Rhodes was the surety of Cappel, Mathews, Bass, Amos and Pierre, on a bond of fifteen hundred dollars furnished by them to obtain a suspensive appeal of the judgment of one thousand dollars rendered

against them in the parish of Rapides, and which—as already stated—was, by this court, increased to three thousand dollars. In law, and by the terms of his bond, the condition of Rhodes' obligation, as a surety, was that—unless his principals satisfied any judgment that might be rendered against them by the appellate court, he would be liable for the sum of fifteen hundred dollars.

The judgment rendered on appeal was not satisfied. Two executions were thereon issued—one directed to the sheriff of Rapides, who—writ in hand—called on every one of the principals on the appeal bond, except Bass who had left said parish, and—to his request to point out property on which to levy to satisfy said writ—they answered that they had neither property nor money. Rhodes—the surety—and the plaintiffs in this case were then called upon, and they answered that they knew of no property belonging to the principals. The other execution was directed to the sheriff of Avoyelles, and he, after diligent search and inquiry, could not discover any property of Bass and the other principals, four of whom he refers to as being the sureties of the fifth one. That error is not important and does not vitiate the balance of his return, from which we infer that he may have called on Bass.

After those fruitless efforts to recover the amount of their judgment, plaintiffs brought suit against Rhodes, the surety on the appeal bond—who—in his answer to their action—alleges and contends:

1. That he was a minor when he signed said bond, and is in nowise indebted to plaintiffs.

2. That the sheriff did not call upon Bass, or any one, to point out property to be seized; that, if it had been necessary, he could have shown that Bass is in the State, not many miles from the place where he lived the year before.

3. That, if indebted to plaintiffs, it is for only the judgment of the district court, and the costs of prosecuting the suit to final judgment in the Supreme Court.

The case was tried on those issues; the district court rendered judgment in favor of plaintiffs for fifteen hundred dollars, with legal interest from judicial demand, and Rhodes has appealed.

Of the several grounds urged by him, not one is tenable.

When he signed the bond sued upon, he was emancipated and—by a regular decree of the parish court—had been relieved of all the disabilities which attach to minors. The fact alleged in his counsel's brief, that his property was then worth more than five hundred dollars, did not divest that court of the power to emancipate him. In his application to that effect, only two questions were presented: Was he above the age of eighteen years and fully capable of managing his own affairs? This, the parish court could and did decide.

Bass was not called upon to point out any property to be seized in Rapides, because—as shown by the return of the sheriff of that parish, he had left that locality. Rhodes knew where he was, but could not point out any property belonging to him, nor was any found—after diligent search and inquiry—in Rapides and Avoyelles.

The Code of Practice provides—not that the sheriff *shall*, but that he *may* call upon the party against whom the execution is awarded to point out to him property which he may possess in the parish. That course is eminently proper and should be invariably pursued, whenever said party is present or represented in the parish wherein the judgment has been rendered against him. C. P. 726.

In this case, the facts that the principals on the bond own no property, and that the creditors have taken every reasonable step to enforce against them the payment of their judgment, have not been successfully traversed, and stand—not merely uncontradicted—but almost admitted by the surety's answer to the sheriff of Rapides. Under these circumstances, the right of action of those creditors against the surety on the bond had certainly accrued. C. P. 596. 8 A. 141. 13 A. 264.

The last ground urged by defendant is that—if liable on the bond, he can be held liable but for one thousand dollars, the amount of the judgment of the district court. To sustain that position, he relies on that part of article 575 of the C. P. which refers to only the judgment appealed from, and provides for its payment by the security, in case it be affirmed by the appellate court, and argues that article 579 which provides for the satisfaction of whatever judgment that may be rendered against the appellant, is merely indicative of the form of the bond to be prepared by the clerk.

"It is obvious—said this court—that the language of article 579 is broader than that of article 575. The latter speaks of the original judgment as the test of the surety's liability; but the former points to the judgment which the appellate tribunal may render against the appellant. Its language is very large and comprehensive, and covers not the mere case of affirmance, but whatever judgment may be rendered against the appellant. In estimating the comparative force of those articles, we have no hesitation in saying that article 579 is entitled to the greater consideration." It more particularly designates the requisites of the bond, and is—in fact—exclusively directed to that object."

3d A. p. 38-39. 5 A. 523.

There is no error in the judgment of the lower court, but we can not treat as absolutely frivolous the appeal taken therefrom and allow the damages claimed by plaintiffs.

It is, therefore, ordered, adjudged and decreed that said judgment is affirmed with costs.

The Chief Justice declined taking any part in the decision of this cause.

No. 7078.

THE STATE VS. JACOB AND DAVID GUNTER.

When a bill of exception to a ruling of the judge in a criminal trial contains a statement of facts in opposition to his own recollection, and his notes of evidence, he is justified in refusing to sign the bill, and to hear any evidence to contradict his own recollection and notes.

Whether the judge below has, or has not improperly refused to sign a bill of exception, is a question which can only be inquired into, when brought before this court in a *mandamus* proceeding.

A prisoner has no right, under the law, to a service on him of a list of the talesmen summoned.

The confession of a prisoner, if received in evidence, must be received as a whole: but it is for the jury to determine whether the whole of it, or any part of it is entitled to credit; and if so, how much credit.

To offset his declarations to one person, offered in evidence by the State, the accused has no right to introduce in evidence other declarations of his, made to other persons, unless they were made *at the same time*, as those offered by the State.

While this court will review, and consider the evidence taken on a motion for a new trial in a criminal case if brought here by bills of exception, or by affidavits appended to the motion, yet it can not be said that the lower court erred, when such evidence was orally produced, in refusing to have it reduced to writing.

The charge of the lower court and the facts urged as grounds for a new trial can be brought before this court in no other way than by bills of exception.

In the interest of justice, this court will sometimes grant a new trial in a criminal case, when no precedent for it exists.

APPEAL from the Ninth Judicial District Court, parish of Vernon. *Blackman*, J.

H. N. Ogden, Attorney General, for the State.

Robert A. Hunter for defendant.

The opinion of the court was delivered by

EGAN, J. The defendants were indicted for murder, found guilty of manslaughter, and sentenced, respectively, to six and three years confinement at hard labor in the Penitentiary. After an ineffectual motion for new trial they have appealed.

The case is before us on several bills of exception, the first of which is to the refusal of the judge to sign a bill of exceptions prepared by the counsel for the accused in regard to one of the jurors who was sworn to try the case after being examined on his *voir dire*, and to the refusal of the judge when applied to to sign the bill, to hear evidence of defendant's counsel as to what his ruling had been, and what were the answers of the juror upon which that ruling was based. The judge refused to sign the bill as drawn by counsel, for the reason, as stated by him, that the statements of what the juror had sworn on his *voir dire*, contained in it, did not accord with his recollection of the facts, and that his uniform ruling had been other than as stated by counsel. The judge

refused to hear the evidence offered in support of the bill as drawn, which was the testimony of three counsel for the accused, for the reason as stated by him that (he) "I would not hear testimony to contradict my own notes and recollections of the facts." The judge did not err in refusing to hear the evidence offered to contradict himself and his own recollection and notes of the facts as stated by him. We know and have been referred to no precedent for so extraordinary a proposition, and one so subversive of all the proprieties of judicial proceeding and the discipline and authority of courts and judges. As to whether the judge properly refused to sign the bill of exceptions as drawn by counsel, we can not determine on a bill of exceptions to such refusal. Where a judge refuses to sign a bill of exceptions properly taken, the proper remedy is by mandamus. C. P. 899; 3 M. 714; 13 An. 484.

The second bill of exceptions is to the refusal of the judge on the trial after the regular panel had been exhausted and tales jurors summoned by order of the court to have a list of the tales jurors served upon the accused as requested by their counsel. The court did not err. The prisoners had no right under the law to service of a list of talesmen summoned. See State vs. Reeves, 11 An. 685; 14 An. 461; same, 651.

The third bill of exceptions is to the refusal of the judge at the request of the counsel for the accused to charge the jury after the State had offered evidence of a confession of the accused in regard to the homicide "that the confession of the accused having been elicited by the State the jury must take the whole confession together; that they could not admit a part without receiving the whole, and that the State was bound by the confession as it had been brought out by the State."

No bill was taken, nor does it appear that the court received a part of the confession and rejected the remainder. We therefore understand, and from the reasons given by the judge for his ruling, that it related entirely to the effect and not the admissibility of the confession. He says "the court refused the charge requested for the following reasons: The court charged the jury that they were the judges of the law and the evidence; that they could believe the confession of the prisoner as true or false; that they had the right to believe a part and reject the other if they saw fit, or reject the whole; the truthfulness or falsity of all evidence, and the weight to be attached to it, being left exclusively to them. The charge asked by defendants' counsel is not law."

Greenleaf says on this subject, vol. 1, sec. 201: "But though the whole of what he, the person making the admission, said at the same time and relating to the same subject must be given in evidence—as we understand was done in this case—yet it does not follow that all parts of the statement are equally worthy of credit; but it is for the jury to consider under all the circumstances how much of the whole statement they

deem worthy of belief, including as well the facts asserted by the party in his own favor as those working against him." See to similar effect State vs. Wedmeyer, 11 An. 49; State vs. Bruyer, 14 An. 461.

The court did not err in refusing the charge asked for, as we understand the facts presented by the bill.

The fourth bill of exceptions is to the refusal of the judge to receive the evidence of a witness offered by the accused to prove declarations or confessions of one of the accused, "about the same time," to other persons than the witness Rhames, who had given evidence for the State of certain confessions of the same party in regard to the homicide. The accused had a right to have offered the whole of the confessions made at the *same time* with those offered by the State, whether made to the same person or not, if we can conceive of such a case, but he had no right to offer on his own behalf declarations made by him in his own favor at a different time from those offered by the State, no matter to whom made. No connection is shown between the confessions or admissions received and those rejected.

The court did not err in refusing to receive the evidence. The record is silent upon the subject, but it has been stated at bar by the counsel for the accused that he was permitted at his own request to await the close of the trial before presenting bills of exception on points reserved during its progress. If this be so, it accounts very naturally for any difference in regard to them between judge and counsel, and only illustrates anew the propriety of what this court has often said, that bills should be presented without unnecessary delay, while the facts are fresh in the memory of both judge and counsel. See 5 An. 24. This is especially true in cases of so grave a character as the present, and it is not for us to presume that a judge whose duty it is to preside impartially and to accord to the accused and his counsel every right given them by the law has failed or refused to do so.

The fifth bill of exceptions is to the refusal of the judge to have taken down in writing for use upon appeal testimony offered by the accused to substantiate the facts alleged as grounds for new trial. The judge says he refused to comply with the request of counsel for the reason that the evidence in criminal cases is not required to be reduced to writing, as the Supreme Court has appellate jurisdiction in such cases on questions of law only. There is no question of the general correctness of this proposition, but its application is usually to the evidence given upon the trial on the merits of the case, which, of course, under the Constitution, and as we have often held, can not be considered by this court, even if brought up in the transcript. It often happens, however, that we have occasion to review and do review the evidence, and the action of the court below upon it, given on matters incidental to the

trial, with a view to ascertaining whether or not that court has ruled correctly as to matters of law based upon the facts proved. As, for instance, in regard to the competency of jurors or witnesses, or the propriety of challenges to jurors. The case at bar is a novel one, and while the judge is doubtless right in saying that evidence in criminal cases is not required to be taken down in writing as in civil cases, it is to be regretted that, as he thought proper to hear evidence in support of the motion for new trial, we are not afforded, by a statement of the facts upon which he ruled, to consider how far he ruled correctly.

The better practice is to append to the motion for new trial evidence in the shape of supporting affidavits which come up with the motion itself; otherwise, it is only by bills of exception that the facts upon which the court below ruled in incidental matters in criminal cases come before us. The bill under consideration does not present the evidence referred to, and we are therefore unable to pass upon or consider it, and thus to afford the accused the benefit of this bill of exception. The motion for new trial itself is based upon the discovery since the trial of important and material evidence, first, affecting the competency of one of the jurors who tried the case, and contradicting his statements when sworn on his *voir dire;* and, second, in regard to statements made prior to the trial by the principal witnesses for the State, in regard to the material facts and their means of knowledge of them, directly contradicting their evidence as given on the trial. Next, upon the ground of alleged misconduct of the district attorney, in giving to the jury and permitting them to take with them to their room, without the knowledge or consent of the counsel for the accused or of the court, and specially inviting the attention of the jury to certain law books with passages marked, with a view of influencing their verdict; matters which were not known to the accused till some time after the jury had retired to their room. Misconduct on the part of the jury, based upon the same matter, is also alleged. The motion for new trial further sets forth the fact that the judge gave certain charges to the jury alleged to be erroneous, which are stated in and as part of the motion; and also the general ground that the verdict is contrary to the law and the evidence.

None of the grounds for new trial are presented for our consideration by bills of exception. If the district attorney did so hand law books with marked passages to the jury for use in their room, it was extremely irregular and improper, no matter how intended. We are, therefore, compelled to remind counsel that *the charge* of the court, whether in a criminal or civil case, can not be proved by witnesses, much less by the affidavit of the accused for new trial, but can only be brought before this court for review through a bill of exceptions—see 8 R. 529,

and 571; 10 M. 66; State vs. McClanahan, 9 An. 210—and that facts appearing as one of the grounds in a motion for new trial will not supply the place of a bill of exceptions. See State vs. Romero, 5 An. 24. The counsel should have taken a bill stating the facts of the conduct on the part of the district attorney and the jury complained of. Without it, they are not properly before us, and we can not assume, without bills of exception, either the existence of those facts, or that the court gave the charges complained of. It is, therefore, unnecessary, as it would be improper, for us to pass upon their correctness or incorrectness. Our attention has been invited to a statement contained in the certificate of the clerk at the close of the transcript, that the evidence of certain witnesses taken on a preliminary trial of the accused, and which was offered in evidence on the trial in the court below, was handed to the jury by order of the court and never returned by them. This statement is made as a reason for not including this written evidence in the transcript. It was neither necessary nor proper that it should be so included, and no bill of exceptions was taken to its being handed to the jury on their retirement, so that the principles just referred to in regard to statements of fact in the motion for new trial apply equally to this also. We will, however, take occasion, in this connection, to remark that if such a thing was done, it is, to say the least, unusual, and that we are not prepared to apply to such a state of facts as that presented by the clerk's statement the principle which, under the peculiar circumstances of that case, seems to have been announced in the State vs. Bradley, 6 An. 556, where the jury improperly took with them to their room a paper offered in evidence, especially as the court then immediately instructed the jury to disregard it. Such partial reminder of the facts of cases out of the presence of court or counsel would be extremely dangerous, especially as juries are now constituted.

While, however, we have applied the principles of well settled law to the various matters reviewed and discussed by us in detail, on the whole case, we are not left without an impression of the possibility that there may have been irregularities calculated to influence the result of the trial unfavorably to the accused, and that his counsel may have mistaken the manner of presenting them for the consideration of this court. As, therefore, less injury would be done to the State by our granting another trial than, possibly, to the accused by refusing it, and as this court has held new trials may sometimes be granted though no precedent exist for them,

It is ordered that the verdict and sentence appealed from be and they are avoided and set aside, and the case remanded to be proceeded with according to law.

No. 5956.

THE CITY OF NEW ORLEANS VS. JOHN DAVIDSON ET AL.

A debt due to a municipal corporation for *taxes*, can not be offset, or compensated, by any debt due by the corporation. Thus the tax due for one year, can not be compensated by an overpayment of taxes made by the debtor the year previous.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Sam. P. Blanc for plaintiff and appellee.

Ogden & Hill for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. Several suits of the City of New Orleans against delinquent taxpayers are here cumulated without objection. The collection of the taxes of 1874 was resisted on various grounds, of which one only is now insisted on: viz that each defendant is entitled to offset any tax which he may owe the City, by the sum he paid to its tax collectors for taxes of 1870 in excess of two per centum on the assessed value of his property.

In 1870 the City assessed and collected a tax of two and three eighths per cent. on the assessed value of property. The act of March 16, 1870 restricted cities and municipal corporations from levying any tax for any purpose exceeding two per centum on that value. Acts 1870, ex. sess. p. 130. The defendant paid the whole assessed tax of 1870, and therefore, as they allege, paid three eighths of one per cent. more than the City should have demanded. In these cases, this excess amounted to $1,641.36. The defendants plead that sum in compensation of the taxes of 1874.

A tax is not a debt in the usual and ordinary sense of that word. It is not a contract between two parties, but the imposition of a tax is the positive act of the government, binding upon the inhabitants, and does not require their individual or personal consent to enable it to be enforced. Taxes are not demands against which a set-off is admissible, says Cooley. Taxation, 13 and authorities cited in note. They are to be regarded not as a debt, but as a contribution required from the citizen for the support of government. Union Co. v. Bordelon, 7 Annual, 192. Considerations of public policy require that a tax of one year should not be compensated by an overpayment of a previous year. The taxes of each year are laid to meet the exigencies of that year. If they could be reduced by a deduction of such sums as had been already wrongfully demanded and paid, the revenues requisite for the support of government might be diminished so largely as to occasion public

detriment. But outside of this public policy, as a matter of law, taxes are not such demands as admit of a plea in compensation.

This does not of course touch the question of the right of the property owner, who has paid to the City a tax illegally exacted of him, to sue for such sum as was wrongfully paid. We are here concerned only with his alleged right to compel the City to compensate her tax of one year by an overpayment of a previous year, and this is condemned both by law and public policy.

Judgments affirmed.

No. 7009.

MRS. CAROLINE FORRESTER ET AL. VS. MOSES MANN.

The declaration made by a wife and her husband in a written contract that a certain plantation was her property, is not invalidated by the fact that she was a married woman.

Contracts made by a married woman personally, or by her authorized agent, for supplies and overseer's wages for the benefit of her separate plantation are, if recorded, binding on the crops grown on the plantation that year.

One who has formed a valid contract can not claim a release from its obligations, on account of an error of judgment, or ignorance of the law regulating the rights and obligations of married women, in this State, when it appears that he had another motive for making the contract, besides the error of law, and no fraud, or bad faith is shown on either side.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist*, J.

Wickliffe & Fisher for plaintiffs and appellants.

W. W. Leake for defendant and appellee.

The opinion of the court was delivered by

EGAN, J. W. W. Forrester was employed and acted as overseer on the plantation of Mrs. Richardson in the year 1875 at a salary of one thousand dollars. He also sold to her agent, Smith, for the use of the place the same year certain necessary supplies of corn, fodder, seed cane, etc., amounting to $3639. Both contracts were in writing, and recorded regularly, and the amounts were stipulated to be paid as privileged charges out of the crops of the year. A few days before they became due Forrester transferred these claims to the defendant Mann in consideration of a mortgage note of Smith for $2500, besides interest accrued and to accrue, and $1840, which Mann undertook and agreed to pay him by the first of January, 1876. Mann, who was a merchant, also advanced to Mrs. Richardson for the use of the place that year to the amount of several thousand dollars under contract with the same agent Smith, who it seems managed every thing connected with the plantation,

crops, etc., and made, and was fully authorized to make, all contracts and to enter into all obligations in relation to it by virtue of a written power of attorney containing the fullest and most minute general and special powers which could be conferred under the law. Mann received and sold the crops of the year and applied the proceeds to the payment of his account, which was kept in the name of Smith, agent, leaving a balance due him of only $195 75. In this account was included a charge of $1000 for the wages of Forrester as overseer. It appears, and is admitted, that Mann paid to Forrester $918 77 of the $1840 agreed to be paid by the written contract between them evidencing the transfer of Forrester's privileged claims against Mrs. Richardson and the crops raised on her plantation in 1875, to obtain the undivided and undisputed control of which seems to have been his object in purchasing those claims from Forrester. There is some evidence that the latter threatened to seize the crops, unless he was paid, and it is not unreasonable or improbable to suppose that he would have done so but for the agreement with Mann. Mann denies his knowledge of these threats, or that they were made to him, but we do not consider that fact very material. Forrester is dead, and Mann alone is left to testify as to the motives of their agreement. We think, however, they sufficiently appear from the attendant circumstances, and that they were that Mann might without molestation or hindrance control all the crops of the year. The plaintiffs, widow and heirs of Forrester, sued to recove rthe balance due by Mann under that contract, which is shown by the accounts of Mann himself rendered to Forrester, who also dealt with him, to be $921 23. The defendant sets up error and failure of consideration, and a reconventional demand of $2400 on account of the note of Smith transferred to and alleged by him to have been collected by Forrester and moneys paid to him under the contract. The error and want of consideration are based upon the alleged fact that Mrs. Richardson was a married woman at the time the contract for overseer's wages and the purchase of supplies from him was entered into by Smith as her agent; that the plantation did not belong to her; that the agent had no authority to bind her, and that the consideration did not inure to her benefit. It is further set up that defendant had sued her on the claim for supplies furnished by Forrester, and judgment was rendered against him whereby the obligations of warranty in the transfer became exigible from the latter and his heirs. The fullest possible authority, as we have already remarked, was vested in Smith by a written power of attorney executed by Mrs. Richardson with the authorization of her husband with especial reference also to the making just such purchases and contracts. In this power of attorney, which relates specially to the management and control of the plantation, crops, etc., it is recited that Mrs. Richardson had

become the purchaser and owner of the Island plantation, in this parish, at sheriff's sale, this day made, which said property is fully described in the sheriff's transfer. This is the plantation in question. There is no other evidence on the subject; there is nothing in the record to show that she was not, as she and her husband asserted, the owner, unless it may be said because she was a married woman in 1875. We think this is a *non sequitur*. It needs no argument to show that a married woman may own, control, and contract for the benefit of separate property. This property was managed and controlled by her agent and in her name, especially to the knowledge of this defendant as of Forrester, as is shown by the fact that he himself credited and dealt with the same agent in that capacity and through him received, controlled, and appropriated to his own account the crops raised upon the plantation in 1875 by virtue of no other or greater right than those with which Forrester was clothed, and, indeed, as we have seen, actually collected and received through the proceeds of the crops made on this plantation, the amount of the overseer's wages by virtue of his transfer from Forrester. It is further shown that he resided in the neighborhood and was on the plantation while Forrester was actually rendering the services; and it is quite evident that he was as well aware of all the facts as Forrester himself, as to the conduct of whom there is not the slightest shadow of fraud or concealment in any thing, but, on the contrary, the most perfect good faith. It is not pretended or shown either that Forrester did not render the services or furnish the supplies which constituted the consideration for the obligations transferred to Mann, nor is their privileged character questioned. On the contrary, both are established. It is manifest that at the time of the transfer Mann expected to collect the amount of both claims out of the proceeds of the crops, and that it is only because they did not produce enough that the present pretext of error is set up. If there was error, it was of judgment, or at most of law, as to the title to the property standing in the name of Mrs. Richardson, and managed for her by an agent of her own selection and creation.

The defendant can not plead ignorance of the law regulating the rights and obligations of married women in Louisiana. In his position it was his business, and, indeed, we must presume that he was, in fact, much more familiar with the law on that subject than Forrester. It is also evident that whether a personal obligation rested on Mrs. Richardson or not, an obligation and privilege did exist on the crops in favor of the claims of Forrester so transferred to the defendant, and, indeed, it was actually so decreed in the very suit against her by the defendant which is offered here in support of his defense and reconventional demand. It is then evident that his desire to control the privileged

claims, and to avoid a conflict of claims was at least one of the causes, and it seems to us the principal cause, of the contract, and not the error of law only, if indeed it existed, as we think is not sufficiently shown in this record. Domat says, vol. 1, sec. 1240: "If the error of law has not been the only cause of the covenant, and he who has done himself some prejudice may have had some other motive, the error will not be sufficient to annul the contract." Our own Civil Code, art. 1846, says: "Error in law as well as error in fact invalidates a contract *when such error is its only or principal cause*, subject to the following modifications and restrictions," among which is enumerated "a contract made for the purpose of avoiding litigation," which it is declared "can not be rescinded for error of law." Judge Story in his Equity Jurisprudence, vol. 1, s. 149, says: "Where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment in regard to extrinsic circumstances, equity will not relieve," and "the like principle applies to all other cases where the parties act upon their own judgment in matters mutually open to them." In like manner he further says: "Where the fact is equally unknown to both parties; or where each has equal and adequate means of information; *or where the fact is doubtful from its own nature; in every such case where the parties have acted with entire good faith*, equity will not interpose, for in such cases the equity is decreed equal between the parties." And again he says: "The like rule will apply to all cases of sale of real or personal estates made in good faith, where material circumstances affecting the value are equally unknown to both parties;" s. 150, same volume. In the next section he announces the general rule to be that "mistake or ignorance of facts is a proper subject of relief only where it is a material ingredient in the contract, and disappoints the intention of the parties by a mutual error, or where it is inconsistent with good faith. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*." The principles of our own law do not materially vary from those thus announced by these two eminent authors, except as we have seen that with us the error must have been as to the entire or principal part of the consideration, even where it is as to matters of law. The same rule applies where the error is as to matters of fact. See C. C. art. 1825; see, also, C. C. art. 1845; while art. 1826, C. C., provides that "no error in the motive can invalidate a contract unless the other party was apprised that it was the principal cause of the agreement, or unless, from the nature of the transaction, it must be presumed that he knew it." No such proof is

made in the present case, nor does any such presumption arise in a transaction for the transfer of rights which it is well known derive their chief value and security from their privilege upon the crops of the year. Had it not been so in this instance, who would suppose that the defendant would have exchanged for the claims of Forrester his own personal obligation and a mortgage note which he alleges not only to have been collectable, but actually collected, and both together amounting to very nearly or quite the sum of the claim purchased from Forrester. But, again, not only did the defendant actually collect the $1000 for overseer's wages out of the crops of the year, but he was allowed by the judgment of the court in the suit by himself against Mrs. Richardson a privilege upon all the property sequestered in that case, and an order for its sale to pay the amount of the other claim transferred, although the court denied him a personal judgment against Mrs. Richardson, the propriety of which denial may well be questioned if it rested upon no other foundation than the facts in the case at bar; upon which facts, at all events, must rest the rights of the defendant here.

Now it nowhere appears, and it was the duty of the defendant to have shown the amount realized by him under the judgment in question; *non constat* but that it may have paid the entire debt; at all events, the evidence was in his power and he should have produced it. The fact that he has not done so by no means operates in his favor. But aside from this, the account of the defendant discloses many and considerable items which are not shown to have been privileged charges against the crops, and some of which certainly are not; such as payment of premiums on life policies, taxes, whisky, table-cloths, cheese and crackers, braids, ribbon, corsets, fine-tooth combs, cash paid on Canfield note, and many charges of "sundry merchandise," without stating its character, while some of the largest items of account, amounting to more than $500, are proved by the testimony of one witness almost if not quite unsupported; and although the defendant himself was a witness, he only swore that Scott, Mrs. Richardson's agent, made no objection to the account. This might do as between them, but certainly not as against the present plaintiffs. Take off, then, the amount of the items not shown to be privileged on the crop, and the defendant received, if not quite enough, at least a very considerable sum, which should have been applied for that reason to the claim obtained from Forrester. Again, were the whole amount privileged, Forrester's claims were at least of equal privilege; see C. C. s. 217, and it was the duty of Mann to have so treated them, and applied the proceeds of the crops; and if, in addition, we deduct from defendant's account against Scott, agent, the items not privileged, or not shown to be so, without going further the full claims of Forrester would be paid

from the proceeds of the crop by imputation of law; and no agreement or imputation, tacit or other, and no other is here claimed between Scott and Mann, could affect the rights of Forrester or his widow and heirs. But from all the facts of the case, as developed in this record, we not only think that it was the duty of Mann to have applied the proceeds of the crops to the Forrester claims for the reasons already stated, but also for the further reason that by his purchase of them he had deprived Forrester of the power and opportunity to protect himself and enforce at least his privileges, as he would no doubt have done; and because we think it is evident that Mann bound himself absolutely and with his eyes open, and without any deceit or concealment of any fact by Forrester, to pay the price stipulated; and if there was any error, it was the result of his own miscalculation as to the amount of the crop, or its proceeds, of which he has not offered any other evidence than his own statements of account, the correctness of the charges in which, as a whole, is not otherwise shown than by the statement that Scott made no objection to the account as rendered, although some of the items are sworn to by one of the witnesses, and the defendant swears that he received no other sugars or molasses of the crop than those credited in the account.

But, again, the defendant's recorded contract to furnish supplies was only to the extent of $5000, less than half the amount of his account; to which may be added a note of Mann, Fischer & Co. for $1911 20, consideration not shown at all, while the same act or instrument contains an express stipulation for the payment, out of the crops, of the Forrester note for supplies furnished, amounting to $3799, and as will be seen by reference to the note itself, which was of record the same day, bearing eight per cent interest from November 1, 1875. While, as we have already seen, the balance against Scott, agent, was only $195 75 on an account with defendant aggregating within a fraction of $13,000, certainly the defendant could not claim to be paid under any view, and even were Forrester's privileges not concurrent, as they were, beyond his registry before paying the Forrester claims. This would pay the latter claims entire and leave a margin still applicable to the defendant's unregistered claim.

We will dismiss the case with the remark that the judgment disallowing the defendant a personal judgment against Mrs. Richardson, and which is claimed to have operated a breach of warranty as against Forrester, was rendered on the twenty-eighth of March, 1876; and that subsequently, as late as the fourteenth of June, 1876, defendant, who had previously rendered an account showing a balance due Forrester of $945 23, rendered another statement to the same effect, referring to that already rendered, and only deducting from that amount two items

amounting to $24, but still stating a balance due of $921 23. This was at least singular, if there was any thing in his defense to the present action, which was filed on the twenty-ninth of May, 1877. This admission of indebtedness at least could hardly be said to have been made in error or in ignorance of the facts, and neither the defendant nor any other witness has testified that it was so made. It is unnecessary to pass upon the plaintiffs' plea of prescription filed in this court to the reconventional demand, as the latter has no foundation.

The judgment appealed from was erroneous, and is therefore avoided and reversed, and it is now decreed that defendant's demand in reconvention be rejected, and that plaintiffs do have and recover from defendant, Moses Mann, nine hundred and twenty-one dollars and twenty-three cents, with eight per cent interest from November 1, 1875, and costs of both courts.

No. 6601.

EDWARD MEYER VS. G. DEFFARGE. H. MEHNERT, GARNISHEE.

In a contest between a judgment creditor and a garnishee, the fact that there is no note of evidence, assignment of error, or agreed statement of facts, will not justify a dismissal of the appeal, when the record contains the answers of the garnishee to the interrogatories served on him, the allegation of the creditor himself of the existence of the writ of *fieri facias*, and other matters of proof, which though not specifically noted as evidence, yet taken together afford sufficient basis for an intelligent judgment.

Documents annexed to, and incorporated with the answers filed by a garnishee are thereby properly in evidence, as part of his answers.

Answers of a garnishee are a part of the pleadings, and are before the court without the necessity of being formally offered in evidence.

Where a garnishee sets up in his answers, that the judgment debtor's one third interest in the property seized in the garnishee's hands was sold and transferred to a third person before interrogatories were served on him, a subsequent judgment annulling the sale of the seized property as simulated, and fraudulent, will not render the garnishee liable for the whole amount of the judgment creditor's debt, but only for the value of the debtor's interest in the seized property.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

F. W. Baker and *Hornor & Benedict* for plaintiff and appellee.

C. E. Schmidt and *Cotton & Levy* for garnishee and appellant.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by SPENCER, J.

ON THE MOTION TO DISMISS.

EGAN, J. The plaintiff obtained judgment against his debtor, Deffarge, upon which a *fieri facias* was issued and Mehnert garnisheed

under it. He was called upon to answer, and did answer two successive sets of interrogatories annexed to two successive petitions. After his last answers were filed the plaintiff, owing to information conveyed in them, filed still another petition, all under color of and treating it as part of his proceedings in garnishment, by which he made the original defendant Deffarge, Mehnert, the garnishee, and one Roubi all parties defendant for the purpose of annulling and setting aside as simulated and fraudulent an assignment or transfer of all the interests and rights of Deffarge, the judgment debtor, in and to certain assets in the hands of Mehnert. Judgment was rendered accordingly in favor of the plaintiff setting aside the transfer to Roubi as simulated, and at the same time against the garnishee, Mehnert, who had set up this transfer as a shield, and whose answers had been traversed by the plaintiffs decreeing him to pay to the plaintiff the amount of his original debt and judgment with interest, costs, etc. From this judgment the present appeal was taken by Mehnert, the garnishee, only Deffarge having offered no defense, and Roubi having filed an answer admitting the simulation, while Mehnert answered disclaiming all knowledge of or participation in the collusion, fraud, and simulation charged to exist as between Deffarge and Roubi. No exception seems to have been taken to this very unusual conjoining of proceedings in garnishment with an action to annul and have declared simulated a transfer which stood in the path of the proceeding in garnishment, and however unusual and calculated to breed confusion, as it has done in this very novel case, we are not disposed to make for the parties exceptions which they have not chosen to make.

As to the garnishee, he can not complain of this manner of proceeding, as no right or interest of his has been affected, and he has no further concern than his own protection. Among the other novelties of the case is the fact that owing to peculiar circumstances attending it, and the death of the original counsel pending appeal, it was reinstated after having been dismissed on the motion of the plaintiff and appellee who has been allowed to file new and additional grounds to dismiss the appeal, which must be disposed of first, and to the proper understanding of which the foregoing statement of the case was necessary; and as the grounds taken in the original motion fall by reason of the filing under leave and order of this court of the additional papers and proceedings and a new and more complete and formal certificate of the clerk, the want of which were complained of, we shall proceed to consider the grounds of the second motion.

The first is "that the transcript is imperfect and incomplete by reason of the absence and failure to file within the delay originally given by the court the same documents, the absence of which was originally

complained of, as we have since allowed the appellant to bring up by *certiorari* and file the missing documents, and as upon an examination of the case we do not consider their production necessary to an adjudication of the case as between the plaintiff and garnishee under *fieri facias*, this ground is not well taken.

The second ground is that the record contains no note of evidence, assignment of errors, nor agreed statement of facts on the trial in the lower court upon which the judgment was based. In support of this ground we are referred to the case of Cooley vs. Broad, 29 An. 71. That was a case between original parties and not a proceeding in garnishment like the present, and under the facts of that case the decision was the inevitable result of well-settled law, and previous adjudications of this court, and while papers and documents appeared in that record of which there was no note, as evidence, we could take no account of them as such and had nothing to review in the absence of a statement of facts or assignment of errors.

In the case at bar, however, while there is no mere note of evidence or assignment of errors or any agreed statement of facts, we have in the record the answer of the garnishee to the interrogatories propounded to him, the allegation of the plaintiff himself (who makes the motion) of the existence of a writ of *fieri facias*, which also figures as part of the record of the original case, all of which has been filed upon the call and to meet the motion of the plaintiff himself, and finally we have the judgment of the court below decreeing and the answer of the transferee admitting the simulation and unreality of the transfer attached. Attached to *and as part* of the answers of the garnishee are several documents, including the simulated transfer itself, and which are thus as fully before the court as if each line and letter were, as indeed in fact and intendment of law they are, sworn to and written down as part of the answers of the garnishee. These answers did not require to be offered in evidence, although they furnished a basis for the action of the court. They are pleadings in the cause between the plaintiff and the garnishee, who files and is called upon to file no other pleadings. They are therefore before us also. It is unnecessary to add that the judgment decreeing the simulation being rendered at the instance of the plaintiff himself as part of and in connection with the garnishment proceeding did not require to be filed or noted in evidence any more than did the judicial admission of the fact of simulation contained in the answer of the transferee in the same case. All these together afford sufficient basis for an intelligent judgment in this class of cases, and though not noted as such furnish together sufficient evidence for the action of the court.

The motion to dismiss is therefore overruled.

ON THE MERITS.

We have thus discussed in detail this anomalous case, and it is only necessary to add on the merits that the garnishee has himself presented for our consideration a complete record, showing the plaintiff's right to proceed by garnishment process and the amount of his judgment debt; that the answers of the garnishee together with the traverse evidence show the existence of sufficient assets and funds in his hands or under his control to pay and satisfy its full amount, and that the judgment setting aside the simulated transfer of those assets and funds which was interposed by the garnishee as a shield against the plaintiff's demand leaves the garnishee without further excuse or defense. The judgment of the court below was against him and in favor of the plaintiff for the full amount of his judgment and interest against the original debtor, Deffarge, and costs of court. We think it did substantial justice under the facts presented to us.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be and it is affirmed with costs of both courts.

ON APPLICATION FOR REHEARING.

SPENCER, J. The garnishee was by our decree condemned absolutely to pay the amount of plaintiff's judgment against defendant, amounting in principal and interest to about $600. The record shows his possession of apparently good assets to amount of several thousand dollars and of $78 53 in money, in which defendant has an interest and ownership of one third. The garnishee complains of this absolute judgment, and we think he is entitled to relief from it as matter of law; though we think as matter of fact, and in view of the large amount of assets as compared to the amount of the judgment, no substantial injury could be sustained by him. The rehearing is granted.

ON REHEARING.

For the reasons stated above, it is ordered, adjudged, and decreed that the judgment heretofore rendered by this court be set aside, and it is now ordered and decreed that the judgment appealed from be set aside and avoided, so far as relates to the garnishee, and that there be judgment in favor of the plaintiff, Edward Meyer, condemning the garnishee, H. Mehnert, to pay to plaintiff in money one third of $78 53, and to surrender and deliver to the sheriff the one third interest of G. Deffarge in and to all the assets described in his answers to interrogatories, to be sold or collected by the sheriff according to law in satisfaction of the *fieri facias* in his hands against defendant, and that in default thereof said garnishee pay the full amount in principal, interest, and costs of plaintiff's judgment against the defendant Deffarge.

It is further ordered that the costs of appeal be paid by plaintiff and those of the court below by the defendant.

No. 6973.

ACQUILLA MCELVIN VS. MRS. ELIZABETH M. TAYLOR ET AL.

A wife separate in property from her husband, who is insolvent, is liable, not merely for supplies furnished to her, either in person or to her son or husband, and on her exclusive credit, for the use of her plantation, but also for household expenses, and those for the education of her children. But she is not liable for her husband's debts, or for items of indebtedness not contracted by her, and which neither inured to her benefit, nor were legitimate household expenses.

A citation served on the husband, addressed to the husband and wife, is a good service on the wife.

APPEAL from the Sixth Judicial District Court, parish of St. Helena. *Duncan*, J.

O. P. Amacker and *Julius E. Wilson* for plaintiff and appellee.

E. F. Russell & Lee and *Jno. M. Bonner* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This is an action by plaintiff on mortgage note for twelve hundred dollars ($1200), made and executed by defendant, a married woman, separated in property from her husband, by judgment of court duly executed. The note was signed and executed with the authorization of the husband, payable to I. W. Cutrer & Co., or bearer, on or before the first of November, 1870, drawing eight per cent interest after due, and dated May 28, 1870.

The note is secured by mortgage executed also with the authorization of defendant's husband, on certain landed estate, fully described in certified copy of act of mortgage annexed to plaintiff's petition.

The plaintiff avers in his petition that the consideration of this note inured to the separate interest and benefit of the defendant, and asks that there be judgment in his favor for amount of said note, with interest and attorney's fees as set forth in the act of mortgage, and that the land described therein be seized and sold to pay same, with costs.

The answer of Mrs. Elizabeth Taylor, defendant, admits her signature to the note sued on, but denies generally and specially each and every allegation in plaintiff's petition, and specially denies that the consideration of the note inured to her separate interest and benefit; also pleads payment and prescription of three and five years.

The defendant being separate in property from her husband, who is shown to be insolvent by the judgment and execution of the wife unsatisfied, and having the control and administration of her estate, was capable with the authorization of the husband of contracting a debt for supplies and cash advanced for her plantation, which is declared in the act of mortgage to be the consideration of the note. She was, besides, by the terms of articles 2435 and 2389 of the Civil Code bound "to con-

tribute in proportion to her fortune and that of her husband, both to the household expenses, and to those of the education of their children," and "if there remain nothing to the husband, she is bound to support those expenses alone."

The accounts of Cutrer & Co. with the defendant were offered in evidence, and, with the exceptions hereafter noticed, were sufficiently proven by Cutrer's and his clerk's testimony. The articles were such as would be needed on a plantation and in a family, and we have no doubt were received and used by the defendant in that way. True, the articles were not all delivered to her personally, but her son and husband received them and hauled them home. She had arranged with Cutrer & Co. for these goods, and they were sold entirely on her credit. It would be unreasonable to expect a retail merchant to follow up the goods and see that her son and husband did not divert them.

The accounts of Cutrer and Co. show to her debit	$1738 96
To her credit	480 20
Leaving balance	$1258 76

In this account there is included a sum of $523 40, paid on account of certain notes of defendant and husband given, in 1867, to T. G. Davidson, before the judgment of separation. The evidence satisfies us that these notes were for the debts of the husband. The account also includes $12 paid to Lea, $7 88 to Human, and $26 to the husband; also $12 difference in exchanging a pistol with defendant's son. These items were, we think, not proven to have been paid by her order, or to have been for her benefit, or such as she ought to have been responsible for. They amount in the aggregate to $581 28. Deducting which sum from $1258 76 leaves amount due by defendant, $677 48. The district court gave judgment for $1113, with eight per cent interest from maturity of note, November 1, 1870, with five per cent attorney's fees and recognition of mortgage. The amount of the judgment should have been, we think, $677 48.

As regards defendant's plea of three and five years' prescription, we think it is not good. The suit is upon a note maturing November 1-4, 1870, and not on the account. This suit was filed February 23, 1875. The testimony shows that the original citations were lost, but that they were made out by the clerk, *addressed each to the wife and husband*, and one served on the husband in February, or early in March, 1875. One was also evidently served on the wife, for on November 2, 1875, two days before prescription would have accrued on the note, she filed a motion to dismiss the suit because the citation served on her did not have the seal of the court to it. The court sustained her motion so far as to order a new citation to the wife. It is unnecessary for us to decide

what interruptive effect would result from a citation without a seal, since the evidence shows clearly that in February or March, 1875, a citation addressed to the wife and husband was served on the husband in person. This was a good service on the wife. C. P. 192.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the principal thereof from $1113 to $677 48; interest and attorney's fees to be be collected on this last amount, and that, as so amended, said judgment be affirmed. Costs of appeal to be paid by plaintiff, and those below by defendant.

No. 6105.

CITY OF NEW ORLEANS VS. J. DAVIDSON AND J. D. HILL ET AL.

The taxes due a municipal corporation for one year, can not be compensated by an overpayment of taxes made by the debtor the year previous.

The assessment against a tax-payer is not rendered null by merely omitting from the assessment roll, as exempt from taxation, five hundred dollars worth of personal property, and one thousand dollars of income.

Where the exemption from taxation fixed by law applies equally, and uniformly to all tax-payers, it can not be said to contravene the constitutional requirement of equality, and uniformity of taxation.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Sam. P. Blanc for plaintiff and appellee.

Ogden & Hill for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. These are suits of the City for taxes of 1875, which have been cumulated by consent. The defence in this court rests upon two objections, 1. the right to compensate the tax now demanded by such sum as was paid for the taxes of 1870, in excess of what was then legally demandable, 2. the assessment is null, because made in violation of art. 118 of the Constitution, and because of the omission from the rolls of five hundred dollars' worth of personal property, and one thousand dollars of income, of each person liable to assessment.

The first point has been decided adversely to the defendants in the City vs. John Davidson et als. The second objection remains for consideration.

The constitution requires that taxation shall be equal and uniform, and that all property shall be taxed in proportion to its value. It confers upon the General Assembly the power to exempt from taxation property actually used for church, school, or charitable purposes, and the power to levy an income tax upon all persons pursuing any occupation, trade, or calling, and such tax shall be *pro rata* on the amount of income, or business done.

The General Assembly, by act of March 16, 1870, exempted from taxation every income which shall not exceed one thousand dollars a year, and household furniture to the value of one thousand dollars. Acts, ex. sess. p. 38. It also exempted certain property if used for church, school, or charitable purposes. The rolls of the taxes of 1875 were made in accordance with the Act just cited, and omitted to assess incomes and household furniture of the value exempted therein.

Perfect equality of taxation is unattainable. A tax on property by valuation is the fairest mode, but that can not be apportioned or collected with absolute justice. It is not essential to the validity of taxation that it be levied according to rules of abstract justice. Abstractly it is unjust that the same property shall be taxed twice, and other property not taxed at all, but it is readily seen that this may and does often happen. It was said in the State v. Poydras, 9 Annual, 165—taxation need not be universal in order to be uniform. Certain objects may be taxed and others exempted, certain occupations may be taxed, and others not, or some occupations may be taxed for a greater amount than others, but as between different subjects of taxation, all in the same class must be taxed equally. The same principle was reiterated in the City v. Kaufman, 29 Annual, 283.

So also exemptions, either by failing to include the exempted property in the subjects of taxation, or by excluding them by designation, do not necessarily destroy the equality or uniformity of taxation. Cooley says—there are some cases in which the legislature has exempted household furniture, tools of trade, etc. and the limited personal effects which very poor persons may be possessed of, but these are to be regarded as rather in the nature of limitations of the general rule than as exceptions to it. Taxation p. 130. And in another work the same writer says—"the constitutional requirement of equality and uniformity only extends to such objects of taxation as the legislature shall determine to be properly subject to the burthen. The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department, but over all those the burthen must be spread, or it will be unequal and unlawful as to those selected to make payment." And in support of this dictum he cites and digests the case of Weeks v. Milwaukie, 10 Wis. 242 which is quoted at length by the counsel of the defendants in this case. Const. Lim. p. 515.

So also in the case in 9 Wis. 410, the name of which is not given us, but the opinion is copied *in extenso* in the defendants' brief, it is said—"the rule of taxation shall be uniform, that is to say, the course or mode of proceeding in levying or laying taxes shall be uniform. It shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing its value, the

establishing its rate, etc. and in order to have the rule or course of proceeding uniform, each step must be uniform. The valuation must be uniform, the rate must be uniform. Thus uniformity becomes equality."

Gilman v. City of Sheboygan, 2 Black, 510 was a case from Wisconsin, where the constitution requires the rule of taxation to be uniform. The City Council had levied a tax upon all the real estate within its limits to pay the interest on its bonds, issued in aid of a railroad, but had not levied any tax upon any other kind of property, and it was proved or admitted that at the time this tax was levied, there was personal property in the City to the amount of three or four hundred thousand dollars. The Court reviewed several of the leading cases in its Opinion and particularly the Wisconsin cases, and held that the tax, having been levied exclusively on real estate, was a discrimination in favor of personal property, and such discrimination was beyond the constitutional power of the legislature.

This Sheboygan case itself came under discussion in Muscatine v. Railroad Co. 1 Dill, Circ. Rep. 536 before Miller J. in chambers on application for injunction. A statute of Iowa had exempted railroad property from all other taxes but one per cent per annum paid into the State treasury. The constitution of the State declares that all taxation shall be uniform. The Justice says—"in this case there is no attempt to render any species of property liable to taxation for any specific debt (as in the Sheboygan case) but an exemption of the railroad from all other burdens, in consideration of a definite sum, which may be more or less than its share of such burthen. Whether this exemption be forbidden by the constitution or not, I am quite clear that it does not render void the tax which is levied upon other property."

If the legislature had exempted from taxation one thousand dollars of income, when derived from real estate, or if it had exempted one thousand dollars' worth of household furniture of those who only owned that much, it would have been a discrimination in the one case against personal property, and in the other in favor of persons who owned but little furniture. Such discrimination would be illegal, because unconstitutional. But the income of all persons up to one thousand dollars is exempt, and the household furniture of every one of that value is exempt. The defendants have the benefit of these exemptions equally with all other persons. They doubtless omitted from their lists of property for assessment these sums, which the legislature had declared exempt. Where the exemption applies equally and uniformly to all tax-payers, it can not be said to contravene the constitutional requirement of equality and uniformity. The objection of the defendants to the assessment and collection of the City taxes is not well founded.

Judgments affirmed.

No.

THE STATE VS. THOMAS C. ANDERSON.

It is not necessary that an examination of the accused before a committing magistrate should be had, preliminary to the finding of an indictment, or the filing of an information against him.

Under the constitution of Louisiana the prosecution of all offenses, except capital offenses, may be initiated on information filed by the public prosecutor, with leave of the court. This information need not be supported by affidavits.

The amendment of the constitution of the United States requiring the intervention of a grand jury, relates only to crimes cognizable by the United States courts, and to criminal proceedings in those courts.

The law authorizing the judges of certain district courts in the parish of Orleans to appoint commissioners to select competent men to serve as jurors, does not violate any clause of the constitution limiting the courts to the exercise of purely judicial functions.

Where it is charged in an information that a certain instrument, created by special statute with specific and distinctive features, has been uttered, and falsely published as true, it must be shown, in order to maintain the charge, that the identical instrument thus created, has been thus uttered and published. It does not maintain the charge to prove that *another* instrument has been uttered and falsely published, no matter how close its resemblance to the instrument created by the statute and described in the information.

Before the utterance or publication as true of a certain false and altered instrument can constitute a crime, it must be made to appear that if genuine, it would be evidence of the fact it recites; and that it does, or may tend to prejudice the rights of another.

Under the act regulating elections in this State, enacted in November, 1872, the "consolidated statement of votes made by a supervisor of registration," is not evidence of the result of any election.

Quære.—Whether the consolidated statement, or returns of a supervisor of registration might not be receivable in evidence in an *election* contest as secondary, or even as the best evidence, in the absence or loss of the returns of the commissioners of election?

Where it appears that the utterance and publication as true of a false and altered instrument, can only tend to anybody's prejudice if so uttered and published by the accused in a *certain official capacity*, the failure to charge in the information that the offense was committed by the accused in that official capacity, will render the information fatally defective.

Whether a certain instrument is, or is not a public record, is a question of law for the court to determine.

The criminal statutes of this State make it a crime to *alter* a record; they also make it a crime to falsely *publish* as true, an altered record, but there is no such crime known to the law of Louisiana as "uttering and publishing" as true, an altered, false and counterfeited instrument.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, and *J. C. Egan*, Assistant Attorney General, for the State.

Cullom & Castellanos and *John Ray* for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant, having been convicted of the crime

hereinafter set forth, was sentenced to two years' confinement in the Penitentiary, from which he has appealed.

The offence charged in the information is, that he did falsely and feloniously utter and publish as true a certain altered, false, forged and counterfeited public record, to wit: The returns from the parish of Vernon of an election held for Presidential electors, in the State of Louisiana, on the seventh day of November, 1876, as shewn by the original returns of said election made by the supervisor of election for the parish of Vernon, knowing the same to be false, altered, forged and counterfeited, with intent to injure and defraud, etc.

The case comes up upon numerous bills of exception and an assignment of errors. We shall confine our examination to such of them only as are necessary to the decision of the issue presented to us.

The prosecution was commenced by an information filed by the District Attorney for the parish of Orleans, and it is objected on behalf of the prisoner that the filing of an information is not allowable, because—first, there has never been a preliminary examination of any specific charge against him, and that he did not waive such examination, and has not had an opportunity of meeting the witnesses against him and of cross-examining them; second, there has not been any finding by an examining officer that the offence charged has been committed, nor any adjudication by such officer, that the prisoner was guilty thereof; third, the information filed is a flagrant violation of section 1010 Revised Statutes of 1870.

That section merely provides how preliminary examinations before committing magistrates shall be conducted, and is much the same as the statute of other States upon that subject.

The objections are not well founded. It has never been supposed that a preliminary examination by a committing magistrate was an indispensable precursor to a prosecution either by indictment or information. One of the counsel for the prisoner argued orally a very different objection, viz.: that, as our criminal mode of procedure was as at common law, and informations could not be filed without leave of the Queen's Bench, which was granted only upon proper affidavits, therefore an information can not be filed here unless a similar course is pursued.

In England there are two classes of informations—government informations, and those emanating from private individuals. There is no local officer there whose duties are the same as those of district attorneys in the States of this country, or solicitors, as they are called in some of them. That office is the creation of the American system. The Attorney General of England filed informations on behalf of the government *ex officio*, but others were filed at the instigation of private indi-

viduals, and by counsel on their behalf, and though the prosecution is in the name of the sovereign, those individuals who provoked it were mulcted in costs if it failed. By the common law it was in the power of any individual to file an information without disclosing to the court the grounds on which it was exhibited. 1 Chitty Crim. Law, 856. The frequent exercise of this power by private individuals from motives of malice or private revenge provoked the statute 4 and 5 W. and M., by which private individuals were henceforth prohibited from filing informations without the consent of the King's Bench.

There was a reason, therefore, for requiring in England an information to be supported by affidavits before permission to file it would be given, that does not exist here. No one can file an information here but the law officer. The public prosecutor, by whatever designation he may be known, is the only person who can initiate a criminal proceeding in that way, and as he is acting under the sanction and responsibility of his office, the same restrictions are not imposed upon him as were wisely imposed by the statute of William and Mary, which changed the common law on that subject.

If the Attorney General of England were now to offer to file an information in the Court of Queen's Bench, he would not be required to accompany it with affidavits; while, if offered by a private person, through his counsel (for he can not do it in person), the court requires to be informed *aliunde* if there is reasonable ground for it. 1 Chitty C. L. 859. Nevertheless, our statute still requires that the consent of the court shall first be obtained, and in practice (here at least) it is granted as a matter of course.

Every constitution of this State has contained the provision that prosecutions shall be by indictment or information. Our statute restricts the latter to offences not capital, and requires the consent of the court to be first obtained; but that being done, and there is no mode prescribed for obtaining it, the prosecution by information has never been doubted to be of equal validity under our law with that of indictment for any offence not capital. It was very early held here that the amendment to the Federal constitution, which requires the intervention of a grand jury, relates only to crimes not cognizable by the United States courts, and to criminal proceedings in those courts. Territory vs. Hattick, 2 Mart. 88. And in 1859 a case was brought up wherein the Grand Jury had ignored a bill for manslaughter, and immediately thereafter, on the same day, the district attorney filed an information charging the defendant with that offence. A motion to quash, on the ground that the Grand Jury had ignored a bill against the same party for the same offence, was sustained by the lower court, and the State appealed. Held, that the State was not barred from proceeding by

information, notwithstanding the Grand Jury had ignored the indictment. State vs. Ross, 14 Annual, 364. It may be doubted if that is not going too far, and we should probably not have ruled thus if the point had been presented to us, but the ruling is cited merely to shew to what extent the practice of prosecuting criminally by information has been sanctioned.

There was no reason why a practice thus sanctioned, and uninterruptedly prevailing in our courts from their organization, should not have been adopted in initiating this prosecution, but we are informed at the bar by the Attorney General, that the Grand Jury, in place of finding a bill, instructed the prosecuting officer to file an information, thus giving its sanction to this prosecution, and forbearing to initiate it by indictment, solely because of some apprehended defect or want of power to act after the time had elapsed for which the jury was summoned.

The prisoner challenged the *venire*, on the ground that the selection of jurors by commissioners appointed by the judges, as directed by the act of 1877, is illegal, the constitution having prohibited that any duties or functions other than judicial shall ever be attached by law to the courts. The act provides that the judges of five courts of Orleans parish shall select two jury commissioners, who in their turn shall select, impartially, not less than one thousand competent men as jurors from the citizens of the parish, having the qualifications requisite to register as voters. Acts p. 73. Experience has demonstrated the necessity of some law to protect the administration of justice from the evil effects of a system which had so far departed from the old landmarks as to admit every man into the jury-box who could use the ballot. This evil was apparent years ago, when ignorant or vicious white men only were intrusted with this privilege, and it was immeasurably augmented by the changes that have since occurred, by which the number of improper persons, eligible to this grave duty, has been multiplied. The Congress of the United States found a solution of the pressing difficulty by providing for the appointment by the judge of commissioners to select a given number of jurors, and our Legislature wisely acted on that hint, and copied the enactment. It seems to us a function peculiarly appertaining to the judge of a court, and when we remember that the same Constitution which confines the Supreme and District Courts to the exercise of judicial duties, confers upon the former the power to select its own clerk, it is apparent that an act of the Legislature, conferring upon the latter the power to select jury commissioners, to make up a body from which the jurors of their courts are to be drawn, is not in contravention of its prohibition of the performance of other duties than those which are judicial. And that this power has not been exercised in the spirit of the law, and for the public good, is not pretended.

We have said thus much upon those points of the defence which affect particularly the constitution of the tribunal, and the kind of proceeding by and through which the trial was had, to the end that the rightfulness of the one and the legality of the other may be vindicated. We now turn to the investigation of some of the alleged defects which the prisoner claims vitiate the prosecution, and here it is necessary to state succinctly the requirements of the statute touching elections, in order to understand the nature of the objections.

Three commissioners are appointed for each poll, whose duty is to count the votes immediately upon its close; to make duplicate lists of them, with very minute specifications of certain details, and deliver one of them to the supervisor of registration of the parish and the other to the clerk of the District Court. The supervisor of registration within twenty-four hours thereafter, must consolidate such returns, to be certified as correct by the clerk of the District Court, and he must forward the consolidated returns, with the originals received by him, to the returning officers. These officers, known in common parlance as the Returning Board, must meet in New Orleans within ten days after the closing of the election, and canvass and compile the statement of votes made by the commissioners of election. The presiding officer (of this board) shall open in the presence of its members the statements of the commissioners of election, and they shall from said statements canvass and compile the returns of the election in duplicate, deposit one in the office of the Secretary of State, and make public proclamation of the other by printing in the official journal. Acts 1873, p. 15. The act was approved November 20, 1872.

The offence charged in the information is uttering and publishing as true a certain altered public record, to wit: the returns from the parish of Vernon, as shewn by the original returns of said election made by the supervisor of election.

When the State offered in evidence the alleged public record, the defendant objected on the ground that it did not conform to the description contained in the information; or, in other words, that it was not the record for the uttering and publishing of which, altered and forged, he was criminally charged. Thereupon the State moved to amend by striking out the words "original returns," and inserting "consolidated statement of votes, parish of Vernon," in lieu thereof, and by striking out the words "supervisor of election," and inserting in their stead "supervisor of registration."

The amendment was permitted, and the trial proceeded on the information as amended, and a bill was reserved. We do not propose to consider the right to amend because the situation of the accused, though changed, was improved by the substitution and his chances of

escape increased. The document was again offered in evidence under the amendment and received.

Whenever forgery of an instrument, or the uttering of a forged instrument is charged, and the instrument has a legal definition and meaning—that is to say, has certain characteristics or qualities imparted to it by law—it is not needful to set it forth in the information with minute precision, because the general or legal term by which it is known sufficiently designates the kind of instrument meant. Thus, a bond or a will is an instrument known to the law, and the law dictates what shall be known and held to be a bond or a will. But when a statute provides for an instrument, not known to the law hitherto, or in other words, creates it and impresses upon it certain features peculiar to itself, forgery can not be committed by making a false statutory one in a form not provided by the statute, even though it be so like the genuine one as to deceive most persons, and the uttering of such false and altered instrument would not be punishable. 2 Bishop Crim. Law, sec. 506.

Under our statute it is only necessary to set out the purport of any instrument, or to designate it by name, if it is usually known by one, in an indictment for forging, uttering, etc. Rev. Stats., 1870, sec. 1049. But in order to be forgery, the instrument thus set out and charged to be feloniously made, must be of such character that, if genuine, it would be evidence of the fact it recites. The instrument must be such that when forged, it does or may tend to prejudice the rights of another, or, as put by Bishop, it must either appear on its face to be, or it must in fact be, one which, if true, would be legally capable of effecting a fraud, 2 Bish. C. L. secs. 503, 511; State vs. Smith, 8 Yerg. 150; Barnum vs. State, 15 Ohio 717; State vs. Snow, not yet reported.

The instrument charged in the amended information as having been falsely uttered, is the "consolidated statement of votes, parish of Vernon, made by the supervisor of registration." The statute nowhere gives to this consolidated statement any efficacy or value as evidence of the result of the election, nor does it anywhere direct or permit it to be used as a means of ascertaining such result. The returning officers are not required to use it. The instrument or documents they are required to canvass are the original returns of the commissioners, and from them, and them alone, they must compile the vote. The preservation of this "consolidated statement" of the "supervisor of registration" among the archives of either parish or State is not commanded. The clerk of court is not furnished with a duplicate, as he is of the commissioners' returns. There is no officer who is authorized by law to give a certified copy of it for use as evidence, or for any other use. The clerk is directed to certify it as correct, and this appears to have been required so that it may be known to conform to the duplicate list of commis-

sioners' returns in his office; and after it is so certified, the supervisor transmits it to the returning officers along with the original returns sent him by the commissioners, and from the latter alone they compile the vote.

If the supervisors of registration of every parish in the State should alter and forge every consolidated statement of votes made by each one respectively, and transmit them thus altered and forged, to the return ing officers, and these officers should canvass and compile the votes, as the statute requires, not from these consolidated statements, but from the unaltered commissioners' returns, no injury would be suffered by any individual or by the body politic. The supervisors' consolidated statement is not made by the statute the basis of the final canvass and compilation of the vote, as the original returns of the commissioners are, and hence the alteration and forgery of all of them, the returns of the commissioners remaining unaltered, would not change the result of the election in any parish. To constitute forgery, the forged instrument must be one which, if genuine, may injure another, and this must appear, either from the description of the instrument, or by the averment of matter *aliunde*. Where, from aught that appears in the information, the instrument was a *nudum pactum*, or of no effect, forgery can not be predicated upon it. People vs. Tomlinson, 35 Cal., 503. And the same principle, of course, applies to the uttering of a forged instrument.

It is unnecessary for us to say whether the consolidated returns of the supervisor of registration, without the clerk's certificate, is or is not a public record, susceptible of forgery. It is sufficient to remark that the paper offered in evidence is not the instrument, the utterance of which as forged is charged upon the defendant in either the original or amended information.

After conviction a motion in arrest of judgment was made, because it was not charged in the information, either in its original form, or as amended, that the uttering or publishing the alleged altered and forged instrument was done by the defendant in any official capacity, either as one of the returning officers, or in any capacity other than as an individual, and that such offence could only have been committed in an official capacity to operate an injury to, or fraud upon any person or body politic.

It is manifest that the uttering and publishing by a private person, or by a person in any public capacity other than that of returning officer of elections, could not have injured or defrauded any one. Suppose that four presidents of as many banks in this city had uttered and published as true, altered and forged consolidated statements of votes of any parish at an election, as made

by the supervisor of registration, and had caused the same to be printed in the official journal under their signatures as presidents of the banks, would they have been indictable therefor under the statute? And why not? Simply because they had no legal mission or authority to do that act, and as no legal effect would be produced by it, no one would be injured or defrauded by it. Every one is presumed to know the law, and therefore to know that the persons, thus uttering and publishing, were without authority to do that particular act, and that it was void, and of no effect when done. Hence it is of the essence of this crime, that it should have been committed by a public officer, whose function was to prepare and publish the true canvass and compilation of votes, and the averment that he uttered and published the false canvass and compilation in his official capacity, and under color of his office, is essential in an information to support a conviction, and justify a judgment thereon. The information has not such averment.

The charge of the judge below, which is admirable in its judicial tone and temper, though, as we have seen, erroneous on the questions of law we have reviewed, proceeds throughout on the idea or assumption that the act charged in the information as criminal was done in the defendant's official capacity. Even the instructions asked by the defendant's counsel are based on that idea. It was nowhere so charged.

It is not needful to say more for the decision of this cause, nor were we inclined to advert to any of its features, other than those directly presented by the record, but we are driven from this reticent attitude by having spread before us in the printed argument of some of the defendant's counsel an open letter, dated "Washington, February 4, 1878," addressed to the prisoner, and signed by John Sherman, Stanley Matthews and others, in which the public, and the people from which the jurors are to be drawn for his trial, is informed that he is falsely accused and maliciously persecuted.

A few years ago—it was within the present decade—a member of the British Parliament undertook to influence the course of a public prosecution, then pending in an English court, against a fraudulent claimant of the honors and estates of an ancient house. The criminal trial there, as here, had been preceded by a civil proceeding, and both were of unexampled duration, so that the question, who was the rightful heir of the Tichborne family, had extended beyond the legal circle, and had invaded social and political life.

When the unwarrantable publication had been made by the member of Parliament under his own signature, in which he had endeavored to bring opprobrium upon the court and its officers by charging that the claimant was falsely accused and maliciously prosecuted, the Lord Chief Justice Cockburn promptly repressed his impertinent, though not

interested, zeal by inflicting upon him a fine of £250, and sentenced him, in default of payment, to imprisonment in the county jail.

He went to jail, and there remained until a relative released him by paying his fine. On the re-assembling of Parliament at its next session, the judge formally communicated his action to the House of Commons, that it might be officially known he had not wantonly invaded its privileges, and that body, ever watchful over the inviolability of those privileges, silently approved the judge's vindication of the sanctity of his court.

Public opinion, in this instance and in this country, can alone exercise that punitive power, the employment of which is equally well merited on both occasions.

It is ordered, adjudged and decreed, that the judgment and sentence of the lower court is avoided and reversed, that the verdict of the jury is set aside, and that the prisoner be discharged from custody.

ON APPLICATION FOR REHEARING.

The ATTORNEY GENERAL applied for a rehearing, and presented a brief in support of his application, of which the concluding sentences are;—

This case, from its great importance, must become a leading one, not only at home but abroad. It is freighted with the most important interests, both of our State and country. Let it contain no assertion of principle which can not be defended by the candid jurist in every quarter of the civilized world. If the prisoner is entitled to his freedom upon the grounds of reason and of law, let an independent judiciary see to it that that freedom is secured to him. But if, on the contrary, he can only escape the penalty of his crimes by the application of principles not strictly consonant to the well-established rules of criminal procedure throughout the world, let it not be said that this high and honored tribunal defeated by hasty and ill-founded conclusions of law the great ends of justice.

From the commencement of this prosecution I have endeavored simply to discharge my duty, as I understood it, to the State, to the courts, and to myself. I have not thought that considerations of mere expediency or policy should exercise the slightest influence upon my conduct. I have tried to be just to the State and just to the accused. My duty is now done and I leave the matter in your hands for final disposition according to law.

The opinion of the court, on the application for a rehearing, was delivered by

MANNING, C. J. The importance of the legal principles involved in this cause, and the grave and far-reaching consequences of our application of them to the prosecution of the defendant, have induced us to reconsider the grounds upon which our decision is based, with the same

circumspection with which we examined them on the hearing. We have given careful attention to the argument of the Attorney General for a rehearing, weighing each branch of it in its turn, and consulting each authority cited. In fulfillment of our manifest duty, of which he reminds us, to permit no considerations whatever to intervene between us and the proper discharge of our judicial function, we shall proceed to review the reasons offered us to effect a change of our judgment.

It must be observed on the threshold of this inquiry that a considerable part of the printed argument for rehearing is directed to the refutation of a dictum not made by us. Whether the instrument charged to have been uttered as forged is or is not a public record, susceptible of forgery—or whether, not being a public record without the clerk's certificate, it would be one with it—are questions we not only did not decide, but we expressly and in unequivocal language announced that it was unnecessary in this case for us to decide. So too, of those portions of the brief which treat of the crime charged as being forgery (as, for example, this, "the paper charged to have been altered or falsified is a paper which the Supervisor," etc.,) it ought to be superfluous to say that the defendant was not charged with forging any record, public or private, nor for forging any paper of any kind whatever. That is not the crime for the perpetration of which he was tried, nor of which he was convicted.

A supplemental brief for rehearing has also been presented by the Attorney General, in which he suggests short notice of the setting of the cause as one of the reasons why he urges a rehearing, and says his reference to the action of the court in setting the case was made in no spirit of complaint of that action, and that he is informed by the Assistant Attorney General that the day assigned for the argument may have been fixed by the court with reference to his suggestion made on the day the cause was first called Such was the fact. The cause was a second time set for argument, and was heard a day later than that on which the Assistant Attorney General was willing to take it up, and two weeks lacking one day after it was first called.

On the day for which it was first set, it went over, at the written request of the Attorney General, and it was then that his Assistant announced in open court that he had proposed to the counsel of the accused to take up the case on the following Monday. We ordered it set for Tuesday, to be sure of giving to the State all the time that was needed or desired. The clerk was instructed to give written notice thereof to both of the State's counsel, and it was done. No further time was asked on the part of the State, and no intimation was given to us that further time was desired. On the contrary, we were given to understand that the Attorney General desired no further postponement. On the hearing, we had the assistance of oral arguments from the Attorney

General and from his Assistant, the time being extended by the court beyond that allowed by the rules, and we also had the benefit of their elaborate printed brief, placed before us at the same time.

The first position taken by the Attorney General is, that what is a record is matter of fact for the jury exclusively to find, and not matter of law for the court to decide.

A public record is a written instrument, made by a public officer as directed by law, to serve as a memorial and evidence of something written, said, or done. Of necessity, the forms and verifications of these public instruments are prescribed by law. Evidence may be received to shew that a paper having the form and appearance of a public record was or was not in fact what it purports to be, or to shew its custody in a public office, or the like; but whether a given document possesses the form and character of a public record is to be determined by its conformity to the statute directing its confection, if it be a statutory instrument, or to the general law, if it be an ordinary legal instrument, and is from its nature a question of law. The proposition that when the general law or a special statute has prescribed the form and manner of making a public instrument, and has directed how it shall be verified, the question of its conformity to the general or special statute is one of fact to be decided by a jury, is destructive of the distinction immemorially recognized between matters of law and fact, and subversive of fundamental principles. Under the operation of such a principle a court would be without power or authority to decide whether the form and substance of an indictment or information (for these are public records) were sufficient under the law. It would have been extraordinary if so high an authority as Chief Justice Parker had sanctioned such doctrine, and he is the only author or jurist cited to support it in the printed brief, and if his language had been given in full, as we shall give it, the identical case cited is shewn to be in accord with the well-established rule. It is Brier vs. Woodbury, 1 Pick, 362, and is cited with the observation that it is conclusive of the question, whether an instrument is or is not a public record, is a question of fact. The sentence quoted is: "A record is conclusive evidence, but what is or is not a record, is matter of evidence, and may be proved like other facts; otherwise there would be no remedy."

The words immediately following and not quoted are: "On the plea of *nul tiel record*, the fact is to be judged of *by the court*," etc., p. 367.

It has been held time and again that the uttering and publishing a forged instrument, purporting to be a cheque, will, deed, bond or certificate, is not indictable unless the forged instrument, on its face, is clothed with the forms prescribed by law, and it has nowhere been held that the question whether the forged instrument has or has not the form and requisites of a cheque, will, deed, bond or certificate, is one of fact and not of law.

Thus;—a party was indicted for forging a bank cheque. The cheque on its face was not payable to bearer, or to the order of any person

named. Held that the cheque was incomplete and could not defraud any one, and that therefore the prosecution must fail. Williams vs. State, 51 Ga., 535. In an indictment for forging a will, it appearing that the forged instrument had not the number of witnesses required for a valid will, a conviction can not be sustained. 2 Bishop Crim. Law, sec. 506. If a deed be void on its face, forgery of it is not indictable, nor the uttering it as forged. 14 Tex., 503. If a bond is not required by law to have an attesting witness, and the name of one is falsely subscribed thereto, it is not forgery, because the presence or absence of a witness' signature does not affect the validity of the bond. State vs. Gherkin, 7 Ired, 206. An indictment for forging a certificate of the acknowledgment by one L. of a certain mortgage, when the certificate was by one K., commissioner of deeds, and it had no venue, and there was nothing on its face to shew of what county K. was a commissioner, was held to be bad. Vincent vs. People, 5 Parker, 88. An indictment for forgery of an order for $48 is not sustained by an order offered in evidence of $49. State vs. Handy, 2 App., 81. In an indictment for forging a railroad ticket, expressed on its face to be "good for this day only," a description of the ticket, as signifying to the holder that it must be used continuously and without stopping at intermediate stations after once entering the cars, is a fatal variance. Com. vs. Ray, 3 Gray (Mass), 441. The special object and purpose of the law requiring the tenor or purport of a forged instrument to be set out in the indictment, is that the court may judge of its character and apply the law to it. Walton vs. State, 8 Yerg, 371.

It is then manifest that the question whether a forged paper possesses the legal requisites of any of these instruments is one of law, and not of fact. Authorities of the same tenor might be multiplied until the mere reading of the citations would be tedious. It will be sufficient to refer to collations of them in Archbold's Crim. Prac. and Pl. Waterman's Notes, 534—563; Hanes' U. S. Dig. Crim. Cas. 192 *et seq;* Wharton's Crim. Law, sec. 307, 607.

We must not omit mention of the case to which the brief on the part of the State has especially referred us, as establishing the doctrine that forgery may be committed of any writings of every description—a general proposition neither affirmed nor denied by us, and one not at all affected by our ruling in this case, and not the point at issue in that.

The case is the People vs. Fitch, 1 Wend. 198, the syllabus of which we transcribe entire, that it may be seen how fully and unqualifiedly it supports the doctrine elaborately discussed and approved in our first opinion: "Where an order for the delivery of goods was accepted and paid, and returned to the drawer, and the date of it subsequently altered by him, such alteration held not to be forgery at common law, although manifestly done with a fraudulent intent. To constitute forgery in such case, the act must have a tendency to effectuate the intended fraud. An order, satisfied by the delivery of the goods, in the hands of the drawer, in legal acceptation is no instrument, and an alteration of its date is no false making. It is what it purports to be."

It is necessary to state anew what crime the prisoner is charged

with. It is that of uttering and publishing as true a certain altered, forged and counterfeited public record, to wit: the consolidated returns of the parish of Vernon, made by the supervisor of registration. It will also be useful to restate the election law *quoad* the two instruments or records provided for by it. One is the commissioners' returns, viz: the returns of each poll in a parish made by the commissioners who held the election at that poll. The other is the consolidated returns made by the supervisor of registration of each parish from the commissioners' returns of all the polls in the parish, and as consolidated, certified by the clerk of the District Court to be correct.

This last is therefore a document or record required by law to have a double verification, by two different officers, who are able and who are required to verify it from two different sources of information. Now in order to ascertain whether a certain paper possesses the form and requisites of this consolidated (statement or) returns of the supervisors, we must first see what form the statute prescribes for it, and what requisites the statute says it must have, and the determination of the question whether the paper conforms to the statute, and has the form and requisites set forth in the statute, rests with the court, and is purely one of law.

We held that the paper, offered as the record which had been uttered as true, and which comes up to us as part of one of the bills of exception, did not conform to the description in the statute of a consolidated statement of votes—that it had not the form and verification required by the statute, as a paper purporting to be a will with only one witness would not be a will—that the paper produced, not having the certificate of the clerk of the district court, was not the paper described and charged in the information, and was not what was known to the law, and described in it, as the consolidated returns or statement of votes, and, therefore, the paper offered was not receivable in evidence under, and does not sustain the charge, as laid in the information, just as a cheque, deed, bond, or certificate, not having the legal form of such instruments, would not sustain a charge of uttering and publishing as true a forged cheque, deed, bond or certificate.

The amendment of the information in the present case is of itself an example of an attempt to conform to the rule we have been elucidating and enforcing. It is not the commissioners' returns which are to be signed by them alone, and to be certified by no one, that the prisoner was tried for uttering as true. That was the instrument which he was charged with uttering as true, having been altered and forged, in the information as first drawn, but the State amended by striking out the description of that instrument, and inserting in its stead the consolidated statement of the supervisor, which is required to be made by that officer, and to be certified by the clerk of the court. When the document thus made the basis of prosecution, was offered in evidence, it turned out that it had not the clerk's certificate, and thus lacked one of the insignia required by the statute, and it does not matter whether the document as

thus offered was or was not a public record. It is enough, and it is conclusive, if the instrument offered is not the statutory instrument charged. And hence we said before, it is not necessary to decide whether the instrument charged is or is not a public record susceptible of forgery. The instrument offered to support the charge is not the instrument described in the statute. The statute describes a paper which shall have the supervisor's signature, and the district court clerk's certificate. The paper offered in evidence has the former and has not the latter.

It is entirely beside our present inquiry whether the clerk's signature to the supervisor's returns would have made it *a* public record, or whether it is not *a* public record without such certificate. Our opinion expressly pretermits the decision of that question in language designedly used. But we held that since the statute commands that these returns shall be certified by the clerk of the court, and the instrument offered had not that certificate, it was not *the* public record the defendant was charged with uttering as forged. And here applies with crushing force the doctrine universally maintained by all the writers on criminal law, that when a statute authorizes or creates an instrument not known to the common law, and prescribes its form and impresses upon it peculiar features, in order to support a prosecution for uttering as forged such an instrument, the paper actually forged or uttered as forged must conform to the statutory description. And Bishop says this is true even when the false statutory one is so like the genuine as to be liable to deceive most persons.

It would be an injustice to infer that the Attorney General was unaware of this provision of the statute. In the brief before us it is said, "the paper prepared by the Supervisor of Registration is a paper of a public nature directed to be made by the Legislature, to be certified by officers of the State, and to be carefully sealed up with the other papers, and sent to the officers of the State, who have duties to perform. This paper is evidence that the commissioners of election have transmitted to the supervisor returns as required by law. It is evidence that the officer (the clerk) within a short period has examined these returns and ascertained the result to which he certifies."

The clerk had never certified to the one on which this prosecution is based, and no one else is required to do it, and so, further on it is argued, "that the clerk's certificate although directed by the law to be appended, is not of the substance of this document, but a mere formal matter—a part of the election machinery of the State, and its omission, while rendering the clerk culpable, does not destroy the validity of the record." It is not our concern to reconcile the admission that the paper is evidence that the clerk within a short period has examined the returns, with the assertion that his certificate to their correctness, and to his ascertainment of the result, is a mere formal matter, or in other words, that it means nothing.

But some of the requirements of election statutes are merely directory, and being so, the question is asked how can it be held, that the absence of this formality (the clerk's certificate) so far changes the substance of this document as to make it inadmissible in evidence under the information. There is no question here of a change of substance of a document because of the absence of a formality, if indeed such a thing be possible, nor is there any question of the effect produced upon the result of an election by the failure to observe certain directions, as to which the universal rule of construction is, that election statutes are to be construed liberally and to favor the right ascertainment of the vote cast, while criminal statutes are by a rule, equally universal, to be construed strictly in favor of the party accused. The actual and vital question here is, having prosecuted the prisoner for uttering as forged a particular statutory instrument, has the State shewn that he did utter as forged that instrument? The State has not shewn it. It may have shewn that the prisoner uttered as forged another and a different instrument, but the decisions of all courts come down to us in an unbroken line of authority, that a conviction can not be sustained under such charge, supported only by such proof.

It is also argued: "It is not sufficient to say that the supervisors' returns was not the paper that the members of the Returning Board were to principally consider, or that it was not the best evidence. The paper was used, and the paper was fraudulently altered and falsified that it might impose upon the public. The paper was successfully used. If this was used in connection with other papers to produce a fraudulent result in their count, and they returned upon its evidence and forged it for that purpose, it makes a case of forgery."

The prisoner was not prosecuted for that crime. He was not charged with forging that paper or any paper for any purpose. One man may forge a paper and another may utter it as forged. The crimes are distinct. The acts are distinct. So far from supposing it was sufficient to say that the supervisors' returns was the paper that the returning officers were principally to consider, or that it was the best evidence, we said, as the statute says, it was not to be considered at all, and that it was not made by the statute any evidence whatever of the actual vote cast. It was not the paper nor one of the papers which the returning officers were to canvass in making their compilation of the vote. Upon that, the directions of the statute are explicit. Whether in the absence or loss of the commissioners' returns, it would not be receivable in an election contest as secondary evidence of the vote cast, or even as good as the best evidence, is a matter of inquiry not relevant to this criminal proceeding. And it must be evident that we can not know as a court, and in a case where we have jurisdiction only of the legal questions,

that the defendant and his co-members of the Returning Board, did in fact make up their compilation from the Supervisors' returns, and successfully used them to produce a fraudulent result. That is a matter of fact, wholly outside of the record, and if it had been in the record could not be taken into account by us in deciding a naked question of law.

"I can not understand the argument," continues the Attorney General, "that pronounces a nullity an official paper which the statute directs shall be made and placed in the hands of public officers, and being of no value or efficacy, may be altered, forged and falsified with impunity." Nor can we. But an acqnaintance with the rules governing criminal prosecutions will enable one readily to understand that when a person is charged with *uttering* as forged a particular instrument, he can not be convicted and punished for *forging* another and a different instrument.

So, further on, apparently forgetting what the charge is in this case, and misreading the words of the statute, he argues elaborately to prove what no one will ever dispute, viz.: That whoever may be guilty of forging a public record shall be punishable; and professing to cite the law, says: "the statute is that any person who shall utter and publish as true any false, altered, forged or counterfeited record with intent to defraud any person, shall upon conviction, etc."

Now that is not the statute. The fact is the word *utter* is not in the statute, but *alter* is the word used, and one of the numerous grounds of the motion in arrest of judgment is based upon the variance between the crime defined by the statute and the crime charged in the information.

There is a well-recognized distinction at common law between the offence of uttering a forged instrument, and the offence of uttering and publishing such instrument. The first offence is complete when the party has offered the instrument as good, intending it should be received as good. The last is not complete until the paper has come into the hands of some person other than the felon. The common law crime has been supplemented by statutes in every country, creating statutory offences of this character. In England the words used in the statute to express the passing or putting off a forged instrument to another as a genuine instrument, or an attempt to do so, are, "offer, utter, dispose of, or put off," which embrace every mode of disposing or attempting to dispose of a forged instrument. Waterman's Archbold Criminal Practice and Pleading, 547—26. The words of our statute are, "alter or publish as true," and are not a misprint, for they occur first in the act of 1818, and are repeated in the Revised Statutes of 1856 and 1870. It was hence contended by the defendant's counsel that the Legislature had not made the act charged to have been done by him, a crime—the charge being "uttering and publishing as true," and that

the crime as laid in the information and for which he was tried is not the crime created by the statute. The statute used the word *alter*. The information has *utter*. The statute uses the disjunctive, alter *or* publish, thus making two crimes. The information has the copulative, utter *and* publish, thus describing one offence. The prosecution is based on section 833 Revised Statutes, and the word *utter* is not used in it, while it is employed in the next section, in relation to the intent in passing paper securities, and is used in section 835 for creating another and distinct offence, thus—"whoever shall utter or tender in payment, etc." The two words would appear to have been employed intentionally, and it was urged both in the oral and printed argument that the words "utter and publish," used in the information as descriptive of the crime, do not charge the crime either of altering or publishing defined by the statute. In other words, the statute made it a crime to alter the record, and the defendant was not charged with that. The statute also made it a crime to publish as true an altered record, and the defendant was not charged with that, but with uttering and publishing, etc. The act of uttering is separable and distinct from either of the others, and unless the phrase "utter and publish" means legally the same as the single word "publish" and designates the same act, the offence charged in the information has no existence. If the draughtsman of the information had the statute before him, he must have intended the word 'utter' used by him conjunctively with 'publish' as expressing only what the latter word expresses by itself; but legally that is not true as the law writers all teach. We did not give this objection of the defendant's counsel a place in our former opinion, because among the twenty-seven bills of exception, and the assignment of errors additional thereto, the two on which we rested our decision were conclusive of the invalidity of the proceedings.

That the crime should have been charged to have been committed by the defendant under color of his office is to our minds a necessity. No one but the returning officers had any power, mission, or authority to compile, canvass or publish the returns of elections. The compilation by any other persons, and its publication, could produce no legal consequence. All persons are presumed to know that the publication of the results of an election by any others than the Returning Board was null and void legally, and hence it was legally impossible that such publications should deceive, injure or defraud any one, and since the criminal act must not only be done with intent to defraud, but must be legally capable of effecting the fraud, it must be charged to have been done by virtue of, and in the capacity of the returning officer. We are asked in the brief if "four presidents of banks had appropriated large sums of money to induce the returning officers to make necessary

alterations in the figures, and after the alterations had been made and the result changed, they had caused them to be published," would not they be punishable? Unquestionably, if we understand it to be assumed that the publication is made in the name and under the authority of the returning officers, because there is another statute that applies to those who *procure* to be falsely made, etc. But that is the Attorney General's imaginary case, and not ours. We supposed a case where it is not alleged or charged, and therefore not to be pretended, that the published document bore the certificate of the returning officers, but only that of four bank presidents. It is undeniable that such publication would not be criminal under our statute for the reasons we then gave. We stated that case to shew that it was of the essence of the offence of uttering and publishing false election returns under the statute, that the publishing should be made by persons having authority and capacity under the law to make it, and therefore it was essential that the information should contain an averment of that authority and capacity, and was fatally defective without it. Its omission could not be supplied by the court.

It is matter of history that the act of the defendant, which actually constituted his crime, was done in his official capacity as a member of the Returning Board. Why was it that the canvassing and publishing of the vote to be made by him and his co-returning officers became the object of public anxiety, and when made, became the subject of public condemnation? If four private persons had done what they did, and then published as election returns whatever might have been in conformity to their wishes, would not the act have been treated with derision, and could it have produced any effect, legally or otherwise?

Is it not apparent if this defendant had not been a member of the Returning Board and had published the altered returns, being only a private person, that no one would have thought of prosecuting him for that act? It was because what he did, was done in a recognized official capacity, that the fame and the infamy of it filled men's mouths, and it was for that cause the criminal prosecution was ultimately instituted. Everywhere, in the market place and at the fireside, in the press and in the forum, at the council board and in the legislative hall, the official act is the thing complained of and denounced. The theory of the prosecution throughout, outside of the information, is that the act was done in an official capacity, and therefore defrauded. The argument of counsel, the charge of the Judge, the bills of exception to that charge and to his rulings in the course of the trial, are all based on that assumption. It is that feature that has imparted to this prosecution the interest, and invested it with the character of a State Trial—which gave to the events that then transpired, and to the criminal acts which are a part of them,

a national importance—and that feature, conspicuous every-where else, is absent alone from the information.

We have been thus careful to rest our decision upon only those principles of law, of the soundness of which there can be no serious question by candid, disinterested and enlightened jurists every-where. There remain now for notice the concluding sentences of the Attorney General's appeal to us to reverse our ruling.

Like him, we are conscious of having been just to the accused, and just to the State. With him, we feel the necessity that our decision shall contain no assertion of principle which can not be successfully defended, and we believe we have now placed that decision upon a basis so unassailable that the rightfulness of our judgment shall commend it to the candid jurist in every land. If this court had yielded to the impassioned and justifiable zeal of the prosecuting officer, or had been swayed by the feeling, natural and spontaneous among all good men, of detestation of a great crime against free government and the rights of the people, and by reason thereof, had permitted its judgment to be clouded by passion, or warped by love of applause, or to be influenced by any consideration, other than its duty with sedulous care to ascertain the law and with firm purpose to apply it, it would be unworthy of the high place it holds in the government of the State. It would argue a deplorable state of public morals, if it could be confidently assumed beforehand in a case such as this, what the decision of a court would be from the known political affiliations or antipathies of its members. It would be a public calamity, the extent of which could not be measured, if a court should prevent the escape of an accused person by torturing the well-settled principles of law, applied through long years to criminal prosecutions with unvarying uniformity, and bend them to the accomplishment of partisan desires.

Rather let it be known of all men that a court can consider neither expediency nor policy—that it can not shape its judgment either to realize the hopes of friends or to quiet the fears of foes—and that judges may abhor a malefactor, and yet refuse to condemn him contrary to the law.

It is therefore ordered that a rehearing is refused, and that our judgment in this cause remain undisturbed.

No. 7031.

JOSEPH V. LEDOUX, ADMINISTRATOR, vs. JOHN C. BURTON. MRS. A. LEDOUX, INTERVENOR. MRS. A. LE BLANC ET AL. WARRANTORS.

One who buys property with full knowledge that the title to the same is in dispute, is not an innocent purchaser, and hence he acquires no greater rights than his vendors had.

When the issues in a second suit are the same as those in a previous suit between the same parties, the mere fact that additional parties appear in the second suit will not prevent the judgment in the former suit from having the effect of *res adjudicata*, as between the parties who appeared in both suits, in the same capacities.

The administrator of a succession can not maintain an action for the recovery of real estate, alleged to be the property of the succession, when the heirs of the succession are present, and all of them are not made parties to the suit.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Semple*, judge *ad hoc*.

L. B. Claiborne, Edward Phillips, and *Robert Montgomery* for plaintiff and appellee.

Hewes & Parlange for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Lovel Ledoux and his wife, Anasie Plantevignes, were in community, owning a plantation. The wife died in spring of 1866, leaving seven children, three of whom were minors and four majors.

On January 25, 1867, after the death of his wife, Lovel Ledoux gave his note to Amaron Ledoux for $1100, being for a community debt, and executed a special mortgage on the plantation to secure it.

In April, 1868, Lovel Ledoux made and recorded an acknowledgment of indebtedness to each of his children for $642 85, and to secure those of age gave a mortgage on same plantation.

On twenty-fourth December, 1868, he caused the said plantation to be surveyed and divided into seven lots, numbered, respectively, 1, 2, 3, 4, 5, 6, 7; marking lots 1, 2, 3 with his own name, and the other lots with the name of the major children. Thereupon he conveyed the lots 4, 5, 6, and 7 to the major children. Subsequently to these conveyances to the children, Amaron Ledoux, by public act, of date twenty-ninth March, 1869, released said four lots, 4, 5, 6, and 7, from his said mortgage, "which four lots of ground *the said Lovel Ledoux has sold and conveyed to Horace Ledoux, Athenaise Ledoux, etc*," but he specially reserves his mortgage on the lots 1, 2, and 3, "marked on the plat" of said survey "as Lovel Ledoux's share," etc.

In 1870 Lovel Ledoux applied for and obtained the administration of the community, and the whole plantation was inventoried as belonging thereto. Subsequently, Amaron Ledoux's executrix, he having died, took judgment by confession against Lovel Ledoux, personally, on this

note, reciting in the petition this waiver and release, and asking and obtaining recognition of the mortgage on the lots 1, 2, and 3.

Early in 1874 she, Amaron Ledoux's executrix (the intervenor in the present suit), issued execution on said judgment, and the sheriff seized the entire plantation thereunder, all the seven lots.

Four injunction suits were brought against this execution: first, by Lovel Ledoux, administrator, claiming lots 1, 2, and 3 as succession property, and not liable to seizure by plaintiff; second, three other injunctions by the major heirs, claiming ownership of lots 4, 5, 6, and 7, reciting the sales to them by Lovel Ledoux, and the release of mortgage by Amaron Ledoux, averring that the said lots were not liable for said debt, that the seizure is illegal, etc., prays for injunction and for a decree declaring said land not subject to seizure for said debt, for damages, and for general relief.

The answer of Mrs. Anna Ledoux, executrix, is as follows, in each of the three injunction cases of the children, substituting for "lot 7" the lot involved in each particular case:

"Now comes Mrs. Anna Ledoux, executrix of the estate of Amaron Ledoux, deceased, and one of the defendants in this suit, and for answer to plaintiffs' petition says, she denies generally all the allegations therein contained; alleges that if any property belonging to plaintiffs has been seized by the sheriff under the writ of *fieri facias* issued against Lovel Ledoux in the suit No. 1589 of the docket of this court, the same was done entirely without the knowledge, authority, or consent of this respondent, who was plaintiff in said suit, or of her attorney therein. And she has given the sheriff orders to release from seizure all property not belonging to Lovel Ledoux, the defendant in said suit, and particularly the lot No. 7, described in plaintiffs' petition. Wherefore, she prays, etc. Signed by her attorney."

The evidence introduced was, by plaintiffs in injunction, their deeds, the release, and proof of damages. By defendant, that she had ordered the sheriff to release these lots, and that neither she nor her attorney had directed, or been cognizant of, said seizure.

The judgments were as follows: "That the injunctions issued in this cause be made perpetual, and that the property described in plaintiff's petition as lots Nos. 4 and 5, be recognized as the property of Augustine Lacour, wife of J. D. Lacour, and not subject to seizure for debts due by Lovel Ledoux, Senior, to Mrs. Anna Ledoux, widow and testamentary executrix of Amaron Ledoux, deceased; * * * that she pay costs, and that plaintiff's demand for damages be dismissed as in a case of nonsuit." Signed December 21, 1874.

These judgments were never appealed from. They are pleaded in this cause as *res adjudicata*.

The injunction taken by Lovel Ledoux against the sale of lots 1, 2, and 3 was finally decided by this court (27 An. 100) holding the said lots to be succession property and not liable to seizure.

In the midst of these litigations, to wit, in June, 1873, J. C. Burton, defendant herein, made an agreement with the Ledouxs to buy the whole place at $8000, to be paid when title was perfected. The claim made for him, that he is an innocent purchaser, is utterly untenable. He agreed to buy with full knowledge, and if he has paid out his money before he acquired a perfect title, he has no one to blame but himself, as he was under no obligation to do so. He has no other or greater rights than his vendors, and must stand or fall with them.

On third May, 1875, Lovel Ledoux filed a final account of administration, which was opposed by Mrs. Amaron Ledoux, executrix, for various reasons. J. C. Burton, who had bought a claim from Olympe Boisse against the community, also opposed it because Mrs. Amaron Ledoux's claim was placed on it.

The history of this branch of the case will be found reported in 28 An. 562. That proceeding related to matters not involved in this suit, which is confined to the issue of ownership of lots 4, 5, 6, and 7. This suit arose as follows: After the decision in 28 An. 562, Lovel Ledoux was dismissed from the administration, and Joseph V. Ledoux, the plaintiff herein, was appointed in his stead as administrator. This new administrator refused to inventory lots 4, 5, 6, and 7 as part of the succession, or to give bond for their value. Mrs. Ledoux, executrix, took a rule to compel him to do these things, which ultimated in a decree of the parish court directing him to institute suit to test the title and to recover possession of said lots.

This suit is brought by him for that purpose, against J. C. Burton, who is in possession, and who has called in his warrantors to defend it, i. e., the major children.

Mrs. Ledoux, executrix, intervenes and joins in his demand, alleging simulation and collusion between the former administrator, the present one, Burton, and his vendors. The court rendered judgment decreeing said lots to belong to said community estate and directing plaintiff as administrator to take possession thereof. Defendant and warrantors appeal.

So far as we can discover there seem to be but two debts against the community, to wit, the one held by Mrs. Ledoux, executrix, and the one due Olympe Boisse, held by defendant Burton.

The questions presented and necessary for us to decide are—

First—Are the judgments in the three injunction cases, hereinbefore described, *res adjudicata* against Mrs. Ledoux, executrix; and do they bar her from claiming the subjection of lots 4, 5, 6, and 7 to her debt?

For if they do bar her demands and claims, there are no creditors of the community to be benefited, since Burton, the defendant, necessarily by his attitude in this case disclaims the right of enforcing his claim on said lots.

Second—If there are no creditors of the community who can claim the benefit of the return of these lots to the community, can its administrator as such reclaim them for the benefit of the minor heirs? Has he legal capacity to do so?

Third—If the administrator can bring such demand, when there are no creditors who can profit by it, what is the legal effect of a sale by the surviving husband, before an administration is inaugurated, of the whole or part of the community effects?

First—As to the plea of *res adjudicata*. The intervenor's counsel contend that in said injunction suits the ownership of these lots was not put at issue. That the parties thereto are not the same as in this suit; "that the thing demanded is not the same." We think that the counsel are mistaken. The plea of *res adjudicata* as between two individuals can not be avoided because in the second suit there are other persons parties who were not such in the first suit. There is no denying the fact that in those injunction suits Mrs. Ledoux, executrix, was party on the one side, and the major children of Ledoux on the other side. There is no disputing the fact that the same parties are at issue in this suit. The issues here are, the ownership of and the validity of the said children's title to said lots, and the ultimate liability of said lots for the payment of intervenor's claim. The issues in the injunction suits were the same. The plaintiffs in injunction distinctly allege their ownership, set forth their title, set forth the release of mortgage, and aver that by reason of these things the property is theirs and is exempt from said debt, and pray for such exemption, for damages, and for general relief. The defendant in injunction (Mrs. Ledoux, executrix,) *denies generally plaintiff's allegations*, and disclaims any intentions to seize their property, to wit, the lots in question. This general denial put at issue plaintiff's ownership—put at issue the fact of release and the exemption pleaded. The release of the lots by the defendant in injunction and her plea thereof could not have the effect of destroying this issue. It might perhaps be construed into a judicial confession of the truth of plaintiff's allegations; and if so construed, it was only another and stronger reason for the judgments which were rendered perpetuating the injunctions, recognizing plaintiff's ownership of the property and its exemption from defendant's debt.

All the identities constituting the thing adjudged are present. In both suits the parties are the same; their capacities are the same; the thing is the same, to wit, lots 4, 5, 6, and 7; the cause of action is the

same, to wit, ownership and exemption of the property. The plea of *res adjudicata* is therefore good against the intervenor, and she has therefore no legal right or interest in questioning the titles of defendants. Nothing is shown *subsequent to the date of said judgments*, December 21, 1874, from which can be inferred any renunciation by these defendants of the benefits of said plea.

Second—Can the administrator, where there are no creditors, maintain a real action like the present, when the heirs of the estate he administers are present, but are not all made parties to the suit? In Hart vs. Boni, 6 La. 99, this court held with reference to this subject, that "in suits by executors to recover the deceased's property, the heirs if interested and present should be made parties to the action." It is, besides, a fair deduction from article 123 C. P. that executors and administrators can not where the heirs are present maintain alone real actions like the present. The propriety of such a rule is made manifest by the case before us. The minor heirs, who are no parties to this suit, have alone the right to question the validity and reality of the sales by their father to their co-heirs. *Non constat*, that they will ever desire to question it. It is therefore unnecessary for us to discuss the effect of these sales by the surviving husband in community, as the necessary parties are not before us for its determination.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the demands of the intervenor be rejected and disallowed, and that the plaintiff's demands be rejected as in case of nonsuit. The costs of both courts to be borne by plaintiff and intervenor.

No. 7017.

SCOTT & WILLIAMS VS. THE SHERIFF ET AL.

It is only in cases in which the execution of a judgment is enjoined, that, on the trial of the injunction, the sureties on the injunction bond are parties to the suit. It is therefore only in such cases that the sureties can be condemned in damages, in the judgment dissolving the injunction. In all other cases the sureties must be proceeded against by a separate action on the bond.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough*, J.

A. W. Roberts and *Leonard & Kennedy* for plaintiff and appellant.

Montgomery & Deloney for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. Algernon Manning, the real defendant in this suit, obtained from the parish court, as creditor of the succession of Wil-

liam Sutton, an order authorizing the sale of property belonging to said succession, to satisfy his claim. This order was obtained with the consent of R. R. Scott, one of the plaintiffs, who was then acting as the executor of William Sutton's will.

Under Manning's application, a writ issued to the sheriff and, in obedience to its terms, he took possession of twenty-five mules inventoried as the property of Sutton, placed them in charge of Williams, one of the plaintiffs, as keeper, and—on the thirty-first of December 1874—he offered at public auction, after an advertisement of a month, twenty of said mules, which he adjudicated to Algernon Manning for *about* eighty dollars each, and instantly delivered to his agent and attorney. Neither that sale, nor the order under which it was made was introduced in evidence on the trial.

Two days after the sale and delivery of the mules to Manning, plaintiffs presented to the district judge a petition in which they alleged that the mules, to sell which an order had been procured at the request of one of them, and—in pursuance to that order—left in the other's charge, as the sheriff's keeper, were not the property of the estate of William Sutton, but had been purchased by and belonged to them.

In their petition, they also averred that the sheriff had attempted to sell said mules on the thirty-first of December 1874, and prayed for writs of injunction commanding the sheriff and Manning, "not to proceed any further in the seizure of said mules, not to take them from their possession, or attempt to hold them until further order of the court."

On their representations, the injunction applied for was granted by the parish judge, in the absence of the district judge, on condition that plaintiffs should furnish bond in the sum of two thousand dollars. The required bond was given, with D. L. Morgan and Wm. Maguire, as sureties.

In answer to the injunction, Manning urges its illegality and the illegality of all the proceedings had under it, alleges that plaintiffs have taken possession of the mules acquired by law, and asks that they and the sureties on the injunction bond be condemned to pay him the sum of two thousand dollars, the value of the mules, and—besides—his attorney's fees.

The case was tried, plaintiffs' injunction dissolved and they and their sureties on the injunction bond condemned to pay to defendant, as special damages for the value of the mules and attorney's fees, thirteen hundred and ten dollars. From that judgment, D. L. Morgan, one of the sureties has alone carried his appeal to this court.

It is only in those cases in which the execution of a judgment is enjoined, that—on the trial of the injunction—the sureties on the bond

are, by law, considered as parties to the suit. In all others, the successful defendant is left to his action on the bond.

C. P. 304. 3d A. 476. 1 R. R. 142. 17 L. 176.

Fully convinced themselves of that indisputable fact, defendant's counsel—in the last paragraph of their brief—dismiss that important question with the remark "that it is not raised, and need not be discussed."

D. L. Morgan was not a party to the suit in which the judgment appealed from was rendered. That was so manifest, that the bond on which alone he could have been held liable, and which—as to him—could not be considered as a part of the proceedings which were before the court, was not even introduced in evidence. He appeared in that court only after the rendition of the judgment, to appeal from it, and he contends—here—that it was premature. Of this, there can be no doubt and Manning's own interest commands the judicial declaration of an indefensible nullity.

It is, therefore, ordered, adjudged and decreed that, as to D. L. Morgan, the judgment appealed from is annulled, avoided and reversed at defendant's costs in both courts, and that every right and action of said defendant on the bond herein referred to, and every other right or action to which he may be entitled on account of plaintiffs' injunction, be and they are specially reserved.

No. 7093.

STATE EX REL. ZUNTZ & SPORL VS. THE JUDGE OF THE FIFTH DISTRICT COURT ET AL.

The appellee has the right to require that the sureties on an appeal bond, who have signed the bond *jointly*, shall all reside within the jurisdiction of the court whose judgment has been appealed from, when the respective sum for which each surety has bound himself must be computed, in order to make up the necessary amount of the bond.

APPLICATION for writs of mandamus and prohibition.

Richardson & Magruder for relators.

Singleton & Browne and *McGloin & Nixon* for respondents.

The opinion of the court was delivered by

MARR, J. On motion the suspensive appeal granted in this case was set aside, on the ground that one of the sureties in the appeal bond was not legally sufficient, because he resides in the Sixth Municipal District of the city of New Orleans.

The bond in this case is not solidary but joint, each surety binding

himself for part only of the amount; and the single question is as to the sufficiency of one of them, J. D. Britton, on the ground stated.

In the cases of Remmers, and State vs. Williams, both reported in 29th Annual, we had occasion to review the several acts of the Legislature by which the cities of Jefferson and Carrollton were annexed to the parish of Orleans and became respectively the Sixth and Seventh Municipal Districts of the city of New Orleans. We decided that by the act of 1876, No. 45, p. 86, the Second Judicial District Court, for the Sixth and Seventh Municipal Districts, was vested with unlimited exclusive criminal jurisdiction, and exclusive civil jurisdiction, in cases involving an amount exceeding $100, except in matters of probate; and that the inhabitants of these districts were not amenable to the ordinary civil jurisdiction of the courts of the First Judicial District.

In 1877, the Legislature, by Act No. 85, p. 124, extra session, repealed Act No. 45, of 1876, and annexed the Sixth and Seventh Municipal Districts to the First Judicial District, so as to subject the inhabitants of the entire parish of Orleans to the jurisdiction of the same courts of the city of New Orleans; but this act is not to take effect until the expiration of the term of office of the present judge of the Second Judicial District, which will be after the general election in November, 1880.

The Code of Practice, art. 575, and the act No. 24 of 1876, require, in plain terms, that the surety in an appeal bond shall be a person "residing within the jurisdiction of the court," that is, the court in which the judgment was rendered.

Counsel for relators maintain that, as the bond in this case is joint and not solidary, all the sureties, according to the Code of Practice, art. 165, No. 6, might be sued in the same court, and they cite a number of cases to the effect that, by contracting a joint obligation, the obligors waive the privilege of domicile.

One of these cases simply decides that where two persons sign a note which reads, "*I promise to pay*," the obligation is several as well as joint, Bank vs. Sterling, 2 La. 60; and three of them decide that all the joint obligors must be made defendants in a suit on the obligation; and that no judgment can be rendered against one or more of them unless all are parties. Mayor vs. Ripley, 5 La. 120; Toby vs. Hart, 8 La. 523; Thompson vs. Chretien, 3 Rob. 26.

In Wallace vs. Glover, 3 R. 411, it was decided that the surety in a bond given for the release of property attached was amenable to the jurisdiction of the court in which the attachment suit was brought, although he resided in another parish; and in Whitehead vs. Woolfolk, 3 An. 42, it was decided that the sureties of the receiver of a partnership were amenable to the jurisdiction of the court by which the receiver was appointed, without respect to their domicile. The court held in both

these cases that the contract was a waiver of the personal privilege of domicile, and made the sureties amenable to the tribunal in which the main action was pending.

All of these decisions were anterior to the act of 1861, amending art. 162 of the Code of Practice, which forbids the election of a domicile or residence for the purpose of being sued; and it may be questioned whether a person could, validly, agree in advance, at the time of signing a judicial bond, to submit to the jurisdiction of a court to which he was not otherwise amenable, merely for the purpose of qualifying himself as surety.

The decisions just referred to, which relate to suits against joint obligors, and many others might be cited to the same effect, are based upon art. 2080, of the Civil Code—2085 of the Revised Civil Code—which provides that, "In every suit on a joint contract, all the obligors must be made defendants." Of course, if they resided in different parishes, they could be cited to answer in the parish, the domicile of one of them, in which the plaintiff might choose to bring his suit; and the Revised Code of Practice, art. 165, No. 6, did but formulate this necessary rule, by providing that, "when the defendants are joint obligors, they may be cited at the domicile of any one of them."

It may be that, under the dominion of this rule, one of the sureties in an appeal bond, in which each of them bound himself for part of the amount only, could not have pleaded his domicile successfully; but act No. 103 of 1870, published in the acts of 1871, page 18, enacts, section 2, "that hereafter, in all suits against joint obligors, it shall be unnecessary to make all the joint obligors parties to the suit; but each of the joint obligors may be sued and a judgment obtained against them separately for the proportion of the debt or obligation due by them respectively, whether all are joined in the suit or not."

It logically follows that the argument *ex necessitate* has lost its force; and that joint obligors can no longer be compelled on that ground alone, but only in virtue of positive law, to answer before a tribunal to the jurisdiction of which they are not amenable, generally, by reason of their domicile.

The decisions relied upon are wholly inapplicable. If it were true that a surety in an appeal bond, not solidary but joint only, could be compelled, notwithstanding the act No. 103 of 1870, without regard to his domicile, to answer before the tribunal in which the original suit was brought, it would not thence follow that the appellee would be bound to accept him as surety. It is the right of the appellee to demand and to insist that the security upon which his right to enforce his judgment is suspended shall be in strict conformity to law. He may, if he chooses, accept without objection, a surety residing in a distant parish, or whose

entire property liable to seizure is in another State; but the law does not compel him to accept any other than "good and solvent security, residing within the jurisdiction of the court, and having property liable to seizure, to the amount of the obligation, within the State." Act of 1876, page 49, 50.

If the mere fact of signing a judicial bond invests the surety with the quality of "residing within the jurisdiction of the court," this requirement of the law is without meaning or effect. It might be proper to hold that the person who has signed a judicial bond as surety should be concluded, and not permitted to set up the plea of domicile in a proceeding to enforce the bond; but a judicial tribunal has no more power to accept as surety in an appeal bond a person not residing within the jurisdiction of the court, than it would have to accept as such surety a person not having within the State property liable to seizure to the amount of the obligation.

The amount for which the three unquestioned sureties bound themselves in this case does not exceed by one half the amount of the judgment, including principal and interest due up to the date at which it was rendered. The other surety, Britton, lacked the qualification of residing within the jurisdiction of the court, as required by law; and the district court had not, nor have we, the power to relieve the relators of the consequences of this fatal objection.

The writs of mandamus and prohibition prayed for are refused; and this proceeding is dismissed at the cost of relators.

No. 6889.

ROBERT MONATT vs. E. T. PARKER, PUBLIC ADMINISTRATOR.

One who has made a donation *inter vivos* of immovable property to his concubine, can not, on the latter's death, recover the property, on the ground that the donation violated a prohibitory law, and was opposed to good morals.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Edward Phillips for plaintiff and appellant.

W. O. Denègre for defendant and appellee.

The opinion of the court was delivered by

MARR, J. The plaintiff alleges in his petition that he purchased a mulattress slave named Mathilde in 1847, whom he emancipated in 1858; and that he lived in concubinage with her from the date of his purchase until her death, which occurred in April, 1877.

That on the third of May, 1870, he purchased a certain lot of ground for $1500, for which he paid.

That being about to make a voyage to Europe, and desiring to make provision for his concubine in the event of his death during his absence, he caused the title to this lot to be taken in her name by notarial act.

That he was absent in Europe about six months, and on his return he had buildings and improvements put on the property, which cost some $3000, all of which he paid; that he also paid the taxes on the property, collected the rents and gave receipts for them in his name; that Mathilde had no means; that he is the lawful owner of the property; and has been in possession since the purchase, in 1870.

That after the death of Mathilde he paid the expenses of her last illness, funeral expenses, and all the debts of the succession; that she had nothing, and her succession owed nothing; and that she left no ascendants, nor descendants, nor collateral relatives, nor legal heirs.

That Parker, public administrator, has been appointed administrator of her succession; and has taken possession of the property in question, as belonging to the succession, and has obtained an order of court requiring it to be inventoried as well.

That the notarial act of May 3, 1870, the conveyance of the property to Mathilde, is null and of no effect, and in violation of "positive prohibitory law;" and if the act can have any effect, it is only as a donation from petitioner to his concubine, which is prohibited by law, and is contrary to good morals and public policy.

The suit is brought to recover the property, and thirty dollars a month for rent during the time the administrator holds possession; and to have the act of May 3, 1870, so far as it purports to convey any right or title to Mathilde, decreed to be absolutely null and void and of no effect whatsoever.

The administrator excepted that the petition exhibits no cause of action against him; and plaintiff is appellant from the judgment maintaining that exception and dismissing the suit.

We think the reference to "good morals and public policy" comes with rather a bad grace from plaintiff, who prostituted his own slave, made her his concubine, and lived with her in that degraded relation for thirty years, in flagrant violation of "good morals, public policy," and common decency.

The law does, indeed, prohibit donations of immovables between those who have lived in concubinage; and of movables exceeding one tenth of the value of their estates, respectively: R. C. C. 1481; but such dispositions can not be attacked by the parties themselves. The heirs or the creditors of the donor may invoke the nullity of donations in fraud of the law and of their rights by alleging and proving his turpitude, which he would not have been permitted to do in his own behalf.

That which one promises to give for an illegal or immoral consid-

eration he can not be compelled to give; and that which he has given on such a consideration he can not recover. The law will not afford relief to either party, *in pari causâ turpitudinis;* but leaves them just where they have have placed themselves. See Mulhollan vs. Voorhies, 3 N. S. 46; Gravier vs. Carraby, 17 La. 118; Pucket vs. Clarke, 3 Rob. 82.

The Roman law did not permit that to be recovered which had been given for an illegal or immoral consideration; nor did it allow any action to enforce promises and undertakings made on such consideration. Such an action as that brought by plaintiff in this case would not have been tolerated under that system:

"*Si ob stuprum datum sit * * * quod meretrici datur, repeti non potest.*" Dig. lib. 12, tit. 5, l. 4. The rule and the reason for it are stated very clearly and forcibly by the Emperor Antoninus:

"*Cum te propter turpem causam, contra disciplinam temporum meorum, domum adversariæ dedisse profitearis: frustra eam tibi restitui desideras, cum in pari causâ possessoris conditio melior habeatur.*" Code, lib. 4, tit. 7, l. 2.

It may be questioned whether the concubine of her master who continues in that relation after her emancipation is *in pari causâ turpitudinis* with him. It is certain that he could not, during her lifetime, have maintained an action against her for the recovery of the property; and her death has not invested him with any right which he had not during her life. All that plaintiff alleges in his petition may be true; it must be assumed to be true for the purposes of this decision; but it only serves to show that he is attempting now to avoid the legitimate consequences of his own acts and conduct in violation of "good morals and public policy."

The exception was properly maintained, and the judgment appealed from is affirmed with costs.

No. 7059.

BROADWAY SAVINGS BANK OF ST. LOUIS VS. EDWARD VORSTER ET AL.

Where an agent, clothed with power to accept bills, has accepted a bill in the name of his principal, the latter can not escape liability as acceptor, on the ground that he had no interest in the transaction in which the bill was given, and that he had received no consideration, unless he proves that his agent, to the knowledge of the holder of the bill, has abused his power.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

Braughn, Buck & Dinkelspiel for plaintiff and appellee.

Sam. R. & C. L. Walker for defendants and appellants.

The opinion of the court was delivered by

MARR, J. Separate suits were brought and separate judgments

were rendered against appellant in favor of the Broadway Savings Bank of St. Louis, on two bills of exchange, drawn by A. W. Schulenburg, to the order of I. B. Kreiger, Jr., cashier, dated at St. Louis; one, twenty-fifth July, 1877, for two thousand dollars, the other thirtieth August, 1877, for twenty-five hundred dollars; with exchange on New York, addressed to Edward Vorster, at New Orleans, accepted by writing across the face "p. p. Edward Vorster, I. Linden Schmidt."

The defense is want of authority in Linden Schmidt, and want of consideration; and by agreement, one appeal was taken, and one bond given, and both cases brought up as one.

Interrogatories on facts and articles were propounded to Vorster; and he answered that "Linden Schmidt did hold my power of attorney for the transaction of my business, at the date of the draft sued on, which procuration had been executed in contemplation of my absence from this city in the year 1876; the same was in writing, and is now on file in the New Orleans National Bank."

He submits to the consideration of the court whether this power authorized Linden Schmidt to use his name for accepting bills of third parties, "or the draft sued on, in which I had no interest and for which there was no consideration in my behalf."

He also states that he is advised by his counsel that he is neither morally nor legally bound for the payment, "the said draft being solely for a transaction for the benefit of A. W. Schulenburg alone, in which I was not interested, and for which I had received no consideration."

The power of attorney was produced on subpœna *duces tecum*, directed to the president of the New Orleans National Bank, in which it had been deposited, for the reason, no doubt, that Vorster kept his account in that bank. It is dated twenty-third March, 1876, and is in the usual form, that is, it is such a power as the merchants of New Orleans are in the habit of giving to their confidential clerks. It gives authority to the agent, among other things, "to make and indorse promissory notes in the name of the constituent, and to draw, indorse, and accept bills of exchange."

There is nothing that Vorster could have done, in person, that Linden Schmidt could not have done, under the power, in and about the business, contracts, and property of Vorster. No doubt Vorster understood and intended, and all other business men would so understand, that this power was not to be used for any business or purposes of Linden Schmidt, but only for the business of Vorster.

It is by no means unusual, it is of daily occurrence, for merchants at St. Louis to draw bill on their correspondents, merchants of New Orleans. Indeed, the commercial relations between the two cities make this a necessity. A merchant at St. Louis draws a bill on a merchant at

New Orleans, to the order of the cashier of a bank at St. Louis. It is sent forward to be presented for acceptance; and it is accepted by a person who has ample and express power to do that precise thing. A month later, the same merchant at St. Louis draws in favor of the cashier of the same bank, on the same merchant at New Orleans; and, like the first, it is sent forward, and accepted in the same manner; and the drawer gets the money from the bank, less the discount.

The drawee does not set up any want of consideration as between the drawer and the payee; on the contrary, in his answer to the interrogatories on facts and articles, he says the drafts were solely for the benefit of the drawer, which can mean nothing else than that the drawer received from the payee sufficient consideration. Indeed, this would be presumed. What he complains of is, that he was not interested, and received no consideration.

It frequently happens that bills are drawn and accepted solely for the benefit of the drawer; it also is not unusual for merchants living in different cities to establish mutual credits, with the understanding and expectation that shipments will be made by the one to the other, by which both will be benefited; and they agree to accept the one for the other, as interest or convenience may require, and indorsements and acceptances, purely for accommodation, are very common.

It will be observed that defendant does not state that Schulenburg had no authority to draw; nor does he charge that Linden Schmidt abused his confidence, and availed himself of the power for his own benefit or purposes. He deals candidly with the affair; admits the giving of the power to Linden Schmidt, and rests his case upon the ground that he was not interested in the transaction for which the drafts were given, and that he had received no consideration.

The question of consideration, as between the drawer and the drawee, is one with which the payee, or other holder before maturity, has nothing to do; and there could be no such thing as public confidence, no safety in dealing with commercial paper, if the holder were compelled to inquire into the relations or state of accounts between the drawer and the drawee.

The drawing of the two bills, in this case, at an interval of something over a month, and the acceptance by Linden Schmidt of both, create a strong presumption that Schulenburg did not draw without authority; and this presumption is by no means impaired by the entire failure of Vorster to suggest that the drawing was not authorized. The inference is legitimate, entirely fair, that these bills were drawn in view of dealings between the parties by which Vorster expected to be in funds to meet them at maturity; that this expectation was not realized; and that Vorster did not, therefore, receive any consideration, or the consideration which he had expected and relied upon.

But there is no occasion to resort to presumptions. Plaintiff holds two bills, drawn on Vorster, and accepted in his name by a person to whom Vorster had given written and express authority "to draw, indorse, and accept bills of exchange;" and Vorster is bound unless he can show that his agent, to the knowledge of the holder, abused his power. Those who give such extraordinary powers incur the risk of loss by the imprudence or by the fraud of the agent; but they must attribute this only to their own misfortune, or want of proper caution in selecting the agent to be intrusted with such large powers. Neither fraud nor imprudence is imputed to Linden Schmidt, nor is there any allegation in the answer of defendant, nor in his answer to the interrogatories on facts and articles, which tends to relieve him of the obligations of acceptor, resulting from the act of his duly authorized agent.

The fact that the words "with exchange on New York" were used in the bills does not affect their character as bills of exchange, as argued by appellants' counsel, but it tends to show that there was some agreement or understanding between Schulenburg and Vorster, by which Vorster was to pay at the maturity of the first bill such sum as would purchase exchange on New York for $2000; and at the maturity of the second bill such sum as would purchase like exchange for $2500.

The judgments appealed from are therefore affirmed with costs.

No. 7046.

MARY M. PENDEGAST, ADMINISTRATRIX, VS. GEO. SCHAWTZ ET AL.

The allegation of a plaintiff in a suit to recover property, (alleged to be unlawfully in the defendant's possession) that he had bought the property, but had never paid for it, and hence that it still belonged to the vendor, is not a disclaimer of title, which can be pleaded by defendant in estoppel, in a subsequent suit to recover the property, brought by the legal representative of the plaintiffs.

A defendant can not dispute the title of the person under whom he holds.

Not only good faith, and possession of real estate for ten years is required, but also a legal and transferable *title of ownership* is required in order to acquire said property by prescription.

The ownership acquired in virtue of a *confiscation* sale, under the act of Congress of 1862 amounted to a mere usufruct. It was and could be only imperfect, and was to terminate with the life of him against whose interests and property the confiscation proceedings were directed. There is wanting therefore in the title of one who purchased the property at a confiscation sale the quality of ownership necessary to enable him to prescribe.

The fact that the price paid by a purchaser of property at a confiscation sale was used to pay off a pre-existing mortgage on the property, does not entitle such purchaser to demand that he shall be refunded the price, when, at the expiration of his usufruct, the owners of the property call on him to restore it to them. Nor can he demand that he shall be re-imbursed what he has expended for repairs, and taxes on the property.

Pendegast vs. Schawtz.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Herron, Bird & Beale for plaintiff and appellee.

J. W. Burgess and *R. & E. L. Posey* for defendants and appellants.

The opinion of the court was delivered by

EGAN, J. This suit is by the administratrix of the late Michael Pendegast, who was also his surviving wife, to recover from the defendants a lot of ground and improvements purchased under what is usually termed the Confiscation Act of Congress of the seventeenth of July, 1862, and sold as the property of Michael Pendegast. The latter died on the eighteenth of March, 1870, and this suit was instituted on the twenty-first of March, 1876. The defendants set up by way of defense—

First—That the plaintiff can not recover, by reason of the judicial disclaimer of title by Michael Pendegast in a suit to recover the same property as heir of his father. To this it is sufficient to reply, 1, that the allegation relied on was that he had bought the property and never paid for it, and therefore it belonged to the vendor, a state of facts which did not divest him of title according to his own allegations. 2, that it was adjudged in that suit that he had title as purchaser and not as heir, and that he could not thus avoid the effect of the confiscation sale, which was therefore protected by the judgment; and lastly, that the only rights acquired by the defendants were by virtue of that confiscation sale of the property in controversy as belonging to Michael Pendegast whose original title they could not therefore dispute, as they held under him.

The second ground of defense is the prescription of ten years, based upon alleged possession in good faith for more than that time under a title translative of property. Not only good faith and possession for the time required by law, but also a legal and transferable *title of ownership* are requisite to acquire property by this species of prescription. This only is that just title which is required. C. C. 3479–3483. The ownership or right acquired by the defendants under the confiscation sale was and could be only imperfect, and was to terminate with the life of him against whose interests and property the proceedings in confiscation are directed. C. C. 490. Section 3, article 3, of the Constitution of the United States, 7 Wallace, 339, 9 Wallace, 339, and joint resolution of Congress of the same date with the confiscation act on the same subject. Had, however, Congress not interpreted their act by their resolution, as was held in the cases cited, the claim that it possessed any war or other power superior to the Constitution can receive no sanction from this tribunal, and, we trust, from no other American court at this day. There was then wanting that essential element in defendants' title to enable them to prescribe—there was no title of perfect owner-

ship, but only a right with us called usufruct, and elsewhere called a life estate during the life of Michael Pendegast. This would not support prescription as to the full or perfect ownership against any one, still less against the representatives or heirs of him under whom, and under whose title alone they claim, or can claim, even that imperfect right. The defendants claim, in any event, that the succession should be compelled to repay to them the amount of a mortgage existing against the property at the time of the confiscation sale, and which is claimed to have been reserved and paid out of the price of the purchase. They claim, also, the value of certain necessary repairs put down in the brief of counsel at $25 per annum, or $325 for thirteen years, and, also, the taxes during their possession since the confiscation. As to the claim to be repaid the amount of the mortgage, it is sufficient to remark that it was paid not in addition to but out of the purchase price, which would otherwise have gone entirely into the hands of the Marshal, and that they paid no more by reason of the existence of the mortgage than they would otherwise have done. Their bid was regulated by the value of the right in the property belonging to Pendegast which was subject to the mortgage, and the whole amount of that bid was the consideration for the life estate or usufruct acquired by them, the duration of which depended on the uncertain event, the death of Pendegast. To repay the mortgage debt would be to return to the defendants the very consideration which they paid for the enjoyment of the property during all these years. Had they paid it otherwise there might be some pretext for its restoration; not so, however, when it was only paid out of the price, which was in no manner increased thereby.

The fact that the mortgage creditor instead of the Government was allowed without contest by the latter to receive so much of the price bid, by virtue of a pre-existing right, is no more reason for its repayment than for that of any other part of the purchase price. As to the claim to re-imbursement for necessary repairs and taxes, these are charges imposed upon the usufructuary by the express provisions of the law, C. C. 570, 571, same, 578, and can afford no basis of claim by the defendants against the plaintiff. As to the statement of account pro and con in the defendants' brief, accepting the figures as correct, it would only prove that had Pendegast lived longer the defendants' rights acquired at the confiscation sale would have been more valuable because longer enjoyed.

We have not been asked to amend the judgment as to the time from which rent should be charged against the defendants.

The judgment of the court below was in favor of the plaintiffs for the recovery of the property and rent or lease price from judicial demand. It is correct, and is affirmed.

No. 7014.

SCHOOL BOARD VS. EMILE L. WEBER ET AL.

State and parish officers, and the sureties on their official bonds may be sued, on account of any malfeasance of such officers, in the courts of the parish in which the officers exercise, or may have exercised their functions, no matter where their domiciles may be.

APPEAL from the Seventh Judicial District Court, parish of West Baton Rouge. *Yoist*, J.

Joseph P. Golsan, District Attorney *pro tem.*, and *Henry C. Meyers* for defendants and appellees.

Wickliffe & Fisher for plaintiff and appellant.

The opinion of the court on the original hearing was delivered by MANNING, C. J., and on the rehearing by EGAN, J.

MANNING, C. J. Weber was formerly treasurer of the School Board of West Feliciana, and this suit is upon his official bond, in which judgment is sought against him and his sureties. The suit was filed in Oct. 1877, and it seems that Weber had changed his residence to Ascension in the preceding January.

On Nov. 9, 1877, he pleaded to the jurisdiction, and on same day filed an exception, but with express reservation of his rights under the former plea, and without prejudice thereto. On 17th. of same month, he answered and in his answer, reconvened. There was no reservation of any rights under the plea to the jurisdiction in the answer, nor do the minutes shew that the court received it without prejudice to that plea.

The lower court sustained the plea to the jurisdiction, and dismissed the suit as to all parties—the grounds of dismissal as to the sureties being, that no judgment could be rendered against them until the amount of the defalcation of the principal shall first be judicially ascertained.

Prior to 1861, the Code of Practice declared the general rule in civil matters to be that one must be sued before the judge having jurisdiction over the place of his domicil, but that the rule was subject to several exceptions. art. 162. In that year, that article was amended so as to read—"it is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicil or residence, and shall not be permitted to elect any other domicil or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided by law." Acts 1861, p. 137.

The two particulars in which the article was amended are, that the privilege of electing a domicil for the purpose of being sued was expressly denied thereafter, and the clause that the rule is subject to sev-

eral exceptions is altered to read, that it is subject to those exceptions expressly provided by law.

Sec. 2. chap. 2 of the Code of Practice treats of the tribunals before which actions are to be brought. Art. 162 is the first one under that head. Art. 165 enacts that there are other exceptions to this rule (i. e. the rule of art. 162) and enumerates them. The 7th. class of exceptions is, in suits to enforce the collections of bonds of state and parish officers, the courts of the parish, in which the officers exercise the duties of their offices, shall have jurisdiction over the sureties, it matters not in what parish they may reside.

If the sureties on an official bond may be compelled to answer a judicial demand against them, based upon the malfeasance of their principal, out of their own domicil, *a fortiori* must the officer himself be amenable to the jurisdiction of the court of that parish in which he exercised his functions and to which he had subjected himself. The Code appears to assume as indisputable that the officer can be sued nowhere else, and in order that the rights of all parties may be determined in one action, compels the sureties to answer before one who is not their judge, and in order to compel them, is at pains to include them in a special exception to the general rule touching jurisdiction, the effect of which would be wholly nugatory if the principal were not suable at the same place and time with them. The exception should not have been sustained. Therefore

It is adjudged and decreed that the judgment of the lower Court is reversed, and the cause is remanded to be proceeded in according to law, the appellee paying costs of appeal.

CONCURRING OPINIONS.

MARR, J. I concur in the decree pronounced in this case by the Chief Justice upon the ground that a parish officer and his sureties are amenable to the jurisdiction of the courts of the parish in which the official duties were to be performed; and that this jurisdiction is not divested by the removal of the officer to another parish.

I do not understand that the court decided, or intended to decide, in Marqueze vs. LeBlanc, 29 Annual, 194, that a defendant might be cited in any other than the parish of his domicile. The majority of the court held that, in a suit by attachment, a person residing in a parish different from that in which the suit is pending may be cited as garnishee, and thus be made a party, and be compelled to answer in the court having jurisdiction of the attachment suit. The distinction was plainly drawn between garnishees in an attachment suit which is pending, and garnishees under *fieri facias* which issues on a judgment, in a

suit which terminated with the judgment, and which is no longer pending. In the one case, the pending suit, the garnishee is compelled to answer in a parish other than that of his domicile; in the other, there being no longer a pending suit, the garnishee under *fieri facias* must be sued and cited at his domicile, because the proceeding against him is in the nature of an original suit, not as an accessory to the main action.

I did not concur in the opinion of the majority in that case; and I still adhere to the views expressed in my dissenting opinion. That decision has settled the case so far as garnishees in attachment suits are concerned; but it in no manner modifies the general law which requires suit to be brought at the domicile of the defendant, and the garnishee under *fieri facias* to be cited at the parish of his domicile.

SPENCER, J. I concur in the decree reversing the judgment appealed from, and overruling defendant's exception to the jurisdiction of the court of West Feliciana.

But I am not prepared to concur in the reasons and grounds upon which the majority of the court rest that decision. I am not satisfied of the correctness of the reasons given. I think there are far better grounds for our decree than those assigned. To say the least, it is very doubtful whether the principal on an official bond can be brought within the terms of number 7 of article 165, C. P. That article expressly limits itself to *the sureties* on such bonds; and article 162 says that a man must be sued before the judge of his domicile except in cases "*expressly provided for by law.*" The case of a principal on an official bond is nowhere *expressly excepted by law* from the operation of the rule of article 162. I prefer, therefore, to rest my concurrence upon different principles. In the answer of Weber filed *before* any decision upon his plea to the jurisdiction, there is no reservation of his rights to urge that plea; nor did the court, so far as the minutes show, allow him to file it, "without prejudice to that plea," as in the case of the exception referred to.

A plea to the jurisdiction of the court *ratione personæ*, is a "declinatory exception." C. P. 334. It must be pleaded "previous to answering to the merits." C. P. 336. "If one be cited before a judge whose jurisdiction does not extend to the place of his domicile or of his usual residence, but who is competent to decide the case brought before him, and he plead to the merits, instead of declining the jurisdiction, the judgment given shall be valid, except the defendant be a minor." C. P. 93.

Where one answers to the merits without previously demanding a

decision on his plea to the jurisdiction, or reserving the benefit of it, it is waived. 10 L. 228; 11 R. 418; 13 L. 373; 11 R. 402; 3 A. 222; 4 A. 350.

But here we are met with the objection that article 162 of the Code of Practice prohibits a defendant, even in a pending suit, *from waiving by answer or otherwise* the plea of want of jurisdiction *ratione personæ*. That article reads as follows:

"It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted *to elect any other domicile or residence for the purpose of being sued*, but this rule is subject to those exceptions expressly provided by law."

It is of course contended that this article 162 is inconsistent with and repugnant to article 93, and, therefore, as the latest expression of legislative will, repeals the prior article. In my opinion it is not only not inconsistent with it, but provides for an entirely different case. Article 162 in its first clause announces that it is a general rule that one must be sued before the court of *his domicile*. By its second clause it announces *that it is a general rule* that one shall not be permitted to elect *any other domicile or residence for the purpose of being sued.*

By its third clause it says: "But this rule is subject to those exceptions expressly provided for by law." Now this third clause qualifies the second as well and as much as it does the first clause. The Code of Practice of 1870 is a single statute. Its different articles are all parts of one whole. The recognized principles of interpretation require us to give effect, if possible, to every article or section thereof. Now, *the general principle* announced in article 162, that one shall not elect another domicile or residence for the purpose of being sued, is declared by the article itself to be subject "to the exceptions expressly provided by law." Now, if article ninety-three declares that where one has been *actually sued* in another parish than his domicile, and appears and answers without pleading to the jurisdiction, "the judgment shall be valid," if such an appearance can be considered "*an election of another* domicile for the purpose of being sued," why should not this case be considered one of those "exceptions" to the rule of article 162? But to my mind it is clear that the second clause of article 162 was enacted for a wholly different class of cases. It was enacted originally in 1861 to prevent persons from the country parishes in giving mortgages to their factors in New Orleans from electing New Orleans as their domicile and residence for the purposes of suit on these mortgages. This *election of domicile* had grown into almost *a customary clause* in such transactions, and had become a crying evil. The planter would elect, for the purposes of suit, the counting-house of his merchant as his domicile, and

appoint and designate some clerk therein as his agent to receive service of citations. The consequence was that men were constantly being sold out under proceedings of which they had no notice. Thereupon the Legislature re-enacted article one hundred and sixty-two and made it what it now is in the Code of 1870, evidently with no thought or intention of repealing article ninety-three, which continued a part of the old Code and is still retained in the new. Article one hundred and sixty-two, as well said by Mr. Justice DeBlanc, in "Marqueze vs. Le Blanc," 29 Annual, 194, simply prohibits a party from agreeing to another domicile or residence for *the purpose of being sued;* in other words forbids *agreements* of the kind I have mentioned above, whereby the party chooses, elects, *in advance* another residence, for the purposes of a contemplated suit. With what propriety of speech can Weber in the case before us be said to have "elected" the parish of West Feliciana as "his domicile or residence for the purpose of being sued?" He has made no such election. The law provides how an election of domicile shall be made. "It is made in writing, is signed by the party making it, etc." C. C. 42. But the interpretation of article 162 contended for not only expunges article 93 from the Code of Practice, not only renders *invalid and void* judgments which that article declares "shall be valid," but it renders nugatory and inoperative articles 333, 334, 335, and 336. It expunges from the Code the whole doctrine of declinatory exceptions for want of jurisdiction *ratione personæ.* These articles declare that such exceptions must be pleaded "*in limine,*" "previous to answering to the merits," but under the construction contended for, they may be pleaded not only after answer, but after *final judgment.* Want of jurisdiction *ratione personæ* is raised to the dignity of want of jurisdiction *ratione materiæ.* A party brings his suit against his debtor in a parish where he erroneously supposes him to reside. He cites him. The debtor appears, makes no exception and defends the suit vigorously, and is defeated—but not vanquished! He turns upon his creditor and says: "I am not a resident of this parish where you have sued me. I could not be sued here. I reside in another parish," and "could not elect any other domicile for the purpose of being sued." Your judgment is a nullity, as much so as though rendered by a court without jurisdiction *ratione materiæ.* If such a doctrine is to prevail, how is a suitor to know when he has got a judgment? I submit that if argument *ab inconvenienti* is to be resorted to, that the evils resulting from this interpretation would be greater than are to be found from persons having themselves clandestinely sued away from their domiciles.

In conclusion, I insist that the "election of a domicile for the purpose of being sued," presupposes that the party has *not yet been sued,* and implies the *selection and designation* of a place of domicile for the

purposes of a *future* suit. The doing of this is what the second clause of article 162 forbids. It presents a wholly different case from that contemplated by article 93, which provides for the case of a suit *actually pending*, and where there has been no previous election, selection, or previous designation of domicile for the purposes of the suit. I can not give my assent to a construction of one section of a statute which, in my opinion, unnecessarily annuls not only preceding but subsequent sections of the same statute. So far, therefore, as our predecessors may have held that article 162 repealed or nullified article 93, and articles 333, 334, 335, and 336, I think they were wrong, and that this is a proper occasion to so declare.

DEBLANC, J. I concur in the dissenting opinion of Mr. Justice Spencer.

ON APPLICATION FOR REHEARING.

EGAN, J. Section 351, R. S. 1870, provides that if it becomes necessary to enforce the collection of any bonds that may be taken under and in pursuance of this act (among which was that of defendant, Weber,) and the sureties reside out of the parish in which the officer exercises, or *may have exercised*, the duties of the office for which the bond was given, shall have jurisdiction over the sureties, it matters not in what parish they may reside. The bonds when registered operate a mortgage on all real estate of the principal obligor in the parish where he exercises his office (same section), and whenever execution shall issue, any lands of the principal which belonged to him at the date of registry of the bond may be seized and sold without regard to any subsequent transfer or change of title, and in whatever hands the same shall be found. R. S. 1870, s. 354. But no sale of the property of the sureties shall be made till that of the principal is discussed—same section. All bonds of this class are required to be authenticated by the attestation of two witnesses, and the signature of the recorder, which makes them authentic acts. These several provisions indicate the legislative will in regard to the manner of enforcing these obligations, and if not in terms in spirit would seem to give jurisdiction to the court of the parish in which is the hypothecated property of the principal obligor, and where he "exercises, or may have exercised his functions." See C. P. 163 and 164, s. 7. From the very nature of the bond and of the obligations and duties of which it is intended to secure the performance, there must first be judicially ascertained and declared some breach of its conditions and obligations on the part of the principal before any responsibility can be fixed upon the sureties, as their obligations are only for the

faithful performance of his official duties by the principal. This necessitates suit against the principal to fix the liability and amount, and as the law abhors multiplicity of actions, it is apparent that in the very nature of things it is in contemplation of the law that the court of the parish where the functions of the principal are or have been exercised is clothed with jurisdiction to sue all the parties to the bond. So it is held in regard to bonds of administrators and other similar officers, though they may actually reside elsewhere. All the reason and analogies of the law favor this view, and the authorities cited relating to jurisdiction in case of private persons can not be held to apply. There is, however, one feature of the present case which is conclusive of the question of jurisdiction independent of any other consideration, that is that the obligation of the defendants in the bond sued on is joint, and some of them reside in the parish where the suit was brought. C. P. article 164, s. 6. *The sureties are bound jointly* though in unequal amounts, and up to those amounts for the faithful discharge of the duties of the principal. That is the principal obligation which the suretyship is intended to secure. It is therefore unlike a similarly drawn unconditional obligation to pay money in several amounts.

The rehearing is therefore refused.

SPENCER, J. I concur in the decree on the grounds of my original opinion.

No. 7127.

THE STATE EX REL. J. B. BALTOR VS. JUDGE OF FOURTH DISTRICT COURT.

In all appeals to this court the appellant is primarily liable for all the costs occasioned by the appeal, and may be compelled to pay them.

APPLICATION for a writ of prohibition.

Simeon Belden for relator.

James David Coleman for respondent.

The opinion of the court was delivered by

MANNING, C. J. The relator is appellant from a judgment in the Fourth Court against him for over seven hundred dollars and interest, and having taken his appeal by petition, citations to the appellees became necessary, of whom there are several hundred. The clerk of that court issued these citations with copies of petition, and demanded of the appellant his fees therefor, amounting to two hundred and thirteen dollars and 84 cents, which not being paid, the clerk obtained the approval of the Judge of the fee bills and proceeded regularly to compel payment by judicial process, whereupon the relator applied to us

and obtained a temporary prohibition with an order to shew cause in the usual form.

The clerk and judge answer that the act of April 6, 1872 justifies their proceedings, and so it does. In all appeals to this court, the appellant is primarily liable for all the costs occasioned by the appeal, and the plaintiff, if appellee, can not be called on to pay these costs unless and until he is condemned to pay them by judgment on appeal.

The relator here, appellant there, is liable now for the fees and costs of the appeal, and the Judge rightly condemned him to pay them.

The writ heretofore issued is set aside and the petition herein is dismissed at the relator's costs.

No. 6851.

THE STATE VS. BILL THOMAS.

The objection of an accused that the property he was convicted of stealing was imperfectly, and incompletely described in the indictment, should be taken on a motion to quash the indictment, before the jury is sworn. It is too late to urge such an objection, being one apparent on the face of the indictment, on a motion in arrest of judgment.

Evidence of an offense different and distinct from that charged in the indictment is only admissible in evidence, where it tends to show the intent with which the act charged was done. Thus where the charge is stealing a certain hog, evidence that the accused altered the mark of the hog is admissible.

One who takes property, or, after having had it in possession for a time releases it, and subsequently retakes it, under a mistaken but honest belief that it was his property, is not guilty of larceny.

When a bill of exceptions is so expressed as to leave in doubt what the lower judge actually charged the jury on some important point, the accused will have the benefit of the doubt, and the case will be remanded.

Declarations of an accused in his own behalf are only admissible when they are a part of the *res gestæ*.

To constitute a part of the *res gestæ* it is not necessary that declarations should be precisely concurrent with the act charged to have been committed; it is only necessary that they spring from it, and are made under circumstances that preclude the idea of design. Thus where one is charged with stealing a certain thing, his declarations that it was his property, made before the alleged stealing, are admissible in evidence.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Parsons*, J.

H. N. Ogden, Attorney General, for the State.

Newton & Hall for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. The charge against defendant is "that, on the fifth of March 1877, he feloniously stole, took and carried away one small hog, of the value of five dollars, the property of James Gallagher, etc."

He was tried by a jury, found guilty of the charge and sentenced to hard labor in the State Penitentiary, for the space of twelve months. He attempted to obtain a new trial and to arrest the judgment, and—having failed in those attempts—he appealed to this court.

The grounds on which he bases his defence are detailed in three bills of exception and in his motion to arrest the judgment. Those grounds are:

1. That—on the trial before the jury—the State Attorney offered and was allowed to prove that defendant had altered the mark of a hog found in his possession, and that, inasmuch as such an act—if established—would constitute an offence distinct from that alleged in the indictment, the proof objected to by the accused and received by the court, was not admissible and should have been excluded.

2. That—upon the request of the State Attorney, the judge charged the jury "that though the taking may be at first innocent, yet if the taker discovers his error and persists in taking and carrying away the property, the taking may be felonious at the time the error is pointed out to, or discovered by the taker."

3. That he, defendant, offered to prove by Frank Allen, then on the stand as a witness, that—prior to the time at which it is alleged in the indictment that the hog was taken, he had asserted his ownership of said hog.

4. That—in the indictment—the hog charged to have been stolen is not described by any mark, or by its color and sex, and that its description as "*one small hog*," is too vague and too indefinite to have properly placed him on his defence, or to bar a subsequent prosecution.

If—as it is—that description were incomplete, its incompleteness would constitute a formal defect apparent on the face of the indictment, and defendant's objection should have been taken and urged, not—as it was—on a motion to arrest the judgment—but by demurrer and on a motion to quash the indictment, before the jury was sworn. It was too late to do so, after trial and conviction.

Revised Statutes, Sect. 1064.

There is not, in the indictment against defendant, any averment that he has altered the mark of a hog, and—as a general rule—no evidence is admissible of the commission of any other but the offence charged in the indictment. To this rule, there are exceptions, one of which is that evidence of a distinct offence, not laid in the indictment, may be given to show the intent with which the act charged was done; and—inasmuch as the altering of the previous mark of an animal tends to show the intent of converting it to one's own use, the district judge properly allowed the proof of such an alteration.

3 A. 512; 16 A. 576.

To constitute larceny, there must be an original felonious intent, general or special, and if there be at any time no reasonable means of discovering the owner of personal property, and no belief that the owner can be found, then even a refusal to surrender the property, on the owner declaring himself does not make larceny.

Wharton, Criminal Law, 7th Edition, No. 1800, vol. 2.

In this instance, so far as we are informed by the bill of exception, the judge's charge, as to the character of the original and subsequent intent, induces the belief that—at first—the hog was taken by the prisoner, under the impression that it was his property, and that, afterwards, though his error may have been pointed out to him, or though he may have discovered his error, he—nevertheless—persisted in taking and carrying away the hog referred to in the indictment.

If there was a first and a second taking, did they occur at one place, on but one and the same occasion? Did they occur at a short interval from one another, in or out of the presence of the prosecutor? Was it openly, after a discussion between the prosecutor and the accused as to the ownership of the hog, or secretly, and after discovery by the accused that the hog did not belong to him?

If—after the taking of an animal, by one who honestly believes that he alone has a title to it, he be—but for only a moment—persuaded that he is mistaken, and turns the animal loose; but—after a careful examination of its form, its color and size, he becomes again convinced that it is his property and again takes it, the second taking is as guiltless as the first.

Either the judge's charge itself was, or the statement of that charge in the bill of exceptions is incomplete. As reported, it may be construed so as to conform to or conflict with the rule. In the doubt as to what were the views of the judge, or the expression of those views, we are unable to decide whether they were correct or incorrect. The law gives to the prisoner the benefit of that doubt.

As to the declarations of a prisoner in his own behalf, unless they form a part of the *res gestæ*, they are not admissible for the defence. It is otherwise when they are a part of the *res gestæ*. To be such, it is not necessary that the declarations should be precisely concurrent with the act under trial; it is enough if they spring from it and are made under circumstances which preclude the idea of design. It is only when the declarations are distinguishable in point of time, and are opened to the suspicion of being a part of defendant's plan of defence, that they should be excluded.

Wharton, Criminal Law, 7th Ed, 1 vol. No. 699.

In this case, the prisoner should have been allowed to prove that, prior to the time at which it is alleged that he took the hog, he had

claimed it as his own. That proof once admitted, it was for the jury to weigh, consider, believe or disbelieve it.

Wharton, Criminal Law, 7th Ed, 1 vol, No. 700.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed—the verdict of the jury set aside, and this case remanded to the lower court to be proceeded in according to law and the views herein expressed.

No. 7140.

STATE EX REL. EPHRAIM MAURICE VS. JUDGE OF SUPERIOR DISTRICT COURT.

No legal grand jury for the parish of Orleans nor petit jury for the Superior Criminal Court of said parish could be drawn after April 2, 1878, except from a panel of jurors drawn in accordance with the act of the Legislature passed the said second of April, providing for the drawing of grand and petit jurors.

APPLICATION for a mandamus.

Charles H. Luzenberg for relator.

John J. Finney for respondent.

The opinion of the court was delivered by

MANNING, C. J. Ephraim Maurice is in prison under an indictment for murder, and moved the Court to set the indictment for trial during the April Term, which was refused by the judge because there was no jury for that term. Thereupon the prisoner applied to this Court for a mandamus to compel the judge to set the case for trial.

The judge answers, that by the Act of April 2 present, a board of jury commissioners was created who supplant those of former laws, who with the sheriff are required to draw not less than seventy names for jurors, whenever a grand jury is necessary, and after its members have been selected, the residue of these seventy names shall constitute the list of petit jurors for the term—that the selection of a grand jury from the panel, drawn by the late commissioners in March for service in April, was deferred because of absence of many of the jurors, for whom attachments were issued, and before the grand jury could be selected, the new law went into effect—and that he can not use that panel for the petit jury now, because a grand jury has first to be drawn under the new law.

The act of the second of this month went into effect from its passage, and repealed all laws in conflict with it, and did not provide that the jurors already drawn by the commissioners under the old law should act, and be a valid jury, for the term or time for which they had been drawn, the new law to the contrary notwithstanding. A saving clause

like that, or of similar import, would have obviated the difficulty, but since the Act does not contain it, a petit jury can not be drawn for the Superior Criminal court, whenever a grand jury is also needed, until a panel of seventy or more names is made, and from it a grand jury is first selected. This can not now be done for the present month. A new panel, must be formed by the Board of jury Commissioners under the new law, from which the grand and petit juries must be drawn in the manner directed by it.

The prisoner can not be tried in any other mode than by a jury. There is no petit jury for the April term of the court before which he is arraigned, and none can now be drawn for it. His constitutional right to a speedy public trial is recognized, but it must be a legal trial, in and by the forms prescribed by law.

The mandamus is refused.

No. 7043.

ADAM DOBEL VS. J. M. DELAVALLADE. E. P. DELAVALLADE, ASSIGNEE.

The transcript of an appeal from an order of seizure and sale need not contain any of the proceedings on the injunction taken out to arrest the seizure and sale, since such proceedings could not be considered by this court on such an appeal.

The holder of a duly paraphed mortgage note, on which certain credits are indorsed, is entitled to proceed by executory process for the balance of the note, against the mortgaged property, and the purchaser of the property, whose assumption of the payment of the note appears by a notarial act of mortgage containing the pact *de non alienando*. If such purchaser has gone into bankruptcy, and is represented by an assignee, the certificate of a register in bankruptcy is sufficient evidence of the assignee's appointment and acceptance.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *Crowell*, J., acting for *McVea*, J., recused.

Chas. O. Lauve for plaintiff and appellee.

George Wailes and *Alex. Hebert* for defendant.

ON THE MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. This is a proceeding *via executiva*. Appellee moves to dismiss on the ground that the transcript is incomplete; that Delavallade applied for and obtained an injunction by which the sale was arrested; that the injunction was dissolved; and that the proceedings on that injunction are not copied into the transcript.

The appeal in this case is taken from the order of seizure and sale, which was granted on the eleventh of October, 1877. The clerk certifies

that the transcript contains "all the documents filed and proceedings had," etc.

The appeal from the order of seizure and sale brings up for review nothing but that order; and any subsequent proceedings, whether by injunction or otherwise, would be out of place in the transcript. Nothing that may have occurred subsequent to the granting of the order of seizure and sale could be considered in determining the only question which an appeal from that order brings before us.

The motion to dismiss is overruled.

ON THE MERITS.

Adam Dobel sold to J. M. Delavallade a certain property, which he, Dobel, had purchased of Lacave. Part of the price was paid by Delavallade in cash, and for the balance he assumed the payment of two notes which Dobel had given to Lacave, which were secured by mortgage on the property; and Delavallade granted a mortgage with the pact *de non alienando* to secure the payment.

Delavallade became a bankrupt; and failed to pay any thing on account of one of the notes. It seems that he paid part, made several payments which are indorsed on the other note. The holder of this note sued Dobel, and compelled him to pay the balance; and Dobel paid the other after maturity, to avoid further trouble.

E. P. Delavallade was appointed assignee of the bankrupt J. M. Delavallade; he was notified of his appointment, and accepted it in writing.

These facts are stated in the petition for seizure and sale. The two notes are annexed to and filed with the petition; also the act of sale, in which are the assumption and mortgage by Delavallade; and copies of the notice given by the register in bankruptcy to E. P. Delavallade of his appointment, and of his acceptance, certified to be correct by the register. Reference is also made to the suit, the papers of which were on file in the clerk's office, and the number of the suit is given; and it is fairly to be presumed that they were exhibited to the judge, to show that Roth, the holder of one of the notes recovered and was paid by Dobel, the balance due on that note.

The assignment of errors is that there was not the necessary authentic evidence exhibited to the judge to authorize the writ; and, as we have said, this is the only question which we can consider on this appeal.

The mortgage and assumption are proven by a certified copy of the notarial act. The balance due on the note sued on would appear by

simple calculation, as the credits are indorsed. Both these notes are identified with the original mortgage granted by Dobel; and they are identified with the assumption and mortgage granted by Delavallade by a minute description. The register in bankruptcy was the proper officer to notify the assignee of his appointment; and his certificate sufficiently proves the appointment and acceptance.

The possession of the notes by Dobel was sufficient proof that Delavallade had not and that Dobel had paid them; and where the creditor demands a balance, admitting the reduction of the original amount, no further proof is required, since this admission is against his interest and in favor of the debtor.

We think the judge was authorized on the evidence before him to grant the order; and the judgment appealed from is therefore affirmed with costs.

No. 7020.

C. D. FAVROT ET AL. VS. PARISH OF EAST BATON ROUGE.

Where there is no community of interest between several co-plaintiffs in a suit, although the rights and relief sought are of the same character, the actions of these several parties can only be cumulated by consent of the defendant. Such a suit, on an exception of misjoinder of parties by the defendant, will be dismissed.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Herron, Bird & Beale, C. D. Favrot, G. W. Buckner and *J. & G. W. Burgess* for plaintiffs and appellants.

John H. Halsey, Thos. B. Duprée, and *Richardson & Magruder* for defendant and appellee.

The opinion of the court was delivered by

EGAN, J. Nine distinct judgment creditors of the parish of East Baton Rouge joined in this suit, which is in the nature of a mandamus proceeding, but not supported by affidavit, to compel the police jury and board of assessors of the parish to levy and collect a tax to pay the amount due upon their several judgments. Numerous exceptions were filed on the part of the defense, of which it is only necessary to notice one: That the plaintiffs have no cumulative form of action or remedy upon their distinct judgments, but that each creditor has his own separate action and remedy upon his individual judgment by another and distinct form of proceeding. This is substantially an exception of misjoinder of parties and causes of action, and must prevail. Where there is no community of interest, although the rights and relief

sought are of the same character, the actions of the several parties can only be cumulated by consent. This is here expressly refused. No one of the plaintiffs has that real and actual interest in the judgments of the others which would entitle them to be heard in relation to them. C. P. 15. Nor by the joinder of several plaintiffs can the defendant be deprived of its right to contest the demand of each separately. In Stevenson vs. Weber, 29 An. 105, we held that a number of co-plaintiffs or co-defendants whose interests are distinct can not be joined in the same action in order to give jurisdiction to a court. This is equally true whatever the object. See 14 An. 182; 15 An. 503. There was judgment in the court below dismissing the action. From this plaintiffs have appealed.

The judgment was not, however, based upon the exceptions, of which there are several others besides the one stated, all of which were referred to the merits, but was after a trial of and upon the merits.

We do not desire by our judgment to conclude the plaintiffs, who may be entitled to some relief in an action between proper parties and in proper form, though on this we express no opinion.

It is therefore ordered that the judgment appealed from be and it is avoided and set aside; and it is now ordered and adjudged that the defendant's exception as to the misjoinder of parties and causes of action be and it is maintained and suit dismissed. It is further ordered that the plaintiffs pay the costs of the court below and the defendants those of appeal. It is further ordered that the right of the plaintiffs to proceed according to law to assert or enforce their rights be and it is reserved to them.

No. 6881.

J. W. MONTGOMERY VS. THE LOUISIANA LEVEE COMPANY.

Corporations can not be sued in any other but the courts of their domicile for damages arising out of their passive breaches of contract. It is only for damages caused by an *active* breach of contract that they can be sued away from their domicile, and in the parish where the damage has been done.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough*, J.

J. W. Montgomery, appellant, for himself.

Thomas Gilmore and *John A. Campbell* for defendants and appellees.

The opinion of the court was delivered by

MARR, J. This suit was brought to recover of the defendant company damages *ex contractu* under section two, sub-section five, of act No. 4 of 1871, for failing or neglecting to keep up to the standard dimensions

a certain levee, in consequence of which plaintiff's plantation was inundated by the overflow of the Mississippi river.

The company, through its president, excepted to the jurisdiction of the district court of Carroll parish, in which the suit was brought, on the ground that the domicile of the president and the domicile of the company corporation was at the city of New Orleans. This exception was sustained, and the suit dismissed; and our inquiry is limited to the correctness of that judgment.

Plaintiff relies on article 165, No. 9, of the Code of Practice, which is as follows:

"In all cases where any corporation shall commit trespass, or do any thing for which an action for damages lies, it shall be liable to be sued in the parish where such damage is done or trespass committed."

The general rule in civil matters is, "that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or residence." C. P., article 162.

It is a familiar rule that statutes in derogation of a common right must be construed strictly. The entire article, 165, is an exception to the general rule established by article 162, and in derogation of the common right of every resident of the State of Louisiana to be sued at the place of his domicile or residence.

Section two, sub-section five, of the act of 1871, No. 4, p. 34, imposed upon the defendant company liability in damages for failing or neglecting, etc.; and the argument of plaintiff is that No. 9 of article 165 of the C. P. authorizes the liability incurred under this sub-section to be enforced by suit in the parish in which the damage is done. It seems to us that this view can not be maintained.

In addition to the rule, already mentioned, that statutes in derogation of a common right must be construed strictly, the entire phraseology of No. 9 of article 165 shows that the legislature contemplated the active violation of some right, the committing of a trespass, or the *doing* of some other illegal thing, which gives rise to an action for damages, in order to deprive corporations of the benefit of the general rule, the common right, recognized and formulated in article 162, of being sued at the place of their domicile.

It would have been competent for the legislature to have declared that the liability of corporations for damages resulting from trespass or any other act, or from mere inaction or failure or neglect, might be enforced by suit in any parish in which the damage was done. But what the legislature might have done, and what the legislature has done, are entirely different; and we are to deal, judicially, with what the legislature has done, not with what it might have done but has not chosen to do.

The plain language of No. 9 of article 165 of the Code of Practice is, that for things done, for acts of *commission*, for which an action for damages lies, the suit may be brought in the parish in which the damage is done; but that this rule does not apply to *omissions*, neglect, or failure to do, because wrongs of this latter class are not only not mentioned in this article, but are excluded by the use of the words *commit* and *committed*, *do* and *done*, which necessarily imply action.

It was a necessity of plaintiff's case to sue *ex contractu*, in order to avoid the prescription of one year, which would have been applicable to an action *ex delicto;* and he maintains in his brief that this is an action *ex contractu*, under sub-section five, section two, of act No. 4 of 1871. We have dealt with the case upon that theory, which we accept as correct. We think that No. 9, of act 165, of the C. P. relates exclusively to actions for damages caused by positive acts, *commission;* that it does not include actions for damages resulting from neglect or failure, *omission;* and that the district court of Carroll parish was without jurisdiction.

The judgment appealed from is, therefore, affirmed.

SPENCER, J. I dissent from the decision of the court, and reserve the right to file my reasons.

No. 6794.

JOHN LARRIEUX ET AL. VS. CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

When three individuals, not partners, or otherwise associated in business, whose rights are several, and distinct, unite in one petition and claim that by some alleged wrong of the defendant, they will be jointly damaged to the extent of only one thousand dollars, this court will not have jurisdiction, since the interest of each plaintiff is less than five hundred dollars.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

E. K. Washington for plaintiff and appellant.

Robert Mott for defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs, alleging themselves to be three butchers on the Algiers side of the river, set forth that the defendant by its charter was required to maintain its grand slaughter-house on that side of the

river; that it had been so adjudged and decreed by the Supreme Court; that in disregard of its charter, and in defiance of said decree, it had not re-established its said slaughter-house on said Algiers side of the river; but was nevertheless disturbing them in their business as butchers, and threatening to prosecute and imprison them for carrying on their occupations. That said company had no right to interfere with them, until it had complied with its charter and said decree, by re-establishing said grand slaughter-house, with capacity for slaughtering five hundred animals per day, on the said right bank. That if said company be permitted to continue its illegal interference with petitioners, they will be damaged in a sum of $1000. Wherefore they pray an injunction to restrain the company from so doing.

The judge *a quo* granted a rule *nisi* on defendant to show cause why an injunction should not be granted. After hearing the court refused the injunction. Thereupon plaintiffs moved for an appeal, which being denied, they applied to this court for a mandamus, which was granted *nisi*—but not heard as the judge *a quo* acquiesced and granted the appeal, which is now before us.

Appellee has moved to dismiss this appeal on several grounds, of which it is necessary to notice but one, that is, want of jurisdiction.

Plaintiffs in their petition do not pretend to have any joint interest in the issues of this suit. They are not partners, nor otherwise associated in business. If the defendant has wronged them, it is as separate and distinct individuals, and their rights and actions in damages are several, and in no wise legally inseparable. Threats and wrongs against one are no concern or business of the others. In other words, their rights and remedies are separate, several, and distinct. Their allegation is that by the threatened wrongs the defendant will damage them (three of them) in the sum of $1000.

This averment does not disclose an interest in any one of the plaintiffs exceeding $500 in amount. It states the aggregate of the damage to be suffered by the three, without distinguishing the shares of either. The allegation is therefore at most that each of the plaintiffs will suffer damage to the amount of $333⅓, which is a sum below the jurisdiction of this court. In Stevenson vs. Weber, 29 An. 108, this court held that "plaintiffs can not give jurisdiction to the district court by aggregating their own interests on one side and opposing them to the interests of sundry persons, holding distinct rights, aggregated on the other side." That was where a large number of tax-payers, alleging that their aggregate taxes exceeded $500, united and sued sundry creditors of the parish to annul judgments obtained by them in the parish court, each judgment being for less than $500, but aggregating many thousands of dollars. That case therefore goes to the extent of holding that when

persons have several and distinct rights, they can not by uniting and aggregating them, even when no misjoinder is pleaded, give jurisdiction to a court which would not have jurisdiction of their several separate demands. See, also, Dyas vs. Dinkgrave, 15 An. 503.

It is therefore ordered that the appeal be dismissed at costs of appellants.

No. 7069.

LESASSIER & BINDER VS. THE BOARD OF LIQUIDATION.

When a bond sued on is, from the manner of its indorsement, payable to bearer; or the defendant tacitly acknowledges the title of the plaintiff; or no adverse title is pleaded, or suggested in the printed argument of defendant's counsel; or when defendant merely pleads the general issue, the genuineness of the signature to the bond is thereby admitted, and no proof of the payee's indorsement is necessary.

When an act under private signature is permitted to be read in evidence, without objection, proof of its execution is waived.

The State not being suable, except by her consent, prescription, as to debts due by her, is suspended.

The bonds issued by the State in 1828 in favor of the "Consolidated Association of the Planters of Louisiana," are valid obligations of the State, and entitled to be exchanged for consolidated bonds of the State, under the funding act passed by the Legislature in 1874. On such bonds the State is bound as principal, not as surety, and hence is not entitled to the right of discussion.

Bonds of the State, the exchange of which for consolidated bonds subrogates the State to rights against third persons, should not be destroyed by the Board of Liquidation, but turned over to the proper State authorities for the benefit of the State.

The application for a rehearing made by an *amicus curiæ*, although filed within six days, will not suspend a judgment of this court, when not called to the attention of the court, and no order is asked, or made in relation to it, within that time.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

Breaux, Fenner & Hall for plaintiffs and appellees.

J. C. Egan, Assistant Attorney General, for defendants and appellants.

The opinion of the court was delivered by DEBLANC, J., and on the application for a rehearing by MANNING, C. J.

DEBLANC, J. Plaintiffs are the holders of three bonds, which—they allege—are exchangeable, and which they have sought to exchange for consolidated bonds, under an act adopted by the legislature and approved on the 24th of January 1874. The bonds thus held by plaintiffs were issued nearly half a century ago, on the 31st of December 1828, under an act of the Legislature of the State. They are signed by

P. Derbigny—then the Governor of Louisiana, and countersigned by F. Gardère, then the Treasurer of said State.

In its answer to plaintiffs' demand, the Board of liquidation denies that those bonds are fundable, and—in bar of the action brought to compel it to fund them, pleads the prescription of five and ten years. In the printed argument filed in its behalf, the attention of the court is called to only one fact, and that is that there is no proof of the genuineness of the signature of the payee of these bonds. In its report of the 1st of October 1877, the Board bases its refusal to exchange them, on the ground that the liability of the State thereon is exclusively that of a surety, and that—as a surety—the State is entitled to the benefit of discussion of the property of the principal debtor, and—in the opinion of the Board—that principal debtor is the Consolidated Association of the Planters of Louisiana.

We, here, transcribe in full one of the three bonds held and declared upon by plaintiffs:

"KNOW ALL MEN BY THESE PRESENTS, That THE STATE OF LOUISIANA, acknowledges to be indebted unto the *President, Directors and Company*, of the Consolidated Association of the Planters of Louisiana, in the sum of ONE THOUSAND DOLLARS, which sum the said State of Louisiana promises to pay, in current money of the UNITED STATES, to the order of said President, Directors and Company, on the thirtieth day of June, one thousand eight hundred and forty-three, with interest at the rate of FIVE PER CENTUM PER ANNUM, payable half yearly, at the place named in the endorsement hereof, viz: on the thirtieth June and thirty-first December, of every year, until payment of said principal sum.

"IN TESTIMONY WHEREOF, the Governor of the State of Louisiana has signed and the Treasurer of said State has countersigned these presents, and caused the seal of the State to be affixed thereto, at NEW ORLEANS, this thirty-first day of December, in the year of our Lord one thousand eight hundred and twenty-eight.

"Signed" P. DERBIGNY, Governor.

"Countersigned" F. GARDÈRE, Treasurer.

The endorsement on the bonds is in these words: "We the undersigned, Manuel Andry, President, and Jacques Louis Prevost, Cashier of the Consolidated Association of the Planters of Louisiana, *for value received*, do hereby endorse and transfer the within bond, of one thousand dollars, bearing interest at the rate of five per cent per annum, to the order of....., *and do hereby bind the State of Louisiana*, and President, Directors and Company of the Consolidated Association of the Planters of Louisiana, *to pay the said interest half-yearly*, on the thirtieth day of June, and the thirty-first day of December of each year, in the city of London, at the counting-house of Baring Bros. & Co., at the

exchange of four shillings and sixpence sterling per dollar, upon presentation and delivery of the dividends warrants, in the margin hereof, *and also do bind the said President, Directors and Company to re-imburse the principal at the same place, at the exchange of four shillings and threepence sterling per dollar, upon presentation and delivery of this bond on the day when this bond becomes due.*

"Signed" MANUEL ANDRY, President.

J. L. PRÉVOST, Cashier."

We have found annexed to the original bond which accompanies the transcript, the following agreement, to wit:

"Know all men by these presents, that the managers and Directors of the Consolidated Association of the Planters of Louisiana, by virtue of an act of the State of Louisiana, approved February 26, 1866, and entitled "An act providing for the final liquidation of the Consolidated Association of the Planters of Louisiana," hereby engage and bind the said Association, through me, their undersigned and authorized agent, to pay in New Orleans, at their banking house, the amount remaining due on bond of the State of Louisiana, C., No. 464, dated 31st December, 1828, and due 30th June, 1843, in the following mode and proportions, viz:

One hundred dollars on 30th June, 1870;

One hundred dollars on 30th June, 1872;

One hundred dollars on 30th June, 1874;

One hundred dollars on 30th June, 1876;

against delivery of the respective warrants hereunto annexed, which will serve as receipts; and this bond shall be considered as a proof of the debt, from the State of Louisiana, and the Consolidated Association to the holder, for no other sum than the aggregate amount of such warrants as may remain in the possession of said holder. The last installment will be paid only on delivery of the original bond.

The Consolidated Association of the Planters of Louisiana hereby engages also to pay regularly at its office in New Orleans, the half-yearly dividend warrants annexed hereto, at their respective maturities, and solemnly declares that nothing in this document or arrangement, is intended to release the State of Louisiana from its engagements towards the holder of the Bond, C., No. 464—nor shall be construed to release or discharge any right of the holder to the securities given by the mortgages granted under and by virtue of the Act of Incorporation of the said Bank, and acts amendatory thereto, approved by the Governor of the State of Louisiana.

In testimony whereof, the agent and representatives of the Managers and Directors of the Consolidated Association of the Planters of Louisiana, holding full power to bind the said Association, has signed

these presents in Amsterdam, the sixteenth day of September, in the year of our Lord, one thousand eight hundred and sixty-six.

[Signed] A. SCHREIBER, Agent.

The counsel representing the Board contends that the general denial filed in its name, puts at issue the title of plaintiffs to the bonds they hold, and that—as there is no proof of the genuineness of the signature of the payee of said bonds, the disputed title has not been established, and—on that ground—they ask the reversal of the judgment of the lower court.

For at least four reasons, that defence is untenable:

1. In their form and endorsed as they are, those bonds are really payable to any bearer therof. 10 R. R. 128; 3 R. 195; 3 N. S. 291—392.

2. The Board did not contest, but—from the tenor of their report, tacitly acknowledged the title of plaintiffs.

3. No adverse title is mentioned either in the pleadings or the printed argument, and none was otherwise suggested. 8 N. S. 509; 2 A. 97—441; 5 N. S. 512; 9 M. R. 469; 4 L. 430; 5 L. 48; 14 L. 254; 13 L. 13.

4. The general issue pleaded by defendant is equivalent to an admission of the genuineness of the signatures, which—though not acknowledged, is not absolutely denied, not even in counsel's brief; and —besides—when an act *sous seing privé* is permitted to be read on evidence without objection, proof of its execution is waived. 8 A. 312; 12 A. 340.

Is plaintiffs' action barred by prescription? The State not being suable, except with her consent, the course of the prescription invoked by defendant's counsel was effectually suspended; and, were it otherwise, the State—under act No. 92 of 1843—took possession of and held in pledge—until recently, all the assets of the Consolidated Association of the Planters of Louisiana, and that pledge was a standing acknowledgment by the State of an obligation, which—tacitly or expressly—was ten times acknowledged by her Legislature, in ten different acts, and more particularly by those of 1847 and 1866, in and by which her Representatives authorized the extension of the time of payment of those bonds.

See Acts No. 19 of 1828, of 1835, 1836, 1842, 1843, 1845, 1847, 1848; 1853, and 1866.

Do the three instruments held by plaintiffs, presented to the Board and now under consideration, witness—in the language of the acts of 1874 and 1875—outstanding and valid bonds of the State, issued in strict conformity to her laws, not in violation of her Constitution or of the Constitution of the United States, and for a legal consideration? They do, and—with its undoubted impartiality—the Board itself has so declared: that declaration is published in their report:

"We wish it distinctly understood that we do not deny the eventual liability of the State, in case the assets of the bank, and of the stockholders prove insufficient, after legal discussion according and in conformity to the full measure of the obligation contracted, and we fully recognize that the faith of the State is pledged to redeem all promises made, and all liabilities incurred, but beyond this we hold that the State has no legitimate authority to extend her liabilities, and therefore we believe in this instance that the bondholders must look to the assets pledged to their re-imbursement, see that they are properly and legally administered and applied, and should these prove inadequate, they, in the meantime, having pursued all their legal remedies, then apply to the State for the fulfillment and redemption of her promises.

Respectfully submitted:

(Signed) LOUIS BUSH, Chairman;
LOUIS A. WILTZ,
ALLEN JUMEL."

The Board is mistaken as to the character of these obligations, the very terms of which repel the construction contended for in its report. "The State of Louisiana acknowledges to be indebted unto the President, Directors and Company of the Consolidated Association of the Planters of Louisiana, in the sum of one thousand dollars, which sum the State of Louisiana promises to pay to the order of said President, Directors and Company, at the place named in the endorsment hereof, etc." Such words do not, can not constitute, embrace or evidence an accessory obligation, do not, can not create or describe an accessory promise. Those words are the studied and clear expression of a principal obligation, of an unconditional promise.

Can we add to those terms? Can we arbitrarily presume that the State did not intend to bind itself, as—in law and in fact—she is bound by the terms of her contract—that, when she said without reservation, I acknowledge to be indebted, I promise to pay, it meant—though she said the very reverse—indebted as a surety, the surety of one who, in the instrument is recognized as a creditor, and pay in case my recognized creditor fails to do so. This would be a perversion of the very letter of the contract submitted to our consideration.

According to our Code, "suretyship is an accessory promise, by which one binds himself for another *already bound*, and agrees with the *creditor* to satisfy the obligation, if the debtor does not. In this instance, if the State be but a surety, who—when she bound herself as such—was already bound as the principal debtor? Who—then—was the creditor with whom the pretended surety agreed to satisfy the obligation, if the unknown and nameless debtor did not? The most careful inspection and perusal of the instrument would not have left the

impression that the Consolidated Association, therein represented as a creditor, was in reality the principal obligor, that the State which alone acknowledged to be indebted, and alone promised to pay, was but a surety, and of whom? Of its recognized creditor, of the party in whose favor the bond was subscribed, to whose order it was payable.

In its report, the Board—referring to the endorsements on the bonds—said:

"Leading to the same result, and confirming the views we have taken of the question, we refer to the subsequent dealings of the parties, to wit: the bank and the bondholders. Acting on the principle that she was merely a surety, and wishing to maintain her faith intact, the State gave her consent, by act 100, of 6th April, 1847, p. 77, sec. 4, to an extension by the *bank* of the bonds for six, nine, twelve, fifteen and eighteen years, and by act No. 38, of February 26, 1866, *on the same terms as then existed*, for a period of ten years, and no more [p. 66, sec. 1], thus waiving, as a surety, the objection which might otherwise have been urged by her that the creditors, the bondholders, had done acts which impaired her rights, or had given a prolongation without her consent. In these two acts nothing is left to inference, for in both it is the Managers and Directors of the Consolidated Association who are authorized to negotiate for the extension of the bonds, and it is they, who with the bondholders, agreed to the prolongation granted, with the consent of the State, given as aforesaid."

The endorsement on these bonds does—in no way—change or impair the unqualified and unconditional obligation of the State to satisfy said bonds. It adds—to the State obligation—that of the Consolidated Association. It mentions the balance due on what is therein called "the bonds of the State of Louisiana," and specially provides that it shall not be construed as releasing the State of Louisiana, or discharging any right acquired by the holder of those bonds under the act of incorporation of the Consolidated Association, or any act amendatory thereto.

Whatever may be—as between the State and the Consolidated Association—the liabilities of the latter to the former, as to third parties and on those bonds, the State was and has not ceased to be a principal debtor; and—as to third parties—can not be legally regarded as the surety of one who—in those bonds—is represented as its creditor.

The obligations sought to be exchanged by plaintiffs bear signatures and dates which repel suspicion: they are, beyond any doubt, a just, an honest debt of our State, and should be funded.

In only one particular, the judgment of the lower court must be amended. The 8th section of the act of 1874 provides: "that the bonds and valid warrants outstanding at the time of the passage of

said act, shall—as fast as they are received in exchange for consolidated bonds—be cancelled and destroyed by the Board of liquidation, etc."

This instruction applies and refers to exclusively the bonds and warrants which—when exchanged for consolidated bonds—are the useless evidence of a prior claim reduced by the exchange—the balance due on which—after the reduction—is witnessed by a new instrument; but it does not refer and should not be applied to any of the warrants and bonds which—as those sued upon—shall, after the exchange, constitute the evidence of a claim of the State against other parties—of its subrogation to every right securing said claim, and which—for that reason—should be preserved and delivered to tbe proper authorities of said State.

It is, therefore, ordered, adjudged and decreed that the Board of liquidation be and it is hereby enjoined and prohibited from destroying, after their exchange, any of the bonds mentioned and described in plaintiffs' pleadings.

It is further ordered, adjudged and decreed that every right and action of the State of Louisiana, in, on, or concerning said bonds, whether said right and action were acquired before, or be acquired by and after the exchange of said bonds, be and they are expressly reserved.

It is lastly ordered, adjudged and decreed that—as amended by this decree—the judgment of the lower court is affirmed with costs.

ON APPLICATION FOR REHEARING.

MANNING, C. J. A member of the bar applies as *amicus curiæ* for a rehearing of this cause. The application for a rehearing was filed within six days, but was not called to our attention, nor any order either asked or made in relation to it, within that time. Although it is competent for the court to grant a rehearing, either on the suggestion of an *amicus curiæ*, or *ex proprio motu*, we are of opinion that the mere filing of an application for rehearing by an *amicus curiæ* has not the effect of suspending the judgment, as is the case when such application is made by one of the parties to the suit. The judgment has become final and is the property of the parties, and therefore

The application for a rehearing can neither be considered nor allowed.

No. 6254.

E. J. BARKDULL, TUTOR, VS. E. F. HERWIG AND MRS. C. SMITH.

A judgment can have no effect on the rights of those not parties to it, and who had no notice of the legal proceedings which led up to the judgment. Thus a mortgage creditor may proceed in a district court against the mortgaged property, without regard to the fact that the property had been sold under a judgment, to which he was not a party, rendered by a parish court, in a suit brought after the institution of the proceedings in the district court.

A mortgagee who transfers part of the mortgage debt to another, can not compete with his transferee for the proceeds of the mortgaged property, where the amount is not sufficient to satisfy both.

Where a suit involving conflicting liens and mortgages on certain property is instituted in one court, and all persons in interest are made parties to the suit, the subsequent institution of another suit, in a different court, by two of the parties is a fraud on justice, and will not divest the former court of jurisdiction to determine all the issues between the parties, in respect of the mortgaged property, without regard to any changes in the title or possession of the property.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Kemp*, J.

Lewis E. Simonds for plaintiff and appellant.

McEnery, Ellis & Ellis and *E. F. Russell* for defendants and appellees.

The opinion of the court was delivered by

MARR, J. Appellees were interested as partners in the "Pelican Mills Wadding and Batting Factory." Herwig borrowed a sum of money from Barkdull, which belonged to Barkdull's minor son; and this money was used for purchasing materials, machinery, etc., for the factory.

In January, 1872, some sort of settlement was made between Herwig and Mrs. Smith, the result of which was that she was indebted to him in the sum of $5191 19, for which she executed her two promissory notes, of the same date, to her own order, and by her indorsed in blank, both payable twelve months after date, one for $3500, the other for $1691 19; secured by mortgage on the factory and the twenty acres of land on which it stands. Subsequently, about a month after, Herwig delivered the $3500 note to Barkdull, in payment of the borrowed money.

At the time this mortgage was granted there were two liens in favor of mechanics resting on the property, and duly recorded, represented by two promissory notes, one for $212 50, the other for $90 66, signed by Mrs. Smith, and the payment guaranteed by Herwig. When Herwig delivered the note to Barkdull, he represented to him that the property mortgaged was amply sufficient to pay it and the other note for $1691 19 which Herwig retained.

Barkdull asked him about the mechanics' liens, and called his attention to the fact that they were not mentioned in the mortgage. Herwig said the reason they were not mentioned in the mortgage was that "I have assumed them;" and he produced, and handed to Barkdull a statement in his own handwriting, showing that he had already paid $215, on account of these liens, leaving only $180 due: and he added that Mrs. Smith would not agree to sign the mortgage notes until "I guaranteed these payments of the mechanics' liens."

In July, 1873, Barkdull brought suit on the note, and to enforce the mortgage: and on the twelfth July, Herwig intervened setting up his mortgage note, and claiming also, that he had made advances to Barkdull to the extent of $570, which he was entitled to have paid by Barkdull, out of the proceeds of the note held by him. He prayed that plaintiff's mortgage be recognized, and that his own note, and the $570 due him by plaintiff be paid out of the proceeds of the sale of the mortgaged property.

In August, 1873, pending these proceedings, Herwig brought suit in the parish court against Mrs. Smith for the sum of $303 16, with interest, being the amount of the mechanics' lien debts assumed and guaranteed by him; and he prayed for judgment recognizing the lien and privilege by which these two debts were secured, and that the property be seized and sold to pay these demands, by preference, out of the proceeds. Mrs. Smith waived service, and the delays of law, and confessed judgment as prayed for: and on the same day judgment was entered accordingly. Execution issued on this judgment; the factory and ground were seized and sold by the sheriff, on the fourth October, 1873, and purchased by Herwig, for $1400, cash, something over two thirds of the appraised value. On the same day Herwig promised and obligated himself, in writing, to transfer the property to Mrs. Smith, "without recourse," for $1800, on her assuming whatever liabilities the property was subject to in his hands.

The sheriff's return shows that after satisfying the judgment in favor of Herwig, the $303 16 with interest and costs, which constituted the first recorded privilege, the balance was not sufficient to pay the remaining privilege and mortgage; that is, the mortgage granted to Herwig to secure the two notes, one held by Barkdull, the other by Herwig; and he therefore left the balance, $1018 95, in the hands of Herwig.

Barkdull's suit against Mrs. Smith, in which Herwig was intervenor, pended until fifteenth April, 1874, when, on motion of Herwig's attorney, judgment of nonsuit was entered on his intervention; and, on the same day, final judgment was rendered in favor of Barkdull, against Mrs. Smith, for the $35 00, and interest, with recognition of his right of mort-

gage; and decreeing that the mortgaged property be seized and sold, and proceeds applied to the judgment.

Barkdull lived in New Orleans, some eighty miles from Amite City, the seat of justice of Tangipahoa parish, where the property was situated, and where Herwig and Mrs. Smith lived. The attorney who represented Herwig in the intervention brought the suit, and was the sole subscribing witness to Mrs. Smith's written confession and waiver, on which he obtained the judgment of the parish court; so that there was no occasion for the publicity which usually characterizes proceedings in court. The appearance of Herwig as intervenor, and his entire conduct in the business, have the aspect of a mere feint, specially designed to conceal the real formidable attack in the parish court, to delude Barkdull, and to induce him to believe that the entire contest would be in the district court, and that the rights of himself and Herwig respectively would be determined and settled in that court, in the suit in which they were both parties.

In June, 1875, this suit was brought to subject the mortgaged property to the judgment of fifteenth April, 1874, in favor of Barkdull. The petition charges that the proceedings in the parish court were fraudulent, collusive and simulated on the part of Herwig and Mrs. Smith, to defraud and defeat the rights of Barkdull: and the prayer is that the property be decreed to be subject to Barkdull's mortgage rights as recognized in the judgment of fifteenth April, 1874, in preference to the judgment in the parish court in favor of Herwig; and for all other proper decrees.

Herwig excepted that the petition contains two causes of action which are contrary to and exclusive of each other: 1: that in which the judicial sale and judgment under which defendant holds the title to the property are attacked as unreal and simulated: 2: that in which the judgment and rule are attacked as real, but in fraud of petitioner's rights: and he called upon plaintiff to elect which of these two causes of action he meant to proceed with.

This exception having been overruled by the court, Herwig excepted that plaintiff was without authority to stand in judgment herein. Should this be overruled, he excepted that the court was without jurisdiction *ratione materiæ* to entertain an action to annul the rule made in virtue of a judgment of the parish court: in the event of the overruling of this exception, he excepted that plaintiff alleges no putting in default, and no tender, and therefore exhibits no cause of action.

Should all these exceptions be overruled, he pleads that the judgment of the parish court and the rule of fourth October, 1873, were legal, real, and *bona fide*, in all respects: and he also sets up the prescription of six months and one year.

Mrs. Smith, made a party by supplemental petition, adopted Herwig's pleas and defenses. The exceptions were referred to and tried with the merits; and this appeal was taken from the judgment in favor of defendants, rejecting plaintiff's demands and dismissing his suit.

We think none of the exceptions in this case were well taken; and that the plea of prescription is not well founded. The suit is not brought to annul a judgment of the parish court, nor to have set aside, for fraud, a conveyance between the defendants by which the rights of plaintiff are prejudiced. The object is to subject to plaintiff's judgment and right of mortgage the property in question. So far as the judgment in the parish court is concerned, it must stand as between Herwig and Mrs. Smith: it is without effect as to plaintiff. The sale by the sheriff, and the adjudication to Herwig must stand as between Herwig and Mrs. Smith; but they do not affect the rights of plaintiff, who was no party to the proceedings, and was in no way notified of them.

Whatever right or title Mrs. Smith had in the property, it is divested, as between her and Herwig, except so far as Herwig may be bound by his written obligation to transfer the property to her.

It is settled, we think, that a mortgagee, who transfers part of the mortgage debt to another, can not compete with his transferee for the proceeds of the mortgaged property, where the amount is not sufficient to satisfy both. As this court said, in Seligman vs. His Creditors, in 2 Rob. 244: "It would be contrary to good faith, that the vendor of a claim, after receiving the price of it from the assignee, should by his own act prevent the latter from receiving the sum he has paid." See also Troplong, Hypothéques, volume 1, number 367.

Herwig was indebted to Barkdull, for a loan; and the money was used to enhance the value of the factory, by the purchase of machinery, etc. Herwig, in settling with his partner in the factory, Mrs. Smith, took from her a mortgage on this property; and he gave to Barkdull, in payment of this debt, one of the notes secured by that mortgage. He assured Barkdull that the property cost from fifteen to twenty thousand dollars, and was amply sufficient to pay both the notes. He quieted Barkdull's apprehensions about the mechanics' liens, by showing that the amount had been reduced to $180: that he had assumed the payment: that Mrs. Smith had refused to sign the mortgage notes until he had assumed the payment; and that this was the reason for not mentioning these lien debts in the act of mortgage.

The plain meaning, the effect of this is that Herwig guaranteed the sufficiency of the property; and that it was upon his representations that Barkdull took the note in payment of the debt that Herwig owed him.

After Herwig's statements that the lien debts had been reduced to

$180, and that he had assumed the payment of them, he could not, without the grossest fraud, set them up as incumbrances outranking the mortgage.

The suit which Barkdull brought against Mrs. Smith, and in which Herwig intervened and asserted his mortgage right, was a proceeding *in personam* so far as judgment against Mrs. Smith was concerned; and *in rem* so far as it sought to have the mortgaged property seized and sold. The law had laid its hand upon this property, and all the parties having any pretension of right or claim to it were before the court, which was competent to adjust the respective claims, liens and priorities: and when Herwig and Mrs. Smith went into the parish court, pending that suit, and there undertook to withdraw the property from the control of the court which had acquired full and complete jurisdiction as to property and parties, they attempted to practice a fraud upon the administration of justice which no judicial tribunal will tolerate. Whatever the proceedings in the parish court may have effected, as between Herwig and Mrs. Smith, they did not divest the district court of its power and authority, nor relieve it of its solemn duty and obligation to pass upon definitively and to settle the rights of the parties with respect to the mortgaged property as, in its judgment, the law and the evidence required. The judgment ordering the mortgaged property to be seized and sold in satisfaction of plaintiff's debt, is a judgment *in rem*, the execution of which the other parties to that suit had no power to forestall or to defeat: and that judgment must be executed, according to its tenor and terms, without regard to any changes either in the title or possession of the property which may have occurred *pendente lite*.

The judgment appealed from is, therefore, annulled, avoided, and reversed: and, proceeding to render such judgment as the district court should have rendered, it is now ordered, adjudged, and decreed that the property described in the mortgage granted by Mrs. Clementine Smith to and in favor of Ernest F. Herwig, of date fifteenth January, 1872, as set forth and described in the judgment of the Sixth Judicial District Court in and for the parish of Tangipahoa, in the suit number 149 of the docket, rendered on the fifteenth of April, 1874, in favor of Enoch J. Barkdull, tutor of his minor son, Charles R. Barkdull, against Mrs. Clementine Smith, in which Ernest F. Herwig was intervenor, be decreed to be subject to seizure and sale, under and in virtue of that judgment, to pay and satisfy the said judgment by preference and priority over any right, title, claim, mortgage, lien, or privilege whatsoever, of or in favor of Ernest F. Herwig; and that the said Ernest F. Herwig and Mrs. Clementine Smith, defendants and appellees, be condemned, *in solido*, to pay the costs of this suit in this court and in the district court.

No. 7010.

PICARD & WEIL VS. J. J. WADE. S. B. NEWMAN & CO., THIRD OPPONENTS.

Where in a contest between a seizing judgment creditor and a third opponent for the proceeds of the seized property, amounting to more than a thousand dollars, the latter claims the whole proceeds, and the former only four hundred and seventy-three dollars of it, no appeal will lie to this court; because the amount really in dispute is only $473.

When the original claim of a judgment creditor when first sued on in a district court is over $500, the mere fact that subsequent payments made by the defendant have so reduced the amount of the judgment that it can not be appealed from, can not have a retroactive effect so as to divest the district court of jurisdiction of the suit, or impair its right to issue executions as long as any part of the judgment remained unsatisfied.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist*, J.

Wickliffe & Fisher for opponents and appellants.

W. W. Leake for plaintiffs and appellees.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. Picard & Weil recovered judgment against Wade, in March, 1876, for $735 30, with interest and costs; and in September, 1877, execution issued on this judgment, on which credits were indorsed amounting to $453 54.

Under this writ the sheriff seized certain property, the interest of Wade in two plantations, which he advertised for sale on the third of November, 1877.

On the second of November, S. B. Newman & Co. filed a third opposition claiming the right to be paid by preference out of the proceeds of the sale about to be made, in virtue of a judgment recorded and operating as a judicial mortgage, anterior in date to the judgment in favor of Picard & Weil: and they prayed that their debt be paid and satisfied in preference to Picard & Weil, and all others.

Newman & Co. purchased the property for $1025. The case was tried on their opposition; and judgment rendered in favor of Picard & Weil, and dismissing the opposition. From this judgment Newman & Co. took a devolutive appeal; and the sheriff collected of them the amount of their bid, of which $473 28 were applied to and satisfied the writ in favor of Picard & Weil; and the balance $551 72, was credited on the judgment of Newman & Co.

Picard & Weil move to dismiss the appeal, on the grounds:

1. That this court is without jurisdiction, because the amount in controversy is less than $500.

2. That appellants have acquiesced in the judgment by executing it voluntarily.

FIRST. It is well settled that it is the amount of the plaintiff's demand that gives jurisdiction. The original demand of Picard & Weil was above $500, exclusive of interest; but at the time the third opposition was filed the amount had been reduced, so that it was, exclusive of costs, about $420.

There was no question as to the right of Newman & Co., except with respect to the seizing creditors, Picard & Weil; and the amount in controversy was the balance due them, which at the time it was paid, January 2, 1878, was $473 28, including costs. This was really the whole amount in dispute,

Counsel for appellants say that the amount in controversy is the price of the adjudication to Newman & Co., $1025, because they claim the entire proceeds, which would not suffice to pay their judgment. But, as we have seen, no other person pretended to any right to be paid out of this fund except Picard & Weil; and they only claimed the balance due them, which, with costs, was less than $500: and the $1025 paid by Newman & Co. to the sheriff, were first applied to the debt of Picard & Weil, which was paid in full, and their writ was returned satisfied; and the balance of $551 72 was paid by the sheriff to the attorneys of Newman & Co. on account of their judgment.

It is also urged that if this court is without jurisdiction because the amount in controversy is less than $500, the district court was without jurisdiction, for the same reason; and the whole proceeding is void. But this is not necessarily true. The district court had jurisdiction of the demand of Picard & Weil originally; and it belonged to that court alone to enforce the judgment which it had rendered. R. C. P. 617, 629. As long as any part of that judgment remained unsatisfied, the plaintiffs had a right to cause execution to issue; and the credits to which defendant was entitled on the writ in no manner impaired the jurisdiction to enforce, by execution, the payment of the balance. The district court necessarily had jurisdiction of opposition by which the right of plaintiffs to enforce payment of the balance was attacked, without regard to the amount of that balance. The controversy was touching that balance alone; and, while the jurisdiction of the district court was wholly independent of the amount thus brought into controversy, the jurisdiction of this court would depend upon that amount alone, not on the amount of the original demand, more than half of which had been paid, and was not in dispute. The right of Newman & Co. to the proceeds was not in controversy except to the extent of the balance due the seizing creditors, and this is conclusively shown by the fact that, although the judgment on the opposition rejected their demand, more than half the proceeds were paid to them on account of that demand, and pending this appeal.

The counsel for appellants cite numerous decisions to show that this court has jurisdiction. They establish, what is not to be questioned, that an appeal will lie from a payment on an intervention or third opposition claiming less than the appealable amount, when the demand of plaintiff is for an appealable amount. See 8 La. 167; 11 L. 462; 2 An. 189; 16 An. 430; 21 An. 366; 22 An. 292, 331; 24 An. 442.

No case has been cited, and we know of none establishing the proposition that the amount claimed by intervenor or third opponent, gives jurisdiction, where the amount demanded by plaintiff is not appealable.

Authorities are cited to show that the proceeding in this case is in the nature of a *concursus;* and that the sum to be distributed gives jurisdiction. The case cited from 3 Rob. 5, Succession of Field, is not applicable; and the appeal was dismissed on the ground that the person opposing the account of the administrator had no right to come into the *concursus*, and his demand was below the appealable amount. In Colt vs. O'Callaghan, 2 An. 189, the court decided that an intervenor might appeal, although he claimed less than the appealable amount, where the demand of the plaintiff was appealable. In Smith vs. Charles, 27 An. 503, the sheriff had sold under execution the interest of defendant in his father's succession. A number of creditors had recorded judgments which operated as judicial mortgages; and the sheriff would not pay the seizing creditor. Thereupon the seizing creditor took a rule on the sheriff: and he called in the other judgment creditors. This proceeding the court said was in the nature of a *concursus*, as it actually was. In Succession of Cloney, 29 An. 327, it was decided that the amount of the fund to be distributed by an executor or administrator determines the right of appeal.

We understand there can be no *concursus* except where there is a fund in the hands of an officer, syndic, executor, receiver, etc., which is claimed by different persons, and the officer calls them in by filing an account or otherwise to litigate their claims, and to have their respective rights and priorities established contradictorily. There was no such thing in this case. The opposition was filed before the sale; and the purchasers being first-mortgage creditors in rank, retained the amount of their bid until after the judgment on their opposition had become final; and the opponents had taken merely a devolutive appeal. The judgment being exigible, they paid the amount into the hands of the sheriff, who immediately paid and satisfied plaintiffs' writ, and gave the balance to opponents on account of their unquestioned claim.

In Gore vs. Kendig, 3 Rob. 387; Hanna vs. Bartlette, 10 Rob. 438; Goodwin vs. Glendower, 11 R. 12; and Pesant vs. Heartt, 22 An. 292, it was decided that where the amount demanded by plaintiff was not appealable, but the demand set up by defendant in reconvention was appeal-

able, an appeal would lie from the judgment on the reconventional demand, but that the judgment on plaintiffs' demand could not be reviewed, and nothing could be inquired into but the judgment on the reconventional demand. The right to appeal in these cases was put upon the ground that the reconventional demand is in the nature of a new action. See 3 Rob. 388.

There is no analogy between the reconventional demand, in which the defendant asserts a right to recover of plaintiff, as a means of defense to the suit brought by plaintiff against him, and a third opposition which sets up no claim or right to recover of plaintiff, but merely asserts a right to be paid in preference to him, out of the proceeds of a sale about to be made at his instance.

On the reconventional demand the amount in controversy is the amount claimed in reconvention; and if that amount be appealable, the judgment on that demand may be reviewed on appeal, although the demand of plaintiff is not sufficient to give appellate jurisdiction. On the third opposition the amount in controversy is the amount of plaintiff's demand, which the third opponent asserts must be postponed to his claim and demand, which is not questioned either as to amount or as to priority, except by plaintiffs to the extent of the amount due them under their writ.

It is not necessary to consider the other ground; but it is manifest, as third opponents, since this appeal was taken, have received the entire amount of the proceeds of the sale, except the amount due plaintiffs and the costs, that the controversy is limited now, as it was at the time the opposition was filed, and at the time the appeal was taken, to the balance due plaintiffs and costs; and that this amount, $473 28, when paid, is not sufficient to give this court jurisdiction.

The appeal, therefore, taken by third opponents, in this case, is dismissed.

No. 6987.

CLINTON AND PORT HUDSON RAILROAD COMPANY VS. TAX COLLECTOR.

When a tax collector summarily seizes property and advertises it for sale for arrearages of taxes, and his right to do so is contested, he must specifically show what property he claims taxes on, what is the cash value of that property, and what the per centage on that value. Otherwise he will be enjoined from proceeding in the summary way allowed by the law.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Kilbourne*, J., in place of *McVea*, J., recused.

W. F. Kernan and *T. B. Lyons* for plaintiffs and appellees.

J. H. Lamon, District Attorney, and *D. J. Wedge*, Parish Attorney, for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The tax collector of East Feliciana seized and advertised for sale, for arrearages of taxes, the railroad, engines, rolling stock, right of way, and appurtenances of the Clinton and Port Hudson Railroad Company; and the company obtained an injunction on the grounds:

1. That the capital stock of the company is exempt from taxation by law.

2. That other railroads in the State are by law exempt from taxation; and that no tax could be levied on this road, without violation of article 118 of the Constitution, which requires taxation to be equal and uniform.

3. That this company having been chartered by the laws of the State, on condition of constructing the road within a stated time, which was done, the imposition of a tax on the company would be a violation of article one, section ten, of the Constitution of the United States.

The assessments offered in evidence for the several years, 1868 to 1876, do not indicate, in any manner, on what property they are estimated. The value for the respective years is as follows: 1868, $20,733: 1869, $25,000: 1870, $14,810: 1871, $14,810: 1872, $13,020: 1873, $17,560: 1874, $20,000: 1875, $20,000: 1876, $500.

Extracts from the delinquent lists, as recorded, show the property taxed in 1868, 1869 to have been 215 acres woodland, twenty-eight mules, one passenger car, and seven flat cars, taxes for each year so much, no aggregate nor separate valuation stated. For 1870, 1871, "215 acres land, rolling stock and mules," tax for each year so much, without other particulars. For 1872, the 215 acres of land only.

The judge *ad hoc*, who tried the case, was of opinion that when the tax collector resorts to the summary process allowed by law, and his right to do so is contested, he must establish his right, and show what property he claims taxes upon, what is the cash value of the same, and what the per centage he seeks to collect. He ordered the injunction to be perpetuated, "so far as to release the seizure of the railroad, engines, rolling stock, right of way, and appurtenances thereunto belonging;" and declined to pass upon any other question.

The appellee, the plaintiff in injunction, has not asked for any amendment of the judgment; and we can only review the matters passed upon by the district court.

Nothing in the record informs us what property was assessed in the several years for which the taxes are claimed. It was proven that during part of the time mules were used as the motive power. Whether the annual assessment was on the mules, the land, and the rolling stock, we

do not know, nor can we form any idea of the value or valuation of any of these several objects, either separately or in the aggregate.

We concur with the judge *ad hoc*, that the tax-collectors should be prepared to show the material facts, when they proceed summarily, to justify that proceeding; particularly to show on what property the assessment is made, and the per centage on the value.

If the land, the mules, the rolling stock, right of way, and appurtenances seized were part of the capital stock of the company we should be inclined to the opinion that they could not be taxed; but as we have no authority to pass upon any of the matters not passed upon by the district court, since plaintiff has neither appealed nor prayed for an amendment, we must limit ourselves to the affirmance of the judgment appealed from.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 6981.

THE STATE VS. H. S. NICOL, JASPER BOWMAN, ET AL.

When no statement of facts, showing what evidence was introduced on the trial of the case below, is submitted to this court, it will be presumed that the judge *a quo* proceeded on proper evidence.

The fact that in the bond given for the release of one charged with crime there is no mention of the offense with which he is accused, nor of any affidavit, information or indictment pending against him, will not release the surety on the bond.

The sureties on a bond which was given for, and procured the release of a prisoner charged with a criminal offense can not gainsay its regularity, or the regularity of the proceeding in which it was allowed.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Duncan, J.*

J. M. Wright, district attorney, for plaintiff and appellee.

James H. Muse, Bolivar Edwards, and *C. J. Bradley* for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. The charge against the defendants is that they have—in the night time—wilfully and maliciously set fire to and burnt a dwelling house, the property of one Peter Forshey, in which a human being was then residing.

Jasper Bowman—one of the accused—was arrested and released on a bond of twenty-five hundred dollars. Failing to appear and answer the charge made against him, his bond was forfeited, and his sureties

have brought an action to annul the judgment of forfeiture, on the grounds that:

1. The bond was not filed in evidence in the proceeding to forfeit the same.

2. There was no legal order authorizing the taking of said bond.

3. The condition of the bond requires the accused to respond to no crime or offence known to or recognized by the laws of the State, or laid or mentioned in any indictment or affidavit referred to in the forfeited bond.

The district court maintained the forfeiture, rejected the sureties' application and they appealed.

I.

To sustain the first ground relied upon by defendants, we are referred to decisions reported in the 12th, 15th and 20th A, and to a sound rule announced in "Voorhies' criminal jurisprudence. In those decisions, the court held—in substance—that parol evidence could not be admitted to prove that a verbal order to take a bond had been given in open court—that, when a bond has never been filed, it can not be inferred that it was introduced in evidence, or was before the court as a part of the proceedings—that, when there is a statement of facts, none but the evidence therein mentioned can be considered by the appellate court—that the declaration of the judge that two judicial days have elapsed from the date of the default, does not make proof of that fact, when the contrary appears from the minutes of the court. In Mr. Voorhies' Book, he remarks: "that an entry is to be made upon the minutes that the principal was called at the door of the court house, and that—failing to appear—his sureties were called to produce his body in open Court, whereupon the bond was duly forfeited. These minutes are signed by the presiding judge, and that constitutes the judgment of forfeiture.

12 A. 189, 349; 15 A. 224; 20 A. 547; Voorhies C. J. p. 362, No. 52.

These decisions do not support defendant's position: for—in this case—though there was no statement of facts, a deputy clerk testified that the bond which had been filed on the 28th of December 1875, was offered in evidence to obtain the judgment of forfeiture, and ordered to be filed, but that he omitted to do so. That testimony was objected to, but it is unnecessary to pass upon the objection.

The judgment of forfeiture commences as follows: "In this case, the accused—Jasper Bowman—having failed to appear as he was bound to do, before the honorable the sixth district Court, was called in a loud and audible voice at the Court house door, and failing to appear, he was again called three times at the Court house door, and ordered to come into Court, and notified that upon failure to comply with said order, his bond would be forfeited; and he still failing to appear or answer, the

sureties on his bond were three times called at the door of the Court house, in a loud and audible voice, and notified to produce instanter in open Court the body of their principal, and they having failed to answer or comply with the notification or order, and the bond being offered and filed, on motion of the district attorney, it is ordered that said bond be forfeited, etc."

The document from which we have copied the preceding portion, is transcribed in full in the transcript and styled "*Judgment—forfeiture on the minutes.*"

If no statement of facts was made during the progress of a trial, and the parties refuse to draw one, or can not agree as to the manner of drawing one, the court—at the request of either of them—shall make such statement according to their recollection of the facts, or from the notes they have taken of the evidence; and this step should be taken by the party who intends to appeal. C. P. 602, 603. Otherwise—it is now settled—it will be presumed that the court *a qua* proceeded upon proper evidence.

24 A. p. 20; 23 A. 504.

II—III.

The second and third grounds are as untenable as the first. Jasper Bowman applied to be allowed bail in the case wherein he is charged with arson, and—in that case—it was ordered "that he be discharged from custody on furnishing bond and security, to be accepted by the sheriff, in the sum of twenty-five hundred dollars. On the 24th of December 1875, he gave the required bond, approved and accepted by the sheriff—the principal condition in which is that he should appear before the court during its session, from day to day, from term to term, etc." That the decree of forfeiture was rendered on that bond, and on no other, there can be no serious doubt. As to the alleged fact that the order admitting to bail one who—then—was a prisoner, makes no reference to the offence with which he is charged, nor to any affidavit, information or indictment pending against him, it is no concern of the sureties on the bond. Their obligation is that—unless their principal did appear when called at the time fixed and specified in the instrument, they should pay the amount of the bond. Their principal was called in the proper case, at the proper time, in the manner pointed out by law, and he did not appear; and—called themselves—they failed to produce him or account for his absence. Their liability—as his sureties—has certainly accrued.

13 A. 299.

When the bond was taken, Jasper Bowman was in the custody of the sheriff—and—as it was by the execution of said bond that his sureties procured and obtained his release, they can not now successfully

gainsay its regularity or the regularity of the proceeding in which it was allowed.

13 A. 299; 14 A. 783; 16 A. 141.

The reasons given by the district judge in support of his decision have effectually assisted us in the examination of this case. As to the facts and the law applicable to them, his conclusion is correct, and the judgment appealed from is affirmed with costs.

No. 5421.

CHAFFRAIX & AGAR vs. JOHN B. LAFITTE & CO.

Where a non-resident commercial firm make an agreement with two resident firms, in virtue of which agreement one of the resident firms is to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the non-resident firm, is to pay for the merchandise, and each of the resident firms agree to receive, instead of fixed sums in payment of their services, certain proportions of the profits to arise from the subsequent sales of the merchandise, and also agree to share in any losses resulting from said sales,

Held: That such an agreement will not make the said firms commercial partners, even as to third persons, when it appears that they did not *intend* to form a partnership, and that they have not held themselves out to the world as partners.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

Finney & Miller, *Thomas Gilmore*, and *Kennedy & Austin* for plaintiffs and appellees.

Carleton Hunt for defendants and appellants.

The opinion of the court was delivered by

MARR, J. In November, 1872, an arrangement was concluded between Morton, Bliss & Co., bankers, of the city of New York, and two New Orleans firms, John B. Lafitte & Co., cotton buyers, and Price, Hine & Tupper, dealers in sugar and molasses, to this effect:

Price, Hine & Tupper were to buy molasses of a certain grade in their own name, to warehouse or ship it in the name of John B. Lafitte & Co., and to deliver the warehouse receipts or bills of lading to Lafitte & Co. On receipt of these commercial evidences of title and possession Lafitte & Co. were to pay Price, Hine & Tupper in cash, the cost of the molasses, and the expenses of the purchase; and Lafitte & Co. were to draw on Morton, Bliss & Co. for the money. Payments were to be made to Price, Hine & Tupper only on delivery of the warehouse receipts or bills of lading to Lafitte & Co.; and Lafitte & Co. were authorized to draw on Morton, Bliss & Co. only when the property was thus in the

possession of Lafitte & Co. for account of Morton, Bliss & Co. Price, Hine & Tupper were to make no charge for their services; but they were to receive one fourth, Lafitte & Co. one fourth, and Morton, Bliss & Co. one half of the profits; the losses to be shared in the same proportions. The names of Morton, Bliss & Co. and Lafitte & Co. were not to be used, and their connection with the business was not to be known, because the appearance of such heavy buyers in the market would have tended to enhance prices, and to diminish the profits of the adventure.

Price, Hine & Tupper made large purchases from time to time; and on delivering the warehouse receipts or bills of lading to Lafitte & Co., the cost and expenses of each purchase were promptly paid to them by Lafitte & Co. All the purchases were made by Price, Hine & Tupper for cash; but in some instances they obtained negotiable warehouse receipts, which enabled them to control and deliver the molasses, without having actually paid the price; and they finally failed, leaving a large amount unpaid, although they had delivered the evidences of title and possession to Lafitte & Co. and received the money from them.

Our predecessors decided, two of the judges dissenting, that there was no partnership between Price, Hine & Tupper and Morton, Bliss & Co.; and that Morton, Bliss & Co. were entitled to the molasses, which Chaffraix & Agar had seized under conservatory process *in limine* on the failure of Price, Hine & Tupper. A rehearing was granted by the same court; and, the case coming before us, we affirmed the decision without dissent. See the case, Chaffraix & Agar vs. Price, Hine & Tupper—Morton, Bliss & Co., intervenors—reported in 29 An. 176; to which we must refer for a more detailed statement of the facts.

In the present case the district court held that Lafitte & Co. were liable as partners, and condemned them to pay the amount due to Chaffraix & Agar for molasses sold to Price, Hine & Tupper; and we are called upon by this appeal to review that judgment.

The facts are the same, and the question is the same as in Chaffraix & Agar vs. Price, Hine & Tupper—Morton, Bliss & Co., intervenors—and we have the benefit of the printed arguments filed in that case, and the oral discussions and printed arguments in this case, which have been of the greatest service to us, and are of marked ability. We fully appreciate the importance of the case, and have endeavored to deal with it as *res nova*. If we have not arrived at a c rrect conclusion, the fault is not with the learned counsel on the one side or the other, who have arrayed all the authorities, foreign and domestic, which seem to support their respective theories. A review of them all would fill a volume; and we must content ourselves with the collation of such of them as seem to us determinative of the controversy.

As far as we have been able to discover, the foundation of the decision which has been accepted as authoritative and has controlled the jurisprudence of England and America for nearly a century, seems to be *dicta* of two of the judges in Grace vs. Smith, decided in 1775, reported in 2 W. Blackstone, 998. We have not been able to find this volume; and we state the case as it is reported in the arguments of counsel and the opinions of the judges in Coope vs. Eyre, 1 Hy. Blackstone 37, decided in 1788; and in Waugh vs. Carver, 2 Hy. Blackstone 235, decided in 1793.

Smith, a retiring partner, lent a sum of money to Robinson, the other partner, who continued in business, for which he was to receive five per cent interest, and an annuity of £300 for seven years, the whole secured by the bond of Robinson. Some years after this, Grace, a creditor of Robinson, brought suit to recover of Smith as a secret partner. The jury found for the defendant; and the court refused to grant a new trial.

Chief Justice DeGrey is reported to have said, we suppose on the motion for new trial: "The question is what constitutes a secret partner? Every man who has a share of the profits ought also to bear his share of the loss; and if any one takes part of the profits he takes part of that fund on which the creditor of the trader relies for his payment. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund for payment." And Blackstone, J., is reported to have said, on the same occasion: "The true criterion, where money is lent to a trader, is to consider whether the profit or premium is certain and defined, or casual and indefinite, and depending on the accidents of trade; in the former case it is a loan, in the latter a partnership."

It is upon this foundation alone that the celebrated decision in Waugh vs. Carver rests. The Carvers and Giesler, ship agents, had two distinct houses, the Carvers at Gosport, Giesler at Cowes. They agreed to assist each other in procuring agencies, and to divide the profits of a portion of the agency business. This was the only connection between them; and it was secret. A creditor of Giesler brought the suit to charge the Carvers and Giesler as partners. The remaining facts, and the decision, will be best stated in the language of Chief Justice Eyre, delivering the opinion of the court:

"It is plain, upon the construction of the agreement, if it be construed only between the Carvers and Giesler, THAT THEY WERE NOT, NOR EVER MEANT TO BE PARTNERS. They meant each house to carry on trade without risque of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that

either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. THAT WAS THE AGREEMENT BETWEEN THEMSELVES. But the question is, whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case therefore, is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely, as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear, upon the face of the agreement; and *upon the authority of Grace vs. Smith*, he who takes a moiety of all the profits indefinitely, *shall by operation of law, be liable for losses* if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of the fund which is the proper security to them for the payment of their debts. *That was the foundation of the decision in Grace vs. Smith*, and I think it stands upon the fair ground of reason. * * * * If, therefore, the principle be true that he who takes the general profits of a partnership must of necessity be made liable for the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of difficulty. *For though with respect to each other, these persons were not to be considered as partners*, yet they have made themselves such, with regard to their transactions with the rest of the world." 2 Hy. Blackstone, 246, 247.

As we have seen, there was no such question in Grace vs. Smith. The simple question was, whether a retiring partner, lending to the partner who continued in trade a sum of money in consideration of a certain annual interest, and an annuity for a term of years, was liable as a partner. It would seem that this was not a question of fact to be left to the jury, but a question of law to be decided by the court. The question would not have been different if no social relations had previously existed between Smith and Robinson; and the court in refusing a new trial necessarily decided that, upon the given state of facts, Smith was not liable as a partner. It is difficult to imagine what support this case gave to Waugh vs. Carver; and we think we are justified in saying, either that Chief Justice Eyre misapprehended and misapplied what was actually decided, or that the case is not correctly stated in any report to which we have had access.

In his examination before a select committee of the House of Commons in July, 1851, on the law of partnership, Mr. Fane exposed, in a masterly manner, the fallacy of the reasoning, and the utter want of foundation for the decision in Waugh vs. Carver. See report of this examination in note, Lindley on Partnership, Am. ed., 1860, p. 93. We do

not hesitate to say, that, in our opinion, Waugh vs. Carver could never have stood the test of judicial criticism; and that it was accepted and allowed to control subsequent jurisprudence, only because of an exaggerated respect for the doctrine of *stare decisis.*

Nevertheless, this decision was followed in England, and was so strictly adhered to that, as Mr. Lindley tells us, and he cites the cases to prove it: "Cruel as it may seem, it is established law, that if a person as executor or trustee employs money in any trade or business, and shares the profits arising from it, he thereby incurs all the liabilities of a partner, although he in fact has personally no interest whatever in the matter." Partnership, 91.

The judicial mind, however, in England and America, was not satisfied with this decision; and its absolute and arbitrary application to every case in which there was a participation in the profits of a business was found to be so unjust, in some cases *cruel*, as Mr. Lindley says, that the judges sought to escape from it, and took refuge in distinctions, which some very eminent men, of world-wide reputation, have characterized as "*very thin.*" Lord Eldon, in Hamper's case, 17 Ves. 404; Judge Story in Hazard vs. Hazard, 1 Story's Reports, 375; Sir Montague Smith in Mollwo's case, L. R. 4 Privy Council.

Thin and arbitrary as these distinctions were, they found ample justification in the equally arbitrary rule in Waugh vs. Carver; and at length they became as well established as exceptions to the rule as Waugh vs. Carver was as the general rule. Thus we find a class of cases of which Hamper's case, decided in 1811, Smith vs. Watson, 2 Barn. & Cress., 401, decided in 1824, may be mentioned as examples, in which the rule is recognized and enforced, that if a trader agrees to pay another person, broker, clerk, agent, for his labor in the concern, "a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; *but if he has a specific interest in the profits themselves, as profits, he is a partner.* 17 Ves. 404. See, also, Dreg vs. Boswell, 1 Comp. 329; Wilkinson vs. Frazier, 4 Esp. 182; Mair vs. Glennie, 4 Maule & Selw. 240. Examples of American cases to the same effect are Muzzey vs. Whitney, 10 Johnson, 228; Loomis vs. Marshall, 12 Conn. 69; Hazard vs. Hazard, 1 Story 375; Denny vs. Cabot, 6 Met. 83; Vandenburg vs. Hull, 20 Wend. 70; Berthold vs. Goldsmith, 24 Howard 536; Seymour vs. Frees, 8 Wallace 202; Hallett vs. Desban, 14 An. 529, in all of which the employees were to receive a certain share of the profits; and they were held not to be partners because they had no proprietary interest in the property.

The arbitrary character of any such distinction is obvious when we remember that the foundation on which Waugh vs. Carver rests, the *ratio decidendi* that he who receives part of the profits is liable as a

partner, is that he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.

Dealing with these subtle, thin, arbitrary distinctions, which serve to show to what straits the judges were reduced, and the heroic efforts they made, taxing to the utmost their ingenuity and mental powers, to evade a rule which found no support in sound reason, which was wrong in principle, and unjust and oppressive in its application, but which they had not, shall we say it? the *nerve* to overrule and to declare not to be law, Judge Story, in his Treatise on Partnership, § 36, says:

"As an original question, it might admit of very grave doubt whether it would not have been more convenient, and more conformable to true principles, as well as to public policy, to have held that no partnership should be deemed to exist at all, even as to third persons, unless such were the intention of the parties, or unless they had so held themselves out to the public."

And again, § 49, this learned author says: "In short, the true rule, *ex æquo et bono*, would seem to be, that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then, that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then, that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons. It is upon this foundation that the decisions rest which affirm the truth and correctness of the distinction already considered as a qualification of the more general doctrine contended for."

In our judgment it is not possible to lay down the rule which should govern in all such cases more clearly, or more in accordance with reason and common sense, equity and public policy. It affords ample protection against acts and conduct by which third persons may have been misled and deceived, while it renders due respect and homage to the meaning and intention of the parties, as expressed in their contracts and agreements; and it does not, like the rule in Waugh vs. Carver, ride rough-shod over actual contracts, and invent, and substitute for them, and enforce as contracts, new obligations to which the parties never consented, and which they never dreamed of contracting.

Reviewing the English jurisprudence on this subject, Mr. Lindley in his work on Partnership, side page 40, expresses the hope "that the rule which makes persons liable as partners simply because they share profits, will ere long cease to exist. The rule is in the highest degree arbitrary: it is grossly unjust; and it is productive of the greatest confusion."

What could be more unreasonable, more unjust, than, setting out with an agreement for a share of the profits, where it was plainly intended not to share the losses, to make liability for losses follow, as a necessary consequence, by mere operation of law, and thus to force upon the parties a partnership with all its consequences, contrary to their intention and agreement, and against which they vainly endeavored to protect themselves by the plain, unequivocal terms of a formal contract?

In Wilson vs. Whitehead, 10 Meeson and Welsby, Exchequer 502, three persons agreed to establish a review. One of them was to be the publisher, and to make and receive general payments: another was to be the editor; and the other was to be the printer: the three to share the profits of the publication equally, after payment of all the expenses. The printer was to furnish the paper for the work, and charge it to the account at cost price; and he was also to charge the printing at master's prices. He furnished accounts to the publisher, from time to time; but no settlement of accounts ever took place, nor were any profits ever realized from the work.

The suit was against the three, as partners, to recover the value of paper sold to the printer, who, it seems, carried on the business of printing generally. Lord Abinger directed a nonsuit, with leave to the plaintiffs to move for a verdict for the amount sued for. The rule was tried before Lord Abinger, Barons Parke, Gurney, and Rolfe; and they all concurred in the opinion that the defendants were not liable; that there was no proof of any authority to the printer to make the purchase for account of his co-defendants; and that he could, if he had chosen to do so, have used the paper for his own purposes, and not for the review. This case was decided in 1842; and it seems wholly irreconcilable with Waugh vs. Carver.

In Cox vs. Hickman, 8 House of Lords Cases, 268, decided in 1860, the proprietors of iron works, becoming embarrassed, gave to trustees, by deed, power to carry on the works for the benefit of the creditors, who were to be paid ratably out of the income. The suit was brought to hold the creditors, the beneficiaries, who were parties to the deed, liable as partners for a debt contracted in operating the works. There was judgment for the plaintiffs; and the case was taken into the Exchequer Chamber, where the judges were equally divided. It was afterward taken to the House of Lords; and the solemn judgment of that august tribunal, after the most elaborate discussion, was that the defendants were not partners, and that they were not liable.

In Bullen vs. Sharp, in the Exchequer Chamber, decided in 1865, L. R. 1 Common Pleas, 86, Sharp was about to commence business as an underwriter at Lloyd's. His father guaranteed his liabilites to the

extent of £5000, in consideration of an annuity of £500, or ten per cent, which was to be increased in the event that the net average profits for three years should exceed £2000. The son failed; and the suit was on a policy of insurance, underwritten by him, to hold the father liable as a partner. The court considered Waugh vs. Carver as overruled by Cox vs. Hickman; and the judgment was that the father was not a partner and was not liable. Baron Bramwell, one of the judges, expressed the hope that the notion that he who takes a moiety of the profits indefinitely, shall, by operation of law, be liable for losses, is overruled; and he characterized the rule as one which "I believe has caused more injustice and mischief than any bad law in our books." P. 128.

In the same case, Justice Blackburn, who dissented in Cox vs. Hickman, delivered an elaborate opinion, in which he said: "I think the *ratio decidendi* is, that the proposition laid down in Waugh vs. Carver, viz., that a participation in the profits of a business does, of itself, constitute a partnership, is not a correct statement of the law of England." P. 112.

This was followed by Mollwo vs. the Court of Wards, L. R. 4 Privy Council, 419, decided in 1872, in which money was advanced to a commercial firm, and it was agreed that the creditor should have inspection of the books, and receive twenty per cent annually out of the profits. It was proven that he did not know much about commercial affairs; but that he had interfered, to some slight extent, in the business. In the course of a clear, forcible, learned opinion, upon which it was decided that this did not constitute a partnership, Sir Montague Smith said: "It appears established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone it may, as a presumption, not of law, but of fact, be assumed, yet, whether that relation does or does not exist, *must depend on the* REAL INTENTION AND CONTRACT *of the parties.* Cox vs. Hickman had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, *not on arbitrary presumptions of law, but on the* REAL CONTRACTS AND RELATIONS *of the parties.*

And again, he said, p. 433, the rule that participation in the profits raises a presumption of partnership sufficient to establish it as regards third persons, is too artificial: "For, it takes one term only of the contract, and at once raises a presumption upon it, whereas, the whole scope of the agreement, and all its terms, ought to be looked at before a presumption of intention can properly be made at all. The rule in Waugh vs. Carver was eminently an arbitrary one; and subsequent discussion has led to the rejection of the reason for it as unsound."

The case of Tenant, decided in July, 1877, in the Supreme Court of Judicature in England, as cited by counsel for defendants, from the London Times, is like that of Bullen vs. Sharp, except that the father, who furnished the capital for his son was to have one half the net profits of the underwriting business, and £25 a year besides, to be paid to him by the son; and that the father claimed to be a partner, and sought as such, to have the assets of his bankrupt son applied to the payment of the debts of the business.

The court decided that there was not a partnership between the father and son; and Lord Justice Baggallay said: "Regard must be had to the whole of the terms of the contract between the parties, which, in the present case, showed that the father was not entitled to a share of the profits to be taken out of the assets of the business, but merely that a share of the profits was made a debt from the son to the father, just in the same way as the £25 was a debt."

We are quite ready to agree with the learned editor and annotator of a recent edition of Story on Partnership, and the equally distinguished author of some of our most valuable works on commercial law, both of whom have favored us with able arguments in behalf of plaintiffs in this case, that Waugh vs. Carver is no longer the rule; and that other tests must be resorted to in addition to participation in the profits, in order to determine the question of partnership *vel non*. Participation in the profits is one circumstance; participation in the losses is another. It is demonstrated that participation in the profits alone is not sufficient. The parties may stipulate for a participation in the profits, and that there shall be no partnership; and they may also agree to share profits and losses, and exclude partnership, since there is nothing in liability for losses, an incident of the contract of partnership, which gives it greater significance as a test of that relation than participation in profits, which is also an incident of that contract. Such agreements serve to fix the rights and relations of the parties with respect to each other; and the public, or third persons are not interested in or prejudiced by them, whether they are publicly avowed, or known only to the parties. The true, final, satisfactory, conclusive test is in the answer to the question: What was the real meaning and intention of the parties, as expressed in their contract, whether verbal or written? If they intended to create a partnership, they will be treated as partners *inter sese* and with respect to third persons: If they did not intend to create that relation, but merely to divide the profits, or to share profits and losses, in a speculation or adventure, they will not be partners *inter sese*, nor will they be liable as such. Those who hold themselves out to the public as partners, or knowingly permit themselves to be so held out, may not, indeed, be actually partners, if they have not so intended and agreed; but they

will be subject to the same liabilities as partners to those who have dealt and given credit on the faith and in consequence of such acts.

The secret partner, and the publicly avowed partner, are equally liable, are equally partners, because, in the one case and the other, it is the real intention and the contract which bind them; and the secret partner can escape liability only by the failure of the creditors to discover his true relation to the business.

We shall not attempt to analyze the American cases. Such of them as hold that he who shares in the profits, or in the profits and losses, is a partner, have simply followed Waugh vs. Carver, and the subsequent decisions which rest upon it, which were so long regarded as authoritative and controlling: while such as hold that one or both of these tests can not be accepted as conclusive proof of partnership rest upon distinctions equally as arbitrary as the rule in Waugh vs. Carver; and are supported by authorities of no less weight. It is to be hoped that the jurisprudence of the United States, like that of Great Britain under the recent decisions, will no longer depend upon arbitrary rules or arbitrary distinctions; but will accept the real intention and contract of the parties as the only safe and conclusive proof of their actual relations, whether *inter sese*, or as to third persons.

Those who have the leisure and the curiosity to trace the conflict in the English and American courts from Waugh vs. Carver down, have but to look into Gow, Collyer, Lindley, Story, Parsons, Troubat, any work on partnership, and read the cases cited in support of the harsh rule which ignored intention and contract, and the equally numerous cases by which it was palliated, by ingenious distinctions, until finally it was declared not to be the law of England, and the plain, natural, just, common-sense rule recognized, by which the real intentions and the contracts of parties are restored to that supremacy which they have always maintained in the civil law, and in the kindred systems which have sprung from that noble parentage.

It is elementary in our law, that there can exist no partnership without the consent of the parties, that is, without a contract establishing that relation. This was the rule of the Roman law. Papinian calls partnership *voluntarium consortium*, Dig. 17, tit. 2, l. 52, § 8: and Ulpian says, id. l. 44: "Si margarita tibi vendenda dedero, ut, *si ea decem vendidisses, redderes mihi decem; si pluris quod excedit, tu haberes:* mihi videtur si animo contrahendæ societatis id actum sit, pro socio esse actionem; si minus præscriptis verbis." There was no inquiry as to whether a compensation was to be given, in proportion to the profits, equal to a certain share, or a specific interest in the profits themselves as profits. The sturdy Jurisconsult did not dally with artificial distinctions, resting on imaginary differences, but came squarely up to the question submit-

ted to him; and he solved it by a rule too plain to be misunderstood, an unerring guide, a perfect test, under all systems, in all ages, in all cases. If the parties intended to contract a partnership, "*si animo contrahendæ societatis*," then that will be their relation with respect to themselves, and to all persons whomsoever, even to the extent of controlling the form of the actions to which it may give rise. If that was not their intention, *si minus*, their agreement will not constitute a partnership, whether *inter sese*, or with respect to others. It may fall into that mass of contracts styled *innominate*, because not susceptible of distinctive classification, but not less obligatory on that account; and the litigations which may grow out of it must be in form *actiones in factum*, actions on the case, so-called "*quia nomen non possumus invenire*," which were as well known and as useful in the Roman tribunals as they are now in Westminster Hall. Dig. 19, title 5, l. 1.

In France, "La société procède toujours d'un contrat. Sans convention, point de société. Troplong, Société, 1, p. 9, No. 3.

The word partnership is used in our Code to designate the contract by which that relation is created, and to signify the relation which is created by the contract. The Revised Civil Code of 1870, art. 2801, Code of 1825, art. 2772, treats of the contract; and it declares that "partnership is a synallagmatic contract."

Art. 2805, R. C. C., art. 2776 of the Code of 1825, treats of the relation; and it declares that "Partnership must be created by the consent of the parties."

Article 2807, 2778 of the Code of 1825, also treats of the relation: "A community of property does not, of itself, create a partnership, however that property may be acquired." And in Pickerell vs. Fish, 11 An. 278, this court said: "A partnership is formed upon the voluntary consent of the parties, as contradistinguished from the relations which may arise between them by the mere operation of law, independent of such contract."

The law may, and it does, impose liability as a necessary consequence of the acts and conduct of parties; but it can not form the contract or create the relation which it calls partnership.

Article 2825, art. 2796 of the Code of 1825, has been relied upon sometimes to show that the relation of partnership exists from the nature of the trade or business in which the parties engage; but it has no such effect or scope.

Section 1, of chapter 2, title xi., treats of "the division of partnerships." Article 2824 declares that partnerships, according to their objects, are either commercial or ordinary; and article 2825 declares that commercial partnerships are such as are formed—

"First—For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture," etc.

That is, where the relation has been created by the contract, the voluntary consent of the parties, articles 2825, 2826, enable us to determine whether it is a commercial partnership or an ordinary partnership by reference to the objects for which it has been formed; but these articles are of no value in determining whether the contract has been formed and the relation established.

Our predecessors decided in Hallett vs. Desban, 14 An. 529, that a clerk who received part of the profits as compensation for his services was not a partner, because he had no proprietary interest; in Belden vs. Reed, 27 An. 103, they decided that a consignment of goods for sale, under an agreement that the consignor should take back such of them as were not sold, at cost and a small percentage, and that the profits and losses should be divided equally between consignor and consignees, did not constitute a partnership, because the consignees had no proprietary interest in the goods; and in Edwards vs. Fairbanks, 27 An. 452, they decided that refiners receiving two thirds of the profits on sugars as compensation for the refining, were not partners, for the same reason.

It would not be profitable to pursue this subject further. We find in this record no evidence of any act on the part of Lafitte & Co. which authorized plaintiffs or any other person who sold molasses to Price, Hine & Tupper, to suppose that Lafitte & Co. had any connection with or liability for these purchases. Price, Hine & Tupper were general dealers in sugar and molasses, and all of their purchases were not for account of Morton, Bliss & Co. The agreement was that Morton, Bliss & Co., through Lafitte & Co., would take and pay for such molasses, of the grade agreed upon, as Price, Hine & Tupper might buy and place in the possession and under the control of Lafitte & Co.; and if plaintiffs allowed Price, Hine & Tupper to make delivery to Lafitte & Co. of molasses for which Price, Hine & Tupper had not paid, the fault was with them, and with them alone.

Price, Hine & Tupper had no proprietary interest in the molasses after they had delivered to Lafitte & Co. the receipts and bills of lading and received the price according to the agreement; and Lafitte & Co. had no proprietary interest, but held merely as agents for Morton, Bliss & Co. The whole proceeds went into the hands of Morton, Bliss & Co. without any power of control on the part of Price, Hine & Tupper or Lafitte & Co.; and if profits had been realized, Morton, Bliss & Co. would have been the debtors of Price, Hine & Tupper and of Lafitte & Co. each for one fourth of the profits, when all of the molasses was sold, and the profits ascertained, the stipulated compensation for their services respectively. There was no partnership between these several

firms, because there was no contract by which that relation was created; and Lafitte & Co. are not liable for the default, or the acts or omissions of Price, Hine & Tupper, because they did nothing with respect to the dealing of Price, Hine & Tupper to mislead or deceive plaintiffs or any person whomsoever.

It is therefore ordered, adjudged, and decreed that the judgment of the district court appealed from be annulled, avoided, and reversed; and that the demand of plaintiffs be rejected, and their suit dismissed with costs in both courts.

DISSENTING OPINION.

EGAN, J. No field of inquiry in the law has been more vexed, and in none have the decisions of courts generally been more irreconcilable than as to what constitutes partnership and when responsibility as partners is incurred. The present case, and the array of learning and authority on both sides afford an apt illustration of this fact. It is both wise and well to borrow light from the enlightened and progressive jurisprudence of other States and countries when our own law is silent, or the jurisprudence of our own State either unformed or uncertain. We are, however, not at liberty to do so where neither is the case if such reference should lead to conclusions antagonistic to the doctrines settled by our own law and announced by our own courts. Unlike Great Britain especially, we have a codal definition both of partnership in general and of commercial partnership in particular. The former is a contract between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry furnished in determined proportions by the parties. C. C. 2801. The latter is formed, first, for the purchase of *any personal property*, and the sale thereof, either in the same state or changed by manufacture; second, for buying or selling any personal property whatever, as factors or brokers; third, for carrying personal property for hire in ships and other vessels. C. C. 2825. When the conditions exist which are embraced within any of these definitions, partnership results from the very terms of the law, though nothing further be said, and no matter whether the parties so understood or intended or not. A sale is none the less a sale where all the elements necessary to constitute it exist whatever the parties may call it; and so it has often been decided. The same is true of partnership of whatever class. We are told, however, that in the present case, although the several parties agreed together in advance for the purchase and sale of personal property, sugar and molasses, and although they agreed for the mutual participation in the profits in determined proportions, that it is not a partnership, but a commercial adventure or joint

account, like the *Association en Participation* of France. In other words, that although all the conditions of a commercial partnership under our law exist, it is not a partnership because some of the parties or all, if you will, did not at the time intend to so constitute it, although nothing was said about their intention at the time beyond that to enter upon the common venture for the common profit. That the parties anticipating profits agreed and are entitled to share in them but not in the losses or liabilities incurred in carrying out the venture. It so happens, however, that we are not left at sea and need not go abroad to ascertain the consequences of such an understanding or agreement. Our own Code, article 2813, provides that "a participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses;" and the next article, 2814, that a *stipulation* that one of the contracting parties shall participate in the profits of a partnership but shall not contribute to losses is void, both as it regards the partners and third persons. It surely will not now be seriously argued that because the plaintiffs were not aware at the time of the sale that the defendants were interested in the purchase and expected to share in the profits they are not liable. Such is not the doctrine either of our own or of any other system of law. Upon that subject there is no difference of opinion among the standard authors of this or any other enlightened country, or in the decisions of enlightened courts anywhere. The undiscovered partner is held liable when discovered everywhere.

It is undisputed that the several parties agreed together for the purchase and sale of sugars and molasses of a certain grade in advance, and that the purchase made from the plaintiffs was in pursuance of that agreement *and so treated by all the parties.* Nor is there any dispute of the fact that although the sugar and molasses purchased from plaintiffs were received and used in accordance with that agreement, the plaintiffs have not been paid for them. It is immaterial whether according to the contemplation of the parties as shown in the original letter from the defendants to Morton, Bliss & Co., Price, Hine & Tupper were to furnish a part of the money for the common venture, or whether, as stated by Mr. Lafitte, that was afterward changed and Morton, Bliss & Co. were to furnish the whole of the money for the contemplated purchases, and Price, Hine & Tupper only their skill and services in selecting and buying the merchandise. Indeed, if any thing, the latter view would militate most strongly against the defendants, for the reason that it puts entirely out of view the idea that more than one purchase or sale was contemplated (i. e.) the one with the money furnished for the purpose by Morton, Bliss & Co., who, as well as the defendants, are thus brought into direct connection with the purchase by Price, Hine & Tupper from

the plaintiffs, and with the latter themselves. So that there is not even the intervention of a middle man at all, for it is not pretended that Price, Hine & Tupper were brokers or acted as such in this instance; and if it were so pretended, there is nothing in the record to sustain it. As we understand it, Morton, Bliss & Co. were to advance the money, John B. Lafitte & Co. to hand it over to Price, Hine & Tupper, upon the receipt from them of the warehouse receipts which it is well known, according to the custom of trade, are always passed when the contract of sale is agreed on, subject to the right of reclamation or enforcement of privilege within the time fixed by the statute in regard to the sale of agricultural products if not paid for; and that Price, Hine & Tupper were to select the sugars and molasses and go into the market to make the purchases, they being experienced dealers; while after the sale the three firms were to share in the profits in proportions defined in their contract; and as Mr. Lafitte says, to "*share in the losses*," also. Nothing more is wanting than this latter admission to do away with any possible idea, which, however, there is nothing else to support, that Price, Hine & Tupper were either brokers or agents in this transaction; for we venture to assert that nowhere, under any system, has a mere broker or agent been held responsible for losses. Still less can it be said that Price, Hine & Tupper could be held liable for losses if they were vendors; and, indeed, there is nothing in the record to support the theory that there was any agreement even for a sale from the latter either to Morton, Bliss & Co., or to them and Lafitte & Co.; still less that there was any fixed price in money agreed on as between them and Price, Hine & Tupper, but only that the price agreed on between the plaintiffs and Price, Hine & Tupper was handed to them to be paid to the vendor, and that they did not do so.

It is not necessary at this late day to assert anew the well-established principle that a failure of one partner (if there be a partnership) to apply to the payment for goods purchased moneys entrusted to him by his copartner for that purpose, can not relieve the latter from after liability for the price. Nor is it necessary to consider at any length the provisions of our law regulating the rights and responsibilities of partners in commendam, since it is not even pretended that the defendants or any one else engaged in this venture were such partners. The position of defendants is that they were not partners at all, and no such stipulative writing or registry for the information of the public as is required in this modified partnership is any where shown in this record, while, on the contfary, it is shown that all the parties to this venture were active participants in its management at some stage. If, then there was in this case neither agency nor resale nor partnership in commendam the conclusion is inevitable that it was a partnership, and the

consequence of liability of the defendants as partners and as commercial partners at that must attach. Once a commercial partnership is shown to exist, our law recognizes a modification or limitation of the liability of the partners in but one mode, and that is provided in the articles of our Code in regard to partnership in commendam. See C. C. articles 2839—2851. And once partnership is shown, liability as partners follows by all authority and under any system of law, here or elsewhere. We think an examination of the authorities relied upon by the defendants' counsel demonstrates this as fully as those cited by the plaintiffs' counsel, and Mr. Parsons, an eminent American writer to whom both have freely appealed, recognizes the fact that such is the general law, and that any modification of the consequences of partnership anywhere is the result of statutory provision, as we have. All that is pretended here is that such agreements and ventures as that which led to the suit at bar do not create a partnership, but only something called in common parlance a commercial adventure on joint account, by embarking in which, though it involves and is designed for the purchase and sale of personal property for the joint profit and advantage, in definite proportions, of all concerned, and that although liable as between themselves for any losses which may result from the venture, those engaged in it are not liable as partners to those from whom is purchased the property from the resale of which the expected profit is to be derived. Whatever may be the case elsewhere, no provision is made under our law for such adventures as exceptions from commercial partnerships and the consequent liability of those concerned. It may be said that this is a narrow view, at war with the general usage of the commercial world elsewhere. If this be so, the remedy is not with us but with another—the legislative department of the government—whose province alone it is to bring the law of Louisiana on this subject in harmony with that which it is asserted prevails elsewhere. In this connection it may be remarked, however, that even under the "*Association en Participation*" of France, none of the parties could absorb to himself the object of the common venture to the prejudice of creditors and to that extent at least that he would have to account and pay over, while under our own law the partner in commendam can not withdraw the stock he has furnished if his partners are in failing circumstances or there is reason to apprehend their insolvency or that of the firm, C. C. article 2851; but the whole sum furnished is liable for the debts of the partnership, C. C. 2841; and that none of the cases relied upon by the defense and by a majority of the court present the same state of facts, especially with reference to joint liability for losses incurred, with that at bar.

Under the testimony in this case it will not be pretended that had the sugars and molasses bought from plaintiffs been lost or destroyed

subsequent to their purchase for joint account, whether before or after the delivery by Price, Hine & Tupper to the defendants of the warehouse receipts, that both they and Morton, Bliss & Co. would have been compelled under their agreement, as stated by the defendant Lafitte himself, to share the loss with Price, Hine & Tupper, and *vice versa*, and the express provision of our own Code, article 2864, "that a partner may be a creditor of the partnership not only for the sums which he has disbursed, but likewise for the obligations he has entered into *bona fide* for the partnership and for losses reasonably incurred in his administration," is in strict accord with the agreement of the parties here.

The decisions of the courts of Louisiana have been so fully reviewed in the dissenting opinion of Mr. Justice Spencer, in which I concur, that it is unnecessary for me to say more in regard to them. They are in support of the views expressed in this opinion. Our law makes ample provision for legitimate profits or the opportunity to earn them by all who may choose to employ their capital, skill, or industry in the purchase and sale of our agricultural products or other personal property in open market and in open competition. I am at a loss to see the equities as against vendors who have not received the price in favor of those who have annulled their own connection with or interest in the purchase in order, as admitted here, to depress the price of any commodity or sale simply because those to whom they have entrusted the money to be used in the common venture with themselves have not so applied it. However widely established may be such a commercial usage, here or elsewhere, it can not, in my opinion, be practiced without carrying with it as to the undisclosed parties in interest all the liabilities which attach to secret partners any where. I yielded a reluctant assent to the decision in Chaffraix & Agar vs. Price, Hine & Tupper, reported in 29 Annual, out of deference to what seemed to me then the weight of authority and to the views of my associates. Further argument, examination, and reflection have convinced me that my reluctance then was with good reason, and that that decision in that case was erroneous.

For these reasons I dissent from the conclusions of the majority of the court in this case as well as those between other parties resting upon the same principles this day announced.

DISSENTING OPINION.

SPENCER, J. The facts of this case are identical with those of "Chaffraix & Agar vs. Price, Hine & Tupper—Morton, Bliss & Co., Intervenors"—reported in 29 An. p. 176. It is unnecessary to repeat them here. In that case plaintiffs sought to hold Morton, Bliss & Co. liable as princi-

pals or partners of Price, Hine & Tupper. In this they seek to hold John B. Lafitte & Co. in the same manner.

These cases have been contested with marked ability, learning, and research. The best legal talent of our State, as well as eminent foreign counsel, have engaged in their discussion.

The sole question is, what was the nature of the contract between the three firms of Price, Hine & Tupper, Morton, Bliss & Co., and John B. Lafitte & Co., and what rights and obligations did it engender as between themselves and as to third persons? If Price, Hine & Tupper were merely the employees of the other two firms, and were furnished by the latter with money to buy the molasses, receiving a share of the profits *as compensation*—or, if Morton, Bliss & Co. and Lafitte & Co. were simply undisclosed and unknown principals, to whom plaintiffs gave no credit, and of whom they had no knowledge, then I do not hesitate to say that, after these principals have, *in good faith*, paid over the money due to Price, Hine & Tupper as re-imbursement of sums advanced or supposed to have been advanced by them, plaintiffs can not maintain an action against said principals for the price of goods sold to the employees. If I hand to my clerk a sum of money and direct him to buy for cash a certain article, and he squander the money and buy it on his own credit, from one *who did not know him to be my clerk*, to my mind it requires no authority beyond common sense and fairness to show that the vendor can not recover the price from me. This eminently fair and common-sense view is also that of the best considered authorities. See Armstrong vs. Stokes, L. R. 7, Q. B. 598.

If Price, Hine & Tupper were mere employees, receiving a share of the profits as compensation for their services, there was no partnership between them and their employers. See Hallett vs. Desban, 14 An. 529.

But were they mere employees? That was the view I took in the case, as against Morton, Bliss & Co. Further consideration and discussion have changed my opinions upon the subject.

The salient fact, which in my opinion, demonstrates that they were not mere employees in the transactions out of which this litigation arises, is *that they were liable for losses.* An agent or employee, acting within the scope of his authority, and purchasing for another, can not, in the nature of things, be liable for losses suffered by his principal, beyond such part of anticipated profits as might be due him as compensation. It seems, indeed is broadly admitted, that under the agreement between these three firms, any losses sustained in this venture, were to be borne by the parties in the same proportion that the profits were to be divided, *i. e.* one half by Morton, Bliss & Co., one fourth by Lafitte & Co., and one fourth by Price, Hine & Tupper.

It would seem to be a corollary of this liability for losses, that P., H.

& T. were bound by any contracts or obligations which Morton, Bliss & Co. or Lafitte & Co. might enter into with reference to the molasses. Thus if Morton, Bliss & Co. had incurred a debt of $20,000 for the transportation, storage, or salvage of the goods, Price, Hine & Tupper would have been liable, *at least and certainly* to the extent of one fourth; for to that amount even Morton, Bliss & Co. could recover against them. I do not see how they could avoid liability on such demand, by pleading, as defendants' counsel does, that the molasses was the property of Morton, Bliss & Co. The answer to this would be, that by the terms of your contract with Morton, Bliss & Co. you bound yourselves for losses, and our claims are chargeable to that account.

Again, it seems to me, that by this agreement to pay losses, Price, Hine & Tupper (supposing them to be solvent) had involved in this transaction, *proportionably*, the same thing as Morton, Bliss & Co. It can not be disputed that, even *inter se*, as between the three firms themselves, Price, Hine & Tupper risked in this venture one fourth of *the entire cost* of the molasses, *plus* one fourth of *all expenses*. If by deterioration or other accident the molasses lost all or part of its value, it was their loss, just as much so, *proportionably*, as it was that of Morton, Bliss & Co. If they had been participants in the profits and losses to the extent of *one half instead of one fourth* their interest in this venture would have been *both in nature and amount identical with that* of Morton, Bliss & Co. Are such *equality* and *identity* of risk and interest characteristics of the relation of principal and agent, of employer and employee? It is elementary that these are not *indicia* or consequences of the contract of mandate. Under the facts of this case, I see no more reason to say that Price, Hine & Tupper were agents or employees of Morton, Bliss & Co. than that Morton, Bliss & Co. were employees of Price, Hine & Tupper. True, Morton, Bliss & Co. agreed to bear *half the losses*, in consideration of receiving *half the profits;* but it is equally true that Price, Hine & Tupper agreed to bear *one fourth* the losses in consideration of receiving *one fourth* the profits. In what respect did the nature and character of their interest and risk differ? We can not distinguish between them, on account of the fact that, by the agreement, Price, Hine & Tupper were to devote themselves exclusively to the selection and purchase of the goods—Lafitte & Co. to receiving and forwarding them and disbursing the money, and Morton, Bliss & Co. to the advancing of the capital, and selling of the goods. These facts have no significance. Such divisions of labor, power, and responsibility are too frequent among persons associated in business to afford ground for distinguishing this case from others. I see no escape from the conclusion that Price, Hine & Tupper were principals in this association, as much so as either of the other firms—having proportionably the same stake

in the adventure, the same interest in its results, whether profit or loss. Nor do I perceive how it can be said that, after the molasses passed into the hands of Lafitte & Co. Price, Hine & Tupper had no interest in it. We have seen that, had this property been lost, or been absorbed by expenses and charges, Price, Hine & Tupper would have borne *one fourth the loss*, just as Morton, Bliss & Co. and Lafitte & Co. would have borne, between them, the *other three fourths*. Where a man is not a guarantor or underwriter, how can it be said that he has no interest in a thing when its destruction is his loss? It seems to me that they were joint owners of this property. And why not? Did the mere fact that Morton, Bliss & Co. or Lafitte & Co. *under an agreement so to do*, furnished the money to buy goods for joint account and risk of themselves and another exclude that other from a joint ownership in the thing so bought? Or does the fact that by the agreement of these parties the thing so bought was to be immediately placed in the name, care, and disposal of one of the associates repel or exclude the idea of joint interest therein? To my mind this was at most a mere precaution, and is no sufficient evidence of exclusive ownership in Morton, Bliss & Co. or Lafitte & Co.

My convictions in this regard are strengthened by the further consideration that the facts of this case repel the idea that there were two sales, one from Chaffraix & Agar to Price, Hine & Tupper, and another from the latter to Lafitte & Co. or Morton, Bliss & Co. The property never stood for a moment in the separate name of Price, Hine & Tupper. The delivery, by transfer on the books of the warehouse, was direct from Chaffraix & Agar to Lafitte & Co. Besides, as between Price, Hine & Tupper and their associates, the transaction lacked one indispensable element of a sale, to wit: a "fixed and determined price." "The price" says Civil Code, art. 2439, "*must be certain*, that is to say, *fixed and determined by the parties*." Here there was no price "fixed and determined." A vendor, in the nature of things, can not be held liable as such for losses suffered by the purchaser on resale of the thing bought, or for deteriorations proceeding from accidental and subsequent causes. It is inconsistent with the nature of the contract of sale. In this case nobody knew or could know what Price, Hine & Tupper were to get. It depended upon the fluctuations of the market and the hazard of circumstances. The sums which they received from Lafitte & Co. were not *the price of a sale*. They were re-imbursements, *according to agreement*, of sums paid or supposed to have been paid, for account and in furtherance of the common enterprise.

We find, therefore, that Price, Hine & Tupper were neither vendors of the molasses nor mere agents in its purchase, but on the contrary, that they were principals, equals and associates of Morton, Bliss & Co.

and Lafitte & Co. in an association whose purpose and object were the purchase and sale of molasses for a limited period, the profits and losses to be divided and borne in stated proportions, each member of the association having assigned to it distinct duties to perform, having a joint common interest of *precisely the same nature* and *differing only in amount.*

What, then, was the relation existing between these firms, according to the laws and jurisprudence of Louisiana? For if these afford us a clear and satisfactory answer we are not at liberty to go further; and need not perplex ourselves more, in the vain effort to reconcile the conflicting jurisprudence of other States and countries.

I say advisedly we are not at liberty to go outside of our own law if it affords a solution. It should be borne in mind that the dispositions of the Code of 1808 (p. 400, art. 61), which expressly subordinated its provisions "to the laws and usages of commerce," as also those of the Code of 1825 (arts. 2823 and 2798), which make reference to a "commercial code" as paramount in matters of commercial partnership, have been expunged from and find no place in the Code of 1870. We are therefore no longer at liberty to subordinate the provisions of the Civil Code "to the laws and usages of commerce." These "laws and usages" are rules of decision for us now only when and to the extent that the Civil Code is silent.

The provisions of our Code pertinent to this question of partnership are as follows:

Civil Code, art. 2801. "Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry, furnished in determined proportions by the parties."

Article 2809. "Property, credit, skill, and industry being the sources from which the profits of a partnership may be drawn, each of the partners may furnish either or all of these in such proportions as they may mutually agree."

Article 2813. "A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses. But the proportion, like that of the profits, may be regulated by the stipulation of the parties, and, where they make none, is provided for by law."

Article 2814. "A stipulation that one of the contracting parties shall participate in the profits of the partnership but shall not contribute to losses is void, both as it regards the partners and third persons. But in the case of a partnership in commendam, hereinafter provided for, the liability to loss may be limited to the amount of the stock furnished."

Article 2825. "Commercial partnerships are such as are formed:

"1. For the purchase of any personal property, and the sale thereof, either in the same state or changed by manufacture."

"2. For buying or selling any personal property whatever, as factors or brokers."

"3. For carrying personal property for hire, in ships or other vessels."

Article 2852. "All the provisions of this title are also applicable to commercial partnership, except as otherwise provided for."

Article 2827. "Commercial partnerships are divided into two kinds, *general and special.*"

In order to constitute a commercial partnership therefore, under our Code, there must be an agreement between two or more persons acting as principals, whereby they are to furnish respectively either property, credit, skill, or industry, or all of these, in determined proportions, for the purpose of buying or selling personal property for their own account or as brokers or factors, or for the purpose of carrying persons or property for hire in ships or other vessels, for their mutual profit or loss in such proportions as the agreement or the law determines.

It will be seen that liability for losses is an element *always and necessarily* present in a partnership, and *never* in the contract of agency. Let us apply the test of these rules to the instant case.

There was an agreement between these three firms as equals and principals, whereby Morton, Bliss & Co. agreed to furnish the money, and Lafitte & Co. to disburse it, and to receive and forward the goods which Price, Hine & Tupper were to select and purchase, for the purpose of reselling them for joint account of the parties, the profits and losses resulting to be borne in stated proportions. We find that the nature of the interest and risk of these several firms in this venture is the same, each embarking and staking, if need be, its whole fortune to make good losses resulting from it.

There is present here every element necessary to constitute those three firms special commercial partners.

Although I think there was a joint ownership of the three firms in the molasses, I do not regard that as a material question. It matters not whether they were partners in the profits and losses only, or in the capital also. I know no law that prevents a partner, as between himself and copartner, retaining the ownership of what he "furnishes" as capital, if he so stipulates. The Code simply says he "furnishes" property, credit, etc. This does not necessarily imply that he must transfer the ownership of such property to the firm. He may limit the right of the firm to the use of the property he "furnishes," but he is neverthe-

less a partner. Besides, it is well settled that joint ownership in the capital is not of the essence of the contract of partnership. See Story on Partnership, sec. 27; R. C. C. 2829.

If we turn now from the Code to the decisions of our own courts I think we will find them in entire harmony with the foregoing views.

In McDonald vs. Millaudon, 5 L. 403, the defendant was held liable as a partner under the following facts: He advanced $20,000 to the firm of W. & D. Flower, and stipulated that he was to receive ten per cent interest on his advance and one third the profits. He contended just as is done in this case, that *there was no consent or agreement on his part to become a partner*, that his name was not used or known in the firm, and that there was not under our law any such thing *as an implied partnership*. But the court held otherwise and said: "The Supreme Court of the United States has lately declared the rule to be perfectly settled, that a party who shares in the profits, although his name be not in the firm, is responsible for its debts. In the present case, the defendant contracted for these profits, and received them." 5 Peters, 561.

So in Purdy vs. Hood, 5 N. S. 626, the court said: "But when personal property is acquired *jointly by two or more persons*, for the express purpose of being sold on joint account with a view to gain, it appears to us that a partnership is created in relation thereto, and that the rights and claims of the parties must be regulated agreeably to rules appertaining to such contracts."

The case of Robertson vs. Lizardi, 4 R. 300, discloses the following facts: McKenzie & Co. and Lizardi & Co. agreed to make on joint account certain cotton speculations. McKenzie & Co. were to buy the cotton in their own name in Mobile, with funds raised on bills drawn by them upon Lizardi & Co. of Liverpool, and the cotton was to be shipped to and sold by Lizardi & Co. in Liverpool for joint account. The question was whether the two firms were partners. The court said:

"The parties certainly contemplated a participation in the profits of the cotton trade during the season, and that is sufficient to constitute them partners, as to third persons dealing with them, or either of them, in relation to that branch of trade. Story on Partnership, sections 55, 103; 3 Kent's Commentaries (1st edition), page 17.

"It is, however, contended by the counsel for the defendants, that the parties never contemplated a general partnership; and he infers this from their having assumed no social name, from there being no capital provided, no partnership books opened, no provision made for expenses, and because no such thing is named in their correspondence. Let it be admitted that all this is true, and that there was not between the defendants and McKenzie & Co. a regular formal and general partnership; yet the moment it is shown that, *for a limited period*, and in relation to

a particular branch of commerce, they were *to buy and sell on joint account* and participate *in the profits*, they became thereby as to third persons partners in relation to that trade. There may be cases in which, in point of fact, the parties are not partners *inter se*, and yet are held liable, as such, toward third persons dealing with one of them. This was the doctrine recognized by this court in the case of McDonald vs. Millaudon, 5 La. 409."

In Boudreaux vs. Martinez, 25 An. 167, it was said: "The liability of secret or dormant partners in commercial partnership in all cases like the present is so well established and so universally recognized that authorities need scarcely be referred to. In the case of a dormant or secret partner the credit is manifestly given only to the ostensible partner, for no other party is known. Still, however, it is not treated as an exclusive credit, for the law in all cases of this sort founds its decision upon the ground that the creditor has had a choice or election of his debtor, which can not be where the partner is dormant or unknown."

In Jenkins vs. Howard, 21 An. 597, the court says: "A single adventure of the character of that made by these parties, a commercial operation, where the purpose is to buy and afterward sell the commodity for profit, constitutes the parties commercial partners, and creates a commercial partnership, *quoad* the single transaction."

In Cooley vs. Broad, 29 An. 345, this court said in reference to a clause in the contract declaring *that it was not a partnership:* "When there exist all the conditions which by law create a legal relation, the effects flowing from such relation will follow whether the parties foresaw and intended them or not. * * * The fact that the parties had made stipulations between themselves as to their liability for each other's debts, or as to the proportion of their several responsibilities, can not affect third persons," etc. In other words, we then held that if the parties have agreed to do certain things, and the doing of those things is made by law a partnership, it matters not whether the parties call themselves partners or not, nor whether they intended to be such or not. We must regard things, not names.

In Case vs. Beauregard, 1 Otto 134, the Supreme Court of the United States use this language, interpreting the Code of Louisiana: "There was in this agreement all the essential conditions for the creation of a partnership—provisions for a union of services and money, and a division of profits and losses. The postponement of a division of profits between the three partners until the capital advanced by two of them should be refunded, with interest, did not alter the character of the agreement as one of partnership, nor the liability of all the partners to third persons for debts contracted in the prosecution of its business. It was sufficient to create the partnership relation that profits to be ulti-

mately divided between the parties were contemplated from their joint enterprise. Civil Code of 1870, art. 2811."

I will only add to this list of our own authorities, expounding our own law, what Mr. Lindley says in his work on Partnership, 3d edition, page 19.

"An agreement to share profits and losses may be said to be *the type* of a partnership contract. *Whatever differences of opinion there may be as to other matters, it admits of no doubt whatever that persons engaged in any trade, business, or adventure, upon the terms of sharing profits and losses arising therefrom, are partners in that trade, business, or adventure.*"

While there are many adjudged cases cited by defendant from the decisions of other States and countries which militate more or less against these views of Lindley, I do not think any well-considered case to the contrary of the doctrine announced by him can be found in our own reports. I do not think that Edwards vs. Fairbanks and Gilman, 27 An. 449, or Belden vs. Read, 27 An. 103, go to the extent claimed by defendant. But if they do, the weight of authority is greatly against them.

There is so much conflict and discordance among the decisions of the courts of our sister States and foreign countries that it would be idle to review them, and impossible, I think, to reconcile them. I feel constrained to follow the beaten track of our own jurisprudence on this subject, which, in my opinion, is uniform and consistent, to the effect that where two or more persons agree to combine their property, credit, skill, or industry, for the purpose of buying and selling personal property, and of dividing the profits and loss thereof among themselves as principals, there exists between them a commercial partnership, which may be "general" or "special" according to the scope or duration of its operations.

The fact that one or more of the persons so combining and associating themselves are unknown to the public, and that credit in any particular transaction is extended *in fact* only to the ostensible and known operator, makes no sort of difference as to the liability of his unknown associates. The sole question is, *were they partners?* not whether they *were known as such.* Surely at this day nobody will or can dispute the liability of a secret partner. It is elementary, and citation of authority would be "carrying coals to Newcastle."

Our Code declares that commercial partners are liable *in solido.* It does not distinguish between a "general" and "special" partnership, in thus fixing the liability of the partners. If the debt was contracted in the course of the common business, each partner is bound for the whole.

Nor is this liability lessened or varied by any secret or private agreements between the partners as to the power or right of any one of them to contract debts or create obligations. The moment they became partners the law declares them bound toward third persons for the acts of each other relative to the common business. The fact therefore that Price, Hine & Tupper were forbidden to use the name of either of the other associated firms has no significance if the three firms were in law partners.

So far as the equities are concerned, I do not think they are so pronounced on either side as to constitute an important element of decision in the case. Defendants trusted their money and plaintiffs perhaps trusted their goods to Price, Hine & Tupper, who squandered the former and did not pay for the latter. But it may be asked what principle of equity, under this state of facts, would allow defendants to take plaintiffs' goods in order to make good their loss which their own associate caused them by misuse of their money? I confess that I can see no superior equity in defendants' claims over those of plaintiffs. I am not sure but that equity as well as the law is with the plaintiffs.

Under our Code, if the purchaser do not pay the price, the vendor may resolve the sale and claim back the thing. C. C. 2539, 2041. This right of resolution is not confined *by our Code* to sales of *any particular kinds of property.* The doctrine of the French law, as to the *instant prescription* of movables by a purchaser *in good faith* is not found in our Code. So far as I can find this right of resolution is not defeated by subsequent alienations. Marcadé, vol. 4, page 489, vol. 6, pp. 289 and 290. It rests upon that broad principle of law and equity, that in all commutative contracts what is given or promised by one party is not only *the cause of* but *a condition to* what is given or promised by the other party. Plaintiffs, therefore, in law and equity, had a right to take back their property not paid for, the possession of which had, as I think the evidence discloses, been fraudulently taken from them, not by Morton, Bliss & Co. or by Lafitte & Co., but by persons with whom they were unfortunately associated. I do not think plaintiffs intended or consented to give possession until the money was paid. Under these circumstances I do not see how, upon equitable principles, Morton, Bliss & Co. and Lafitte & Co. can be permitted to save themselves from loss—nay perhaps make a profit, at the expense of plaintiffs. It can not be denied that under some form or other they were the associates of Price, Hine & Tupper. Even if these three firms be treated not as commercial partners, but as associates "*en participation,*" (a contract however, which, as I think, is not known to our law, unless it fall under the class of "special commercial partnerships,") still we find that by the laws of France governing such associations the participants can not withdraw the assets of

the association to the prejudice of its creditors. They risk what they put in. See Troubat on Limited Partnership, p. 26, section 18.

Now that is precisely what Morton, Bliss & Co. and Lafitte & Co. have done or are seeking to do. Taking defendants' own view, these three firms associated themselves for a joint adventure in the purchase and sale of molasses. By every principle of right the money they put in or the property purchased with it, should be held to answer for debts contracted in the course of the business.

The judgment below was in favor of plaintiffs and against Jas. B. Lafitte & Co., and is correct, I think. I therefore dissent from the opinion of the court in this case.

No. 6711.

STATE EX REL. J. H. RILLS VS. DAVID N. BARROW.

Where the repealing clause of a law expressly repeals certain designated sections of the Revised Statutes, and in general terms repeals *all* laws in conflict with it, it will have the effect of repealing every previous act, identical with any one of those expressly repealed.

All laws are considered promulgated the day after their publication in the State Gazette, or in thirty days thereafter, according to locality. The act of the Legislature adopting the "Revised Statutes" of this State, was legally promulgated.

The party who alleges that a law has not been promulgated must prove it.

The decision of this court in the case of *Farrar vs. Garrett* 29 Annual 637, is hereby re-affirmed.

The failure of a district attorney *pro tem.*, who has been elected by the police jury of his parish, to qualify within the legal delay, creates a vacancy, which can only be legally filled by appointment of the Governor.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *McVea*, J.

E. B. Talbot for plaintiff and appellee.

George Wailes and *Barrow & Pope* for defendant.

The opinion of the court on the original hearing was delivered by MANNING, C. J., and on the rehearing by DEBLANC, J.

MANNING, C. J. The office of district attorney *pro tempore* was created by the legislature of 1868. The enactment of that year was incorporated in the revised statutes of 1870 in four places, viz in sections 1072 *et sequentes*, and sections 1178 *et seq.*, and sections 2032 *et seq.*, where the full statute appears. The fourth place, where it is repeated in part only, is in secs. 2760—61.

An act of 1874 repealed sections 1178, 1179, 2760, and 2761 of those statutes by express mention. Its fourth section repeals all laws and parts of laws that are in conflict with it. Acts 1874, p. 81.

Sections 1072 and 1073 are identical with sections 1178 and 1179, and the latter being repealed by the act of 1874, the former are necessarily repealed by it also. Section 2032 is identical with sec. 2760, and sec. 2033 is identical with sec. 1179. The repealing clause of the act of 1874 affects all laws that are in conflict with it, and therefore any section of the revised statutes, and any act of the legislature prior to that revisal, that is identical with another which is expressly repealed, is itself repealed.

In Farrar v. Garrett, decided last summer at Monroe, we held that the portion of the act of 1874 which provides for the appointment of these officers by the Governor was unconstitutional because its object is not expressed in its title, and that the authority of the Governor to appoint is derived from his general power to fill vacancies. But it is contended by the respondent that we were in error, in stating in the opinion read in that case, that the term of office of a district attorney *pro tem.* is conterminous with that of the district attorney, because he says the sections which are repealed are the only sections wherein the tenure of the office is mentioned. The error is the respondent's, and not ours. Section 2033 expressly makes that provision for the term of this officer.

It is also urged that the Act of 1874 which repeals certain sections of the Revised Statutes of 1870, had nothing to operate on, because the book, known to us by that name, is not law, and we are seriously asked to declare that the Revisal of that year is not a statute of binding force as law, because it was never promulgated. It is questionable whether more good or harm would ensue from such judicial declaration. The confusion of our law produced by the adoption of that book, as an Act, is very well illustrated by the present case. But the consequences in some aspects would be too serious for us to adopt the view of the respondent upon that point unless we were imperatively required to do so.

All laws are considered promulgated the day after their publication in the State Gazette, or in thirty days thereafter, according to locality. Cooley says, "the courts will not inquire too nicely into the mode of publication. If the laws are distributed in bound volumes, in a manner and shape not substantially contrary to the statute on that subject, and by the proper authority, it will be held sufficient, notwithstanding a failure to comply with some of the directory provisions of the statute on the subject of publication." Const. Limitations, 156.

It might be answered, that the Code, in the same article in which the promulgation of laws is provided for, requires that whenever the promulgation of any law is contested, the person contesting it shall be held to prove the fact. art. 6. No proof has been tendered by the respondent here.

We re-affirm the decision in Farrar v. Garrett, and hold that all parts of the act of 1868, as well as all sections of the revised statutes of 1870, which are in conflict with the act of 1874, are repealed. The respondent excuses his zeal, and justifies his onslaught on the Revisal of the Statutes, by the information that the act of 1874 was passed specially to effect his removal. If this be true, our regrets that the State loses so efficient an officer will be enhanced by the fact that our duty, as we interpret it, requires us to give effect to an enactment which terminates the respondent's tenure of office sooner than is desirable in the interests of the public.

Judgment affirmed.

DeBlanc, J. Plaintiff and defendant claim to be—the first, under a commission from the Governor—the other, under an appointment from the Police Jury, the district attorney *pro tempore* of the parish of Iberville.

The evidence shows that defendant was twice appointed to that office by the police jury—on the 11th of November 1872 and on the 29th of November 1876. On the 27th of said month, two days before defendant's last appointment, J. H. Rills had been—by the same body, appointed to the very same office. His appointment was rescinded forty eight hours after it was made and followed by that of his competitor.

The cancellation of Rills' appointment was unauthorized. If otherwise, the cause which induced the police jury to revoke it, is not disclosed in either the resolution by which it was attempted, the pleadings or the evidence; and—inasmuch as that body could not arbitrarily destroy the accomplished effect of their own action, we are compelled to presume that, on the 29th of November 1876, when defendant was appointed, there was no vacancy in the office. If Rills qualified under his appointment by the police jury, he was and has not ceased to be the incumbent, and this, for the reasons urged by defendant why we should—under a similar, but subsequent appointment, recognize his right to the disputed office. If, within the delay prescribed by law, Rills did not qualify as the appointee of the police jury, there certainly was a vacancy in the office, when—on the 10th of February 1877, he qualified under the Governor's commission of the 31st of January.

In his answer, defendant admits that the term of his office expired in November 1876, and his own evidence shows that the title he claims is based on a re-election which, necessarily, occurred during the acknowledged vacancy, and which might avail him, had it not been preceded by the relator's election.

This view renders useless the discussion of the other questions raised in the parties' arguments. The first and admitted vacancy, that which happened by the expiration of defendant's term, was filled by Rills' appointment, and if—by his failure to qualify—there happened a posterior, a second vacancy, it stands filled by the Governor's commission.

Rev. Statutes of 1870, Section 1577.

It is, therefore, ordered that our former decree remain undisturbed.

No. 7018.

H. R. WADE VS. R. J. LOUDON AND SHERIFF.

In the absence of evidence as to the amount in dispute in a suit on appeal before this court, it will not be inferred that a sufficient sum is involved to give this court jurisdiction merely from the fact that there were two judgments of the district court enjoined. This court will not assume jurisdiction on an inference.

The dissolution of an injunction issued to restrain an order of seizure and sale, (in a case where no allegation is made of defect or nullity in the judgment ordering the seizure and sale) leaves nothing more to be decided in the injunction suit, and hence, the court may properly order it to be stricken from the docket.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough*, J.

A. W. Roberts for plaintiff and appellant.

Montgomery & Deloney for defendants and appellees.

The opinion of the court was delivered by

MARR, J. In January, 1877, appellant obtained an injunction restraining Loudon and the sheriff from further proceeding in the execution of the judgments of the district court, numbers 6328, 6329, of the docket.

The injunction was granted upon the affidavit of one Hedrick, who styled himself agent and attorney in fact for H. R. Wade, "that the allegations of the petition are true and correct to the best of his knowledge and belief; and that the said Wade is in ill health and is physically unable to appear to take out these proceedings."

At the ensuing term of the court defendants moved to dissolve the injunction with damages, on the grounds:

1. That the plaintiff, Wade, at the time the affidavit was made by Hedrick, was present in the parish, and was residing within three miles of a justice of the peace, before whom he was amply able to appear and make affidavit.

5. That there has been no legal and solvent bond executed in this suit, and the same if given was not signed by any one authorized to do so.

According to the note of evidence there was no testimony offered on the trial of this motion, except that of a member of the bar, who stated merely that "fifty dollars is a moderate fee for dissolving the injunction in this suit."

The judgment dissolved the injunction with fifty dollars special damages, and ten per cent per annum interest on the amount of the judgments enjoined, for the reason, as stated in the judgment, "the law and evidence being in favor of defendant."

At the December term this injunction suit appeared on the docket; and counsel for defendant moved the court to strike it from the docket, as having been placed there in error, for the reason that the judgment dissolving the injunction disposed of the whole case.

The judgment as entered on this motion is, "that the matters in this suit were all tried and adjudicated upon on the trial of the motion to dissolve the injunction, and that this suit be now stricken from the docket."

The appeal is taken from this judgment; and we can not inquire into any other or former judgment.

Appellees have moved to dismiss on the ground that it does not appear that the amount or value in dispute exceeds $500; and it is admitted by counsel for appellant, as an examination of the transcript proves, that there is nothing to show this material fact. The counsel thinks we ought to infer sufficient value from the fact that there were two judgments of the district court enjoined. It is possible that each of these judgments may have been reduced by partial payments, so that the aggregate amount due on both would be less than $500. Or, the amount sued for, in each case, may have been reduced by compensation, or reconvention, so that the amount of both judgments as rendered may have been less than $500. Where the jurisdiction of a court is limited, as the jurisdiction of this court, the jurisdiction must appear of record: and we should not feel at liberty to assume jurisdiction by inference. Where the value does not appear otherwise, it may be shown by affidavit; but it must be made to appear, satisfactorily, in any case where the jurisdiction of this court depends upon the amount, that it exceeds the sum $500.

The injunction asked for in this case was not for any defect or cause of nullity of the judgments which the sheriff was about to execute; and the prayer of the petition was "that a writ of injunction issue, restraining said sale (the sale which the sheriff was about to make under execution); and that on trial the seizure be decreed illegal, and set aside and the injunction made perpetual." It is evident, therefore, that the dissolution of the injunction with damages left nothing more to be decided in the injunction suit. The order of the court striking it from

the docket caused no injury or prejudice whatsoever to appellant. If he has any cause of complaint, it is that his injunction was erroneously dissolved with damages; and he has not seen fit to appeal from that judgment.

The appeal is fatally defective on two grounds:

1. Because the amount or value in dispute is not made to appear in any manner:

2. Because the judgment appealed from, the order of the court striking the case from the docket, caused no injury or prejudice to appellant, since there remained nothing more to be tried, and nothing upon which judicial action, in that case, could have been taken.

It is not irreparable injury, nor is it any sort of injury, to either party for the judge to order a suit to be stricken from the docket six months after it has been finally disposed of by the judgment of the court.

The appeal is therefore dismissed with costs.

No. 6732.

CHARLES A. HARRIS VS. ANTOINE DUBUCLET, STATE TREASURER.

The Legislature is empowered to form a contract, to pay an annual rent for buildings necessary for the use of the State; and its power to buy a State-House is equally unquestionable, if the debt thereby created does not exceed the constitutional limitation.

A Legislative act, which, after appropriating a certain sum for a certain legal purpose, payable in annual installments, provides that "out of all State taxes collected, one half of one mill on every dollar shall be set apart of the general funds as a fund to meet" said sum, does not violate the third amendment of the State constitution, devoting the revenues of each year, (except surplus revenues) to the expenses of that year. The effect of such an act is merely to diminish the general-fund tax by the amount it levies for the purpose contemplated in the statute.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

A. L. Tucker, *Anatole A. Ker*, *Breaux*, *Fenner & Hall*, and *Thomas J. Semmes* for plaintiff and appellee.

H. N. Ogden, Attorney General, for defendant and appellant.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by MANNING, C. J.

EGAN, J. This is a mandamus suit, brought against the State Treasurer to compel him to pay out of the moneys in the State Treasury, to the credit of "State-House Fund," the nine certain warrants held by plaintiff, and filed with and made part of his petition, amounting to three thousand three hundred dollars, drawn by the Auditor of Public

Accounts on the State Treasurer, and payable out of the State-House fund, appropriated for the purchase of a State House by act number six of the Legislature in 1875, in favor of R. E. Rivers, Treasurer of the New Orleans National Building Association, and by him indorsed. These warrants cover a part of the purchase price of the St. Louis Hotel property. Sec. three of act number six of the General Assembly of 1875, providing for the purchase by the State of the St. Louis Hotel property for a State House, appropriates the sum of $250,000 for the payment of said property.

Section four of the same act provides, "*That out of all the State taxes collected one half of one mill on every dollar shall be set apart of the general funds by the Auditor and Treasurer, as a fund to meet the purchase price of said property;* and the said funds, or so much thereof as shall have been collected, shall be paid to the vendors, at the times to be designated in the act of sale; provided said payments shall be made at least twice in each year."

The answer of the Treasurer avers, "that the contract out of which relator's pretended action arises violates the third constitutional amendment proposed by the third Legislature in article number four of the second session of 1874, and adopted the same year," which reads as follows: "The revenue of each year, derived from taxation upon real, personal, and mixed property, or from licenses, *shall be devoted solely to the expenses of said year*, for which it shall be raised, *excepting any surplus remain, which shall be directed to sinking the public debt.* All appropriations and claims in excess of revenue *shall be null and void*, and the *State shall in no manner provide for their payment.*" It would seem that this constitutional amendment fixes at once and beyond the reach of legislative will the destination of the entire revenue derived from all sources of taxation for each successive year, first, *to the payment of the expenses of the year for which* the revenue shall be raised, and, second, if there shall be a surplus, that it shall be devoted to the creation of a *sinking fund to meet the public debt.* This would seem to provide for the exhaustion for the purposes named of the entire revenue for each year, to *the exclusion of* all other uses and purposes. But the amendment, after thus fixing absolutely and beyond legislative control the destination of the entire revenue for each year, goes further and provides that, "*all appropriations and claims in excess of revenue shall be null and void, and the State shall in no manner provide for their payment.*" Thus in one breath the entire revenue is exhausted for the uses and purposes named, and in the next it is provided that all appropriations and claims, in other words, all debts, contracts, or obligations, *in excess of revenue shall be null and void*, and the State is absolutely and positively prohibited from *providing for their payment in any manner.*

Whatever the motives which prompted this amendment to the Constitution, which followed immediately a period of the most profligate expenditure of the public moneys which the State has ever witnessed, its ratification and adoption by the people sufficiently indicates that it was their will and purpose to put a curb upon this condition of things, and upon any disposition on the part of future Legislatures to indulge in their repetition for any purpose whatever other than those named in the amendment itself. This record does not disclose either the particular years from the revenue of which the four or five thousand dollars shown to be in the State treasury to the credit of the State-House fund was derived; manifestly, however, it must have been since 1875, as the act of sale in the record dates the purchase of the St. Louis Hotel for a State House on the tenth of March, 1875. Neither are we informed by the record of the amount of expenses of each or all of said years, nor whether they equal or exceed the revenues of the year, or leave any surplus after; but as, in any event, we have seen that the entire revenue of each and, consequently, of every year is devoted by the constitutional amendment in question to other uses and objects, there was no room or place for the appropriation of "one half of one mill on every dollar of all State taxes collected" for any or all of the years since, "to meet the purchase price of said property," and such appropriation attempted by article number six of 1875, being in violation of the Constitution, was and is null and void. Such appropriation was neither for the expenses of any year within the language and meaning of the amendment, nor was it the destination of any excess of revenue over such yearly expenses toward the creation of a sinking fund, or to sinking the public debt, within the language or meaning of the amendment, which is set up by the Treasurer as a reason for not paying the warrants held by the relator. The mere fact that there is in the treasury a fund called "the State-House fund," and which has been erroneously reserved or set apart heretofore as such, can not entitle the relator to take that fund, or any part of it, from the treasury for a purpose prohibited by the amendment to the Constitution.

It is not pretended that any additional or special tax was levied or collected to pay for the State House, but only that a certain part or proportion of all State taxes should be set apart out of "the general funds," and not out of or as a special fund created or collected by law for this specific purpose. This act is also violative of article 111 of the Constitution. It is, however, argued that the State can not retain the property and refuse to pay the price. That may be very true, but that is not the question which we are called upon to determine in the present case. What we are called upon to determine is whether we shall by our order compel the State Treasurer to pay the bonds of the

relator issued for the purchase of the State House out of funds in his hands which are by the Constitution itself devoted to other uses, and which were never collected or received for the payment of the debt incurred in the purchase even if lawfully made.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be avoided and reversed, and that the mandamus sued out by the relator be discharged at his cost in both courts.

ON REHEARING.

MANNING, C. J. It appears from the recitals in the act of sale, that at the time the State became the purchaser of the St. Louis Hotel property, she occupied towards her vendor the position of lessee, under a lease executed 17th April, 1874, by virtue of which, the Building Association had leased to the State the property in question, for a period of nineteen years at an annual rent of $50,000.

The act of sale declares, that this recorded lease which operated as an incumbrance on the property, was extinguished by confusion, the lessee having become absolute owner of the leased premises. It also appears, that at the date of the act of sale, the property in question was leased in part to other persons than the State, and by the purchase she was subrogated to the rights of the lessor as to these lessees. It also appears that the State occupied the property as a State House from April 17, 1874, the date of the lease, until March 10, 1875, the date of the purchase.

The lease for nineteen years was made under authority of the Act of March 16, 1874, which appropriated $38,000 to pay the rent of all public buildings, and authorized the Governor and two other officers to lease in the name of the State "such public building or buildings for the various executive departments, and for the General Assembly, for an annual rental not to exceed $50,000, and for a period not to exceed twenty years," and exempted the buildings from the obligation to pay State and parish taxes while occupied as a State House.

On April 3, 1875 the General Assembly appropriated $7,000 to pay the rent of the State House for the first two months of that year. The property had been purchased March 10th.

It must be observed that the lease for nineteen years at an annual rental of $50,000, was authorized in March 1874, and was executed on the 17th. of the following month, while the Constitutional amendment was not adopted, and therefore did not become operative, until nearly a year afterward. The power of the legislature to make an agreement to pay an annual rent for the buildings necessary for the use

of the State can not be doubted. Its power to do so at the time this lease was executed is unquestionable, and its power to buy a State House is equally unquestionable, if the debt thereby created does not exceed the constitutional limitation. There is no pretence that this purchase had that effect.

Our former decision was controlled by the application of the constitutional principle, as embodied in the amendment, that the revenues of each year must be applied to the expenses of the year, and that the State should in no manner provide for the payment of appropriations or claims in excess of that revenue.

The Act of 1875, after appropriating two hundred and fifty thousand dollars for the purchase of the property, enacts that "out of all State taxes collected, one half of one mill on every dollar shall be set apart of the general funds as a fund to meet" this purchase price, and this fund shall be paid to the vendors at the time stipulated in the act of sale, at least twice in each year. Acts, p. 28. The effect of this was to diminish the general-fund tax to 3½ mills, and to levy ½ mill for the State-House purchase. It is not disputed that the Legislature could reduce the general-fund tax to 3½ mills, and levy a tax of ½ mill for the State House, and this is what it did in effect, though not in those words.

Upon a closer examination of the terms of this enactment, we construe it to be, not an appropriation of $250,000 made in that year for an expense of that year, but a designation of that sum for a particular purpose and a dedication of it to a particular use, to be realized and applied through several years at the times specified in the act of purchase. It is not therefore amenable to the objection of being violative of the Constitutional inhibition. Instead of continuing to pay the large rental, stipulated in the lease, the State changed her obligation, with the assent of the other interested parties, into an agreement to pay another and smaller sum in annual instalments, and appropriates such sum as one half of one mill on the dollar will produce in each year for that payment. This is devoting the revenues of each year to the payment of the expenses of the year.

It is therefore ordered and adjudged that our former decree is set aside, and annulled, and that the judgment of the lower court is affirmed with costs.

EGAN, J. I adhere to the views expressed in the original opinion prepared by me as the organ of the court in this case. In my opinion the moment a general-fund tax is levied and collected the destination of every dollar of it is fixed absolutely and beyond legislative control by the third constitutional amendment. The attempt, then, to divert a

part of it for the purchase of a State House or any other purpose, however wise or proper in itself, involves a clear infraction of the Constitution, and so can not be considered as making that provision for its payment which the Constitution, article 111, requires when a debt exceeding $100,000 is incurred, because a provision in the teeth of the Constitution is no provision at all. What the Constitution contemplates and requires is a legal and adequate provision.

Again, it is provided in the Constitution that the provision made to meet a debt at the time of its creation shall be irrepealable until it is paid, both principal and interest. Now who can or will for a moment pretend that the general revenue law of the State, *passed some years before* and not when this purchase was made and debt attempted to be incurred—by virtue of which alone the general-fund tax was levied out of which the provision for this purchase was made by the act of the Legislature authorizing it—possesses that character of irrepealability contemplated by the Constitution! What was to prevent the Legislature from repealing it at any moment, and has it not in fact done so in the exercise of its absolute and unquestioned right? What then becomes of that important feature of the act? It will not do to say that the new revenue law makes equally good provision for the collection of a general-fund tax. That is not the question. Suppose, for instance, the Legislature had repealed the revenue law, *passed and in existence before* this purchase, without enacting any other in its stead, or should to-morrow do the same thing with the act now in existence, *which was passed since* this purchase, how could its right to do so be questioned; and how, under the Constitution, could the relators be heard to complain? If they did so, the answer would be immediate: "The act repealed was not passed when your debt was incurred, nor to make provision for the payment of your debt; and we had and have, at any time, a perfect right to repeal it."

It is, however, argued that because the price of the State House is payable in installments, that each installment is a part of the expenses of the year in which it falls due, and it is therefore competent for the Legislature to appropriate to its payment so much as may be necessary out of the revenues of that year. If this be so, what is to prevent the purchase of a State House, or any other public property, for $2,500,000, instead of $250,000, and the absorption, to meet it, of all the revenues of the State in preference to, and disregard of, all antecedent creditors and debts, provided only the Legislature will resort to the device of making the purchase price payable in installments maturing each successive year until the whole be paid? If this can be done, what is to prevent the State from embarking on a new career of acquisition of public property, the price of which shall absorb every available dollar of its revenue for years to come, and when its creditors, foreign or domestic, make

complaint that their debts remain, and are likely to remain unpaid, by reason of the sinking fund, designed to be created by obedience to the provisions of the third constitutional amendment, being all absorbed by this new device, this new process of the State growing rich in newly acquired property, while its hungry and starved creditors are turned away empty handed, and must be content with being told "This is no debt which we have incurred in making these new purchases the payment of which is preferred to yours. *It is only an expense of each successive year*, legitimately payable out of its revenues even though it absorb them all and leave none for you or the payment of your debt." Does not this exhibit the fallacy of the argument which leads to such conclusions?

The truth is, that it will require only a very cursory review of the legislation of the State, and of the Constitution itself, to show that the terms "*debt*" and "*expenses*" as there used are no more convertible and synonymous than are the same terms when applied to any private person, in regard to whom, or by whom, what is more common than to hear it said, "My expenses are so heavy they leave nothing for the payment of my debts;" or, "My annual expenses are so great that I have nothing left to pay my debts at the end of the year." Look at any Auditor's or Treasurer's report, at any appropriation bill, at any bill to make provision for the conversion or payment of any debt of the State, and the distinction will always appear. The very language of the third amendment to the Constitution itself makes and marks the distinction between *debt* and *expenses*, in that it devotes the revenues of each year in excess of the expenses of that year to sinking the public debt, without distinction also as to what debt, so it be a public debt. Art. 111 of the Constitution, which limits and controls the General Assembly in contracting a debt exceeding $100,000, and the various amendments and provisions of law for the funding, limiting, and reduction of the public debt, all mark the distinction with equal clearness. Indeed, it would seem almost useless to discuss the distinction, were it not that able and ingenious counsel have, in their efforts to sustain the claim of the relators, endeavored to induce the court to disregard it, and to consider the debt incurred in the purchase of the State House as so many items of expense of the years in which the several installments are to be paid by the terms of the contract. It can no more be said that the debt incurred in the purchase is an expense of the years in which the installments fall due, than of any other year in which they may be paid, or of all future time if unpaid.

There are two other considerations, both serious: one affecting the interest of the relator, and the other that of the State, which show the fallacy of the position assumed on behalf of the former. If relator's claim be treated and regarded not as debt but as an expense of the

years in which installments fall due, he would be wholly remediless, and could never be paid, according to the terms and prohibitions of the latter part of the third amendment, in case the revenues of those years fall short of the expenses; while, on the other hand, if the claim be treated as an expense of those years it would be equally entitled to payment out of the revenues of the same with those ordinary expenses necessary to the very existence and operations of the government of the State, the wheels of which might be stopped in order that the relator's debt might be paid in a manner different from any other. The considerations of policy and of interest in the State in the maintenance of the purchase can not control or alter the principles of law applicable to this case.

I adhere to the original opinion in this case, and dissent from the judgment now rendered.

No. 7094.

SUCCESSION OF JOHN DURKIN. OPPOSITION OF MORTGAGE CREDITORS.

Where a necessitous widow dies, without having received her portion of $1000, under the act of 1852, her *major* heirs can not claim that portion from the husband's succession. Only her children, and her remoter descendants who are *minors* and necessitous, are entitled to claim such portion.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Charles Luzenberg for the succession.

Charles E. Schmidt for James McCracken, appellee.

H. G. Morgan and *W. H. Hunt* for opponents and appellants.

The opinion of the court was delivered by

MANNING, C. J. The sale of John Durkin's property, which consisted only of certain lots in this city, realized, with a small sum for rents, seventeen hundred and forty dollars. The privileged claims, which by the way are ranked as 'ordinary' on the tableau of debts, amount to $394.50, and with taxes, and some debts, really ordinary claims, and a mortgage debt, swell the total indebtedness to near two thousand dollars, of which the mortgage alone is $1230 principal. The succession is therefore insolvent.

Durkin left a widow in necessitous circumstances, and four children, all majors. Very shortly after his death, his widow also died. The tableau of distribution, filed by his administrator, proposed that out of the assets, the privileged creditors should be first paid, and the

residue should be applied to the extinction *pro tanto* of the mortgage debt. The major heirs opposed this distribution, alleging that their mother, being a widow in necessitous circumstances at the moment of their father's death, became thereby *eo instanti* entitled to one thousand dollars, as the widow's portion under the act of 1852, which upon her death shortly thereafter descended to her heirs.

The act of 1852 was not only carelessly and obscurely drawn. It was misnamed in its title, as providing a "homestead." A more fitting and descriptive designation is an act providing the necessitous widow's portion of her husband's estate.

We have before said, the right of a widow and minor children of a decedent to this Portion vests in them at the moment of his death. White's Suc. 29 Annual, 702. It is now contended that having thus vested in the widow, the right to this portion became so absolute that her children inherited it from her. Thus a new question is presented, viz whether the major heirs of the necessitous widow, who has not received her portion under the act of 1852, can claim it as her heirs from the husband's succession. It is obvious that they can not.

The argument of counsel has confounded the rights, secured to necessitous minor children by that act, with the supposed rights of inheritance of the widow's children. These opponents are majors. The law is;—whenever the widow or *minor* children of a deceased person shall be left in necessitous circumstances * * the widow or the legal representatives of the children shall be entitled to demand and receive from the succession of their deceased father or husband * * * one thousand dollars * * and the surviving widow shall have and enjoy the usufruct of the money * * * afterwards to vest in and belong to the children or other descendants of the deceased.

The 'children,' meant throughout the Act, are those descriptively mentioned in the first clause as the 'minor children of a deceased person,' for whose benefit alone the bounty provided by the act was intended. Of course we understand the word children here as having the largest import, and as including grandchildren and other descendants, who are minors.

Much stress is laid in the argument upon the fact that the widow never exercised, nor attempted to exercise, the right conferred by the act, and that in consequence, it expired with her. This argument was probably suggested by the circumstance that the phraseology of the law has been supposed to have some special significance when it uses the words, shall be entitled to receive, instead of shall receive. Robertson's case, 28 Annual, 832.

We do not rest our construction of the act upon so narrow a basis, nor do we think the widow's omission to claim her portion a matter of any consequence. Her omission has no effect beyond the personal one of non-enjoyment of the bounty. It can not prejudice the rights of others, but as we have seen, the only other persons who are participators with her of the bounty are the minor children, and her right is only usufructuary, and expires with her life.

The true meaning of the act is best discovered by inquiring what purpose the legislature had in view in passing it. Unmistakably, it was to give to the necessitous widow some immediate help from her husband's estate, the enjoyment of which lasted during her widowhood, and on its termination, the bounty thus given was to vest, not in the deceased's heirs of every description, but only in his descendants, who should be minors.

In the present case the opponents do not claim this portion of John Durkin's estate as his heirs, or children, but their pretensions are manifestly based on the idea that thus much of his estate was severed from it, and became the property of Helen Durkin at the moment of his death, and she now being also dead, that they have succeeded to her right by inheritance.

Here again the intent of the act furnishes the clue to its proper understanding. The bounty was designed to accomplish a particular purpose, i. e. the relief of the widow's necessities primarily, and as a secondary and remoter result, a beneficence to the minor children. No one else is cared for. 'Whenever the widow, or minor children, of a deceased person are left in necessitous circumstances,' are the only two contingencies, upon the happening of which, the law permits this specific sum to be taken away from that fund it had previously consecrated to a purpose, equally sacred with that of taking care of wife and children, viz the payment of one's debts.

The widow's portion was not used nor consumed by her. There were no minor children, or minor descendants of any kind, who would have been entitled to it at the widow's death. It therefore remained in the succession of the deceased husband, to be appropriated to the payment of his, and his succession's debts, and so the lower court adjudged.

Judgment affirmed.

No. 7120.

JAMES WOOD TO THE COURT.

The power of this court to issue writs of habeas corpus being confined to cases when we may have appellate jurisdiction, although no appeal be actually pending, it follows that we can not issue such a writ in a case where no fine has been imposed, and the sole proceeding in which the writ is asked, is a sentence of the lower court condemning the petitioner to imprisonment for contempt.

A sentence of the lower court sending a party to prison for some act of contempt committed during the trial of a case, is no part of the case, and hence the amount in dispute in the case has no bearing on the question of the jurisdiction of this court as to the sentence of the lower court in the matter of the contempt. Nor can an allegation that the imprisonment of the petitioner will damage him to an amount above the appealable sum, give this court jurisdiction.

APPLICATION for a writ of *Habeas Corpus*.

J. J. Foley for petitioner.

The opinion of the court was delivered by

MANNING, C. J. The petitioner alleges that he is in prison under an unlawful sentence of the judge of the fourth District court of this city, condemning him to imprisonment for ten days for a contempt of court, and applies to this court in full Bench for the writ of habeas corpus.

It appears that a suit had been tried wherein Wood, and another person of the same name, were defendants, and the jury had left the court room to deliberate, when Wood assaulted Benedict, the lawyer of his adversary in the suit, and struck him with a stick. This was not done in the court room, in the immediate presence of the judge, but in the court building and in a clerk's office, the court being however in session. The judge sent Wood to jail for ten days, and very properly.

Our power to issue writs of *habeas corpus* is confined to "cases when we may have appellate jurisdiction." art. 77 Const. It is very clear that we have not, and can not have appellate jurisdiction here. There is no fine imposed, and the sole proceeding or case in which the writ is asked, is that of the sentence, or order of imprisonment. It was a summary proceeding of the court, directed against the violator of its good order and decorum, the object of which was to vindicate its sacredness.

It seems to have been supposed that jurisdiction could be conferred upon us, by alleging that the party imprisoned is damaged more than five hundred dollars by his detention from his business and family, and yet again, by alleging that the "sum involved in the suit of Golding v. Wood in which the contempt was committed" is over five hundred dollars.

The contempt of court was not committed in a case. It is of no

consequence whether a case was on trial, or what case. The contempt has no connection with the case of Golding v. Wood, except in so far as it may have been committed because of something said on that trial. The commitment is headed by the clerk with the name of that case, which is a mistake, and certainly does not make the contempt case a part of the other. The amount involved in that case is not a matter having any connection with this. It certainly can not give us jurisdiction, nor can an allegation that the imprisonment of the petitioner will damage him in an amount above the appealable sum for the jurisdiction of this court to attach.

It is not essential to give us power to issue this writ, that we should have jurisdiction by an appeal actually pending, but the matter must be such that this court may have ultimate jurisdiction in the event that the proceedings of the lower court reach a stage when an appeal would lie.

The proceedings in the lower court are complete. There is nothing more for the court to do, and nothing it has done gives us jurisdiction.

By the court;—The application for the writ of *habeas corpus* is refused.

No. 6986.

B. W. SEWELL vs. CHAS. MCVAY, EXECUTOR. MCGHEE, SNOWDON & VIOLET, INTERVENORS.

A plea of prescription filed by a defendant impliedly admits the plaintiff's ownership of the note sued on.

Prescription does not run against a debt due by the husband to the wife, during the marriage.

Prescription does not begin to run against a debt due by the father and natural tutor to his children, until his death, or their majority.

Prescription does not run against a debt due by a father's succession to his minor children, during their minority.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Brame*, special judge.

S. A. Moore and *J. D. Wedge* for plaintiff and appellant.

Kennard, Howe & Prentiss, D. C. Hardee, and *Kernan & Lyons* for intervenors and appellees.

The opinion of the court was delivered by

DEBLANC, J. On the 30th of January 1861, Frank J. Haynes appeared before a notary public of the parish of East Feliciana, acknowledged that he was indebted unto Joseph B. Gribble in the sum of sixty-three hundred and thirty dollars, and—to represent that indebtedness—subscribed and delivered to his acknowledged creditor six

notes drawn to his own order and by him endorsed, the payment of which he secured by a conventional mortgage recorded in March 1861 and re-inscribed in March 1873. Mrs. Haynes intervened in said act, and—by her renunciation—gave to that mortgage precedence over whatever rights she herself had on the property hypothecated by her husband.

On the 13th of February 1866, Mrs. Haynes obtained against her husband a judgment for $4302.50, and—from that date—resumed the administration of her separate estate. On the 24th of November 1866, she became the owner—by purchase made for her and at the request of her husband—of one of the six notes delivered by him to Joseph B. Gribble, and which matured on the 23d of January 1862.

Mrs. Haynes died on the 28th of November 1871, leaving three children, who remained under the tutorship of their father until his death, on the 19th of March 1874. Bennett W. Sewell was appointed as tutor of said minors on the 8th of April 1876—and, on the 10th, two days after his appointment, he proceeded on the note acquired by Mrs. Haynes on the 24th of November 1866, and—as tutor—obtained an order commanding the seizure and sale of the property mortgaged to secure the payment of said note.

In accordance with that order, said property was seized by the sheriff, but the sale of the same was enjoined by Charles McVay, as testamentary executor of Frank J. Haynes, on the ground that the note sued upon was barred by the prescription of five years and the mortgage about to be foreclosed perempted by that of ten years. McGhee, Snowdon and Violet, alleged creditors of Frank J. Haynes, intervened in the injunction suit, joined the executor, and—as the latter—rely, in their petition of intervention, on exclusively the prescription of five and ten years. On the trial, the intervenors offered in evidence their judgment against Haynes, a copy of which was to be furnished. It is not in the transcript and we are not informed when and for what amount it was rendered.

The defence presented in the brief filed in behalf of the executor and intervenors is too broad to rest on their pleadings. They contest—in argument—Mrs. Haynes' title to the note sued upon: her title is recognized by a judgment of this court rendered on the 28th of March 1870, and—were it otherwise—their pleas of prescriptions which can be considered but as their answers to the proceedings by the tutor to procure and maintain the order of seizure and sale, impliedly admit—as they do not deny—the alleged, uncontradicted and well established fact that—by inheritance from their mother—the wards of plaintiff are the owners of the note sued upon.

7 R. R. 467; 9 R. R. 518.

The only question to be decided and the only one raised in the pleadings is: Were said note and mortgage barred by the invoked prescriptions? As to the mortgage, it has or at least appears to have preserved its rank, inasmuch as no other mortgage bearing on the property it affects, was recorded between its inscription in 1861 and its re-inscription in 1873. Its fate is—therefore—linked to and depends upon that of the note. As principal and accessory, they must stand or fall together.

Was the note prescribed on the 10th of April 1876, when the notice of seizure and sale was served on McVay, as testamentary executor? It became due on the 23d of January 1862, during the war; the communications remained opened between the City of New Orleans—the residence of Gribble, then the holder of said note—and the parish of East Feliciana—the residence of his debtor, until the 2d of May 1862—three months and nine days. From that time until at least the 4th of May 1865, all communications were effectively interrupted between the City and the other sections of the State. From that date—when they were re-opened, to the 24th of November 1866, when Mrs. Haynes acquired her husband's note, there lapsed one year, 6 months and 20 days. Whilst Gribble retained said note as Haynes' creditor and up to the time when he purchased it for his debtor's wife, there were two intervals of altogether one year and ten months during which he could have brought suit on the same.

This note—after its purchase in the name of and for the benefit of Mrs. Haynes, passed in the possession of the agent of Mrs. Alice O'Donnell, who—in February 1868—filed an action against Haynes to recover its amount. In his answer to said action, he declared that the note sued upon had been bought and paid for by his wife, who intervened in that suit and also claimed said note as belonging to her. Her intervention was dismissed, her demand denied in the lower court. She appealed, and—by a decree of this court—was, eight years ago, recognized as the owner of the disputed note. The judicial assertion of her ownership by her husband, is evidently an acknowledgment by him of his indebtedness to her.

Husbands and wives can not prescribe against each other. That rule is clear, absolute, rational: it covers and protects—not as contended—only those obligations which result from the marital relation, but all others. As regards the actions specified in the 3540th article of the Code, the prescription of five years which runs against minors, interdicted persons and persons residing out of the State, is not applicable to a note due by the husband to the wife. Not being included in that sweeping clause, she is excepted from its effect, and that exception confirms the rule "that the spouses can not prescribe against each other"—and why?

"Il serait contraire à la nature de la société du mariage, que les droits de chacun ne fussent pas—l'un à l'égard de l'autre, respectés et conservés. Un époux prescrivant contre son propre conjoint, un époux obligé d'ager contre son conjoint pour interrompre une prescription, sont des choses qui répugnent et que la loi ne pouvait certes pas permettre. La prescription est donc suspendre ici pour toute la durée du mariage; qu'il y ait séparation de biens ou méme séparation de corps, peu importe, tant que subsiste la qualité d'époux la prescription est impossible.

Marcadé de la prescription, p. 163. R. C. C. 3523.

At the date of Mrs. Haynes' death, that note passed to her minor children, and—from that date and as to their father and tutor—ceased to be the evidence of a claim actually demandable. Its maturity and the date of its payment were then postponed by law until their majority or their father's death. He could not have sued himself, and had he done so and recovered the amount of the note, he would have received as tutor whatever he would have collected from and paid to himself as a debtor.

"La prescription est suspendue entre tout administrateur légal du patrimoine d'une personne, et cette personne, entre le père administrateur légal et son enfant, entre le tuteur d'un mineur et son pupille, et quant à tous les droits—personnels ou réels, de l'enfant ou de pupille.

Marcadé, de la prescription, p. 165.

When—on the 19th of March 1874—Haynes died, his children were under age, and—as the acceptance of his succession must be considered as having been made for them with benefit of inventory, by mere operation of law, from that date and as to the claim which they have against said succession, no prescription did or could run against them. The Code so provides.

R. C. C. art. 977, 3526.

The note sued upon matured on the 23d of January 1862—was purchased by and became the property of Mrs. Haynes on the 24th of November 1866, four years and ten months after its maturity; and—from that time until two days before the institution of this suit, the then incomplete prescription was continually suspended.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is reversed, avoided and annulled; and, proceeding to render such judgment as should have been rendered by the lower court.

It is further ordered that the intervention filed in this case by McGhee, Snowdon and Violet is rejected, and that—as tutor of the children born of the marriage of Frank J. Haynes and Maggie Atkinson—Bennett W. Sewell, the plaintiff in this case, have judgment against and recover from the defendant, the succession of the said Frank J. Haynes,

herein represented by Charles McVay, as testamentary executor, the sum of twenty-five hundred and thirty dollars, with interest thereon at the rate of eight per cent per annum from the (23d) twenty-third of January (1862) eighteen hundred and sixty-two.

It is further ordered, adjudged and decreed that the property mortgaged to secure the payment of the note sued upon, and described in plaintiff's petition, be sold—as the law prescribes—to satisfy this judgment; and that defendant and intervenors pay the costs incurred in both courts.

No. 6934.

JOHN H. CATHERWOOD & CO. vs. WM. H. SHEPARD.

If the last of the ten days allowed a defendant for answering falls upon a *dies non*, the whole of the next day is given to him to file his answer; and any judgment of default taken against him before the expiration of that day, is premature.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Hornor & Benedict and *F. W. Baker* for plaintiff and appellee.

Singleton & Browne for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The service of process was made on the defendant on Dec. 22, 1877. Ten days were allowed to answer. The default was entered on January 2d following. From the judgment confirming that default, this appeal is taken.

Neither the day when the citation was served, nor the day when the delay expires, are counted as part of the ten. Code of Practice, art. 180. The first day of January was the last of the ten days, and a default on the second would have been well taken, but for the fact that the first of January is a legal holiday, upon which no judicial proceeding could be had.

In all cases where delay is given, either to do something, or to answer, neither the day of serving the notice, nor that on which the act is to be done, or the answer to be filed, are counted as part of the delay. Code of Practice, art. 318. But if the last day of the time, allowed for the performance of any judicial act, falls upon a *dies non*, the whole of the next day is allowed for the performance of the act. Fowler v. Smith, 1 Rob. 448. Garland v. Holmes, 12 Rob. 421. In this last case, the court say, the ten days allowed for a suspensive appeal expired on the first of January, which being *dies non juridicus*, the whole of the next day was allowed.

The mistake in counting, made by the plaintiff, was probably caused by his supposition that the delay was for his benefit and by considering that as he was the party to take or move for the default—and as ten clear days had elapsed, and the time within which he was prohibited from acting had elapsed—there was no legal obstacle to his moving on the eleventh day.

But it is from the other standpoint, the question of right must be regarded. The delay is accorded to the defendant to answer. It is he that is entitled to ten clear days to file his answer, and he is entitled to the last moment of the last day. He could not file it on the last of the ten days, because that was the first of January, and therefore he had the whole of the second to file it. State ex rel. Mercier v. Judge, 29 Annual, 223. The default could not legally be taken until the third of January, and having been taken on the second, was prematurely taken. Therefore

It is ordered and decreed, that the judgment of the lower court is avoided and reversed, and that this cause is remanded thereto for a new default to be taken and other proceedings to be had according to law, the plaintiffs to pay all costs of, and after, default in the lower court, and the costs of appeal.

CONCURRING OPINION.

MARR, J. By the terms of the Code of Practice, defendant was required to answer "within ten days, to be counted from the time the citation has been served. * * * * In counting the ten days, neither the day when the citation has been served, nor the day when the delay expires, is included." Articles 180, 318.

This means that ten clear days, excluding the day of the service of the citation, and the terminal day, are to be allowed to the defendant before a default can be taken against him. The first day to be counted was the twenty-third December; and the terminal day was the first January, thus: 23 one, 24 two, 25 three, 26 four, 27 five, 28 six, 29 seven, 30 eight, 31 nine, 1 ten.

The same law that excludes the twenty-second of December, the day on which the service was made, excludes the first of January, the day on which the delay expired, and defendant had the whole of the next day, the second of January, in which to answer. The default, therefore, was premature; and the confirmation of it by final judgment was void.

For these reasons I concur in the decree pronounced by the Chief Justice.

No. 6978.

THE STATE VS. WILLIAM *alias* BEDFORD BURNS.

The addition of the words "with capital punishment" to the verdict of a jury can not affect the verdict. The words are mere surplusage.

Proof that a homicide was committed in any of the parishes of this State, is proof that it was committed within the State.

The verdict of a jury in a murder case will not be set aside on the ground that the court below refused to hear evidence to prove the desperate character of the deceased, when there is nothing in defendant's bill of exception to indicate the nature of the evidence offered, except that the deceased was a man of desperate character, and nothing to show in what way that fact affected the prisoner's conduct in the killing.

APPEAL from the Eleventh Judicial District Court, parish of Jackson. *Graham*, J.

Allen Barksdale, district attorney, for the State.

E. E. Kidd for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The prisoner was convicted of murder, and sentenced to death, the verdict of the jury being, 'guilty with capital punishment.'

A new trial was moved on the grounds, that the verdict was contrary to the law and the evidence, and that it contained the addendum, 'with capital punishment.'

It was doubtless because our law gives to a jury the option of finding a simple verdict of guilty, or of qualifying it by the words, without capital punishment, that the jury in this case appended the words, 'with capital punishment,' which are surplusage, and only signify that their verdict was unqualified.

The prisoner offered on the trial to prove the 'desperate character' of the person who was killed, which was denied, and further requested the court to charge, that proof that the homicide was committed in the parish of Jackson, was not proof that it was committed in the State of Louisiana, which was refused. The prisoner reserved bills in both instances.

A homicide, committed in any part of the territory of a State, is committed necessarily in that State. The greater includes the less, and courts take cognisance of the territorial divisions and subdivisions of the State, in which they exercise their functions, when these divisions are made by public authority.

The ruling of the court, excluding evidence of the character of the person on whom the homicide was committed, is sustained by the weight of authority. State v. Chandler, 5 Annual, 489. While this is the general rule, we only announce an already recognized principle in saying,

that there are exceptions to it. D'Angelo's case, 9 Annual, 46. In a subsequent case, the evidence was excluded because there was nothing to shew it was brought within any exception to the general rule. State v. Brien, 10 Annual, 453.

And for the same reason it must be excluded in this case. Whatever may be said of the reasonableness of admitting evidence of the violent or malignant character of a person who has been killed, when such violence or malignancy and the knowledge of it by the accused, constitute the justification of the homicide, it has never been doubted that the record must shew a state of facts to warrant its admission. The bill by the prisoner merely states that he "offered to prove the desperate character of the deceased, to which the district attorney objected, and the objection was sustained for the following reasons, etc."

In Brien's case above cited, the court say, "we find the evidence, under the facts stated in the bill, to be open to all the objections to which such evidence is generally liable." There are no facts stated in the bill here. There is nothing in the bill to indicate the nature of the evidence offered, except that the deceased was a man of desperate character, and nothing whatever to indicate the connection of that fact with the defence of the prisoner, or in what way the existence of such a fact affected or controlled the prisoner's conduct in the killing. The rejection of evidence of the bad character of the slain person is not error where the record does not shew a state of facts to warrant its admission. Queensberry v. State, 3 Stew. 308.

There is no error in the judgment of the lower court, and it is affirmed.

No. 6924.

GEORGE M. KLEIN vs. MRS. BUCKNER ET AL.

The maker of a promissory note indorsed in blank, and acquired by the holder before its maturity, can not resist the payment of the note on the ground that the holder is not the real owner, unless he alleges and shows that he has good defenses, or claims, against the real owner.

An agent in whose hands a note has been placed for collection, may sue on it in his own name.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough*, J.

E. D. & W. Farrar for plaintiff and appellant.

Seale & Morrison for defendants and appellees.

The opinion of the court was delivered by

MARR, J. This is an appeal, by the holder of a promissory note, from a judgment of nonsuit, in favor of the maker and the indorser.

The consideration of the note is fully proven, and the only question is as to the right of the holder, George M. Klein, to sue and recover in his own name.

The note is indorsed in blank by Brackett, the payee, and by Seale; and on the fifteenth November, 1875, the date of payment mentioned in it, Seale waived presentment and demand by writing on the back of the note, signed by him.

The judge assigned no reason for his judgment except that "the law and the evidence being in favor of defendants," etc.

Interrogatories were propounded to George M. Klein, in answer to which he stated that he was Cashier of the Mississippi Valley Bank, a private copartnership composed of himself and four other persons: that the note sued on belongs to him individually in law: that when collected he will be accountable to his partners for their proportion; "but the legal title to the note is in me, and I owned the note at the time the suit was brought."

It was proven that after the note was delivered to Brackett, signed by the maker, Mrs. Buckner, he asked Seale to indorse it, so that he might get the money on it; and it was also proven that soon after, probably on the same day, the bank of which Klein was cashier, discounted the note.

It is too well settled, it is too plain, as a legal proposition, to be questioned, that where a promissory note is indorsed in blank by the payee, suit may be brought on it, and payment enforced, in the name of any person, whomsoever, who is in possession. Of course, if the holder has stolen the note, or otherwise obtained it wrongfully, the real owner might claim it: or the defendant, having knowledge of the fact, might, if necessary for the protection of his own rights, allege that the holder was not entitled to recover, because of his wrongful possession; as, for instance, if the defendant has claims or defenses, as between himself and the real owner, he may allege that the holder, in whose name the suit is brought, is but the apparent owner, or that he sues for the benefit of the real owner.

In this case there is nothing set up, nothing suggested, which impairs, in the slightest degree, the right of plaintiff to sue for and recover the amount due on the note. Seale, in his amended answer, alleges that the note was held and owned by the bank, and "that plaintiff as cashier, and in his official capacity, and for said bank, holds said note, and that he is without any interest whatever in the subject matter of this suit."

Here then we have a case in which the legal title would be in any holder by reason of the indorsements in blank; in which the holder is a partner in the bank alleged by defendants to be the real owner, and is,

moreover, as cashier, the legal custodian of the proper securities belonging to the bank; and in which the defendants set up no right or claim or defense which they could not have urged, as effectually, in a suit on the note by Klein as they could have done if the suit had been brought in the name of the bank.

If the real owner of a note, which is indorsed in blank by the payee, and thereby made payable to bearer, places it in possession of any person whomsoever for collection, the right of such person to sue and recover in his own name is as perfect as that of the real owner.

The judgment of the district court is avoided and reversed; and proceeding to render such judgment as that court should have rendered, it is now ordered, adjudged, and decreed that George M. Klein do have and recover of Mrs. Lucie Buckner and Jacob C. Seale, *in solido*, the sum of one thousand three hundred and forty-three dollars and thirteen cents ($1343 13), with interest at the rate of eight *per cent per annum* from the fourteenth (14th) day of April, 1875, until paid, and costs in both courts.

No. 6905.

THE STATE VS. JOHN P. BECKER.

The tender of a license tax, and its deposit in court by a defendant who is threatened by the State with seizure, and against whom an injunction has issued to restrain him from carrying on his business, are not such voluntary acts as will estop him from pleading the unconstitutionality of the tax, and recovering the amount of the tax, if the same is adjudged to be illegal.

The act of the Legislature imposing an additional license tax on saloon-keepers who give singing and dancing entertainments, in conjunction with their occupation of selling liquors, does not violate the constitutional requirement of equality and uniformity of taxation.

Any change in the judgment of the lower court, desired by the appellee, must be asked for by him in a regular answer to the appeal. It is not sufficient to demand it merely in his brief.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

J. C. Egan, Assistant Attorney General, for plaintiff and appellee.

B. R. Forman for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. Defendant owns and conducts—in this City—a coffee-house or beer saloon, in which theatrical plays, dancing and singing are performed—and, in accordance with paragraph 7 of the 1st Section of Act No. 14 of 1872, the Tax Collector notified him to call at his office and pay—as keeper of the aforesaid saloon and for last year—a license of $1000; or that—otherwise—he would proceed to recover it by seizure.

He refused to pay the license thus demanded, and—on the 7th of September 1877, an injunction issued from the 3d District Court, prohibiting him to carry on his saloon. He was—besides—cited to appear before said court to show cause why he should not be condemned to pay to the State the amount of the license claimed. He appeared on the same day, alleged that he had tendered said amount to the Collector, who had refused to accept it, renewed his tender in court, left it in the hands of the Clerk, and prayed to be discharged from further liability, on the ground that the action filed against him was premature.

The Judge on being informed of the tender and of its deposit, dissolved the injunction allowed against defendant, who now assails, as unconstitutional and as discriminating between his and similar callings, that part of act No. 14 which imposes different licenses on coffeehouses and saloons where theatrical plays, dancing and singing are performed, those where no such performances are had, and on Bar-rooms in and out of steamboats.

The assistant Attorney General contends that defendant's unrevoked tender is a standing acknowledgment of his indebtedness to the State, and that he can not be released from the payment of costs, by reason of his tender which is a confession of the debt, and be heard to deny and contest the liability that he has judicially confessed. Had defendant's resistance to the payment of the license ceased when he made the tender, he would certainly have avoided all the costs of this litigation; but—since his deposit with the Clerk—he has incessantly opposed the payment of the license, and—if he fails in his opposition—he must certainly bear the expenses of the appeal he has taken.

Do his tender and deposit preclude him from urging the unconstitutionality of the license imposed on his calling? They do not: the tender and deposit were made under circumstances which repel the presumption that they were voluntary: they were the direct and immediate consequence of a threatened seizure, of an injunction already allowed, the execution of which would have, at least, suspended defendant's business.

"Taxes illegally assessed may always be recovered back, if the Collector understands from the payee that the tax is regarded as illegal, and that suit will be instituted to compel the refunding, and a payment made to release goods from seizure, or after threat of distress of goods, is a payment on compulsion."

Cooley on Taxation, p. 568 and 569.

Does the act of 1872 imposing that license violate the 118th article of the State Constitution, which provides "that taxation shall be equal and uniform?" Is the calling of one who keeps a coffeehouse or beer saloon wherever theatrical plays, dancing and singing are performed

free of charge, the same as the calling of one who keeps a barroom on a steamboat or elsewhere, without such performances?

Defendant's counsel contends that the music and dancing are mere accessories to the business of selling liquors by the drink, and that, as his client charges no entrance fee to his establishment, the tax imposed on his business is higher than that imposed on others engaged in a similar business, and—therefore—is neither equal nor uniform.

The Judge of the lower Court, considering that the injunction in behalf of the State was prematurely issued, dissolved it at its costs and rendered judgment against defendant for the amount of the license, and he has appealed.

The Legislature has, and not without reason, considered that there is a difference between the callings herein before referred to; for, it seems evident that, in such a saloon as that kept by defendant, the main attraction, the principal entertainment is the music, dancing and singing, the presence and performance of the dancers and singers. It is, in reality, a concert saloon with a barroom attached to it, or rather a combination of the two, and—though no admission fee is required to enter it—those who do so are induced and expected to spend, not merely in proportion to what they drink, but in proportion also to what they see and what they hear, and—we imagine—that expectation is seldom deceived. Many, who could take their drink at ten different places nearer than that where "those accessories" are to be found, pass those ten different places to go to the other. Were it not for the amount of the license—there would undoubtedly be an indiscriminate opening of such establishments in the City; and it has often been held that, in cases of that description, the object of the license is less to raise the revenue by taxation than to discourage the occupation.

Cooley on taxation, p. 410, and authorities cited by him.

"The constitutional requirement that taxation shall be equal and uniform throughout the State, does not inhibit the Legislature from, nor deprive it of the power of dividing the objects of taxation into classes, but it does command the law-making department of the government to impose the same burden on all who are in the same class."

29th A. 284.

Defendant's establishment belongs to a special class of coffeehouses and barrooms, and that part of the act of 1872 imposing upon it a license which differs in amount from those imposed on coffeehouses and barrooms which belong to another and a distinct class, does not conflict with any of the provisions of article 118 of the State Constitution.

It has escaped the attention of counsel to file an answer to the appeal, and ask a change of the judgment, as concerns that part of it which condemns plaintiff to pay the costs of the lower court. His

printed argument alone refers to that fact, and—as that argument is not the answer, or equivalent to the answer required by law, the change he thus seeks to obtain can not be allowed.

C. P. 592, 888; 5th A. 140, 38, 683; 1 A. 340.

It is, therefore, ordered and decreed that the judgment appealed from is affirmed; the costs of the appeal to be paid by defendant.

No. 6884.

LOUIS BAUER VS. LOCHTE & CORDES AND SHERIFF.

The plaintiff is entitled to a suspensive appeal from a judgment dissolving an injunction with damages, on giving a bond for a sum exceeding by one half the amount of the judgment for damages.

The surety on an injunction bond who has, in the decree dissolving the injunction, been condemned in damages *in solido* with his principal, can not be surety on the bond of the appeal from the decree.

APPEAL from the Second Judicial District Court. *Pardee*, J.

N. Commandeur for plaintiff and appellant.

E. N. Whittemore for defendant and appellee.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. Louis Bauer enjoined a writ of seizure and sale, and gave bond with Ignatz Berger as his surety, in the penal sum of $500: On trial, the Injunction was dissolved, with twenty per cent damages, on $1500, the amount enjoined. Bauer took a suspensive appeal from this judgment, and gave bond with two sureties, Catrina Gugenheimer for $200, and Ignatz Berger for the entire amount, $525.

Appellees move to dismiss the appeal on the ground that the bond is insufficient:

1: Because the amount enjoined is $1500, and the judgment dissolving the Injunction is for $300, damages, so that a bond for $2700 would be required:

2: Because the judgment for damages is against Bauer and Ignatz Berger *in solido*, and Berger can not be surety on the appeal bond; because he is a necessary party to the appeal.

FIRST. The plaintiff in Injunction is required to give bond in an amount to be fixed by the court on granting the Injunction. If the Injunction be dissolved, without damages, the plaintiffs would be entitled to a suspensive appeal on giving bond for such sum as the court might fix, sufficient to cover the costs. The appeal does not arrest the seizure:

the Injunction did that; and the Injunction bond is the indemnity to which the defendant must look on the dissolution of the Injunction.

If the Injunction be dissolved with damages, plaintiffs would be entitled to a suspensive appeal on giving bond for a sum exceeding by one half the amount of the judgment for damages.

SECOND. In Bowman vs. Kaufman, decided on the sixth March, the plaintiff in Injunction appealed from a judgment dissolving the Injunction, and condemning him and his surety *in solido*, in damages; and the surety on the Injunction bond, was the surety on the appeal bond. On motion the appeal was dismissed, on the ground that the surety on the Injunction bond, being a necessary party, either as appellant or as appellee, could not be surety on the appeal bond. See also Dumas vs. Mary, 29 An. 809.

The other surety, Catrina Gugenheimer, bound herself only for $200, and the appeal bond is not good and sufficient in law.

The appeal is therefore dismissed.

No. 6968.

JAMES LUSK VS. SUCCESSION OF W. M. BENTON.

One administrator of a succession is not estopped by mistaken admissions in the pleadings of a suit made by a preceding administrator.

The district court is utterly without jurisdiction of a suit by parties against the succession of their former tutor, then under administration in the parish court.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough*, J.

Montgomery & Deloney for plaintiff and appellee.

J. W. Montgomery for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. In 1853, on the 9th of April, Mary C. Lusk wrote her last will, and—by that will—left in charge of one Robert C. Gayle, her minor children and the administration of the property which, soon after, they inherited from her. Gayle was appointed as tutor of those children on the 12th of July 1853. The inventory of their parents' estates amounted—including the value of the slaves—to $11,601.70.

From the uncontradicted evidence adduced on the trial of this cause, Gayle disregarded the last wishes of Mrs. Lusk. In her testament, she expressly recommended that her children should receive a good education, and—whilst under the care of the executor of their mother's will—they attended during three months of the year the schools of the

neighborhood, and the balance of the time they worked in their tutor's field, and were clothed and treated as slaves. Gayle converted to his own use the personal property and assets of his wards. When they left Gayle, James—the plaintiff—and Squire, his brother—had, between them, three mules valued each at fifty dollars.

Gayle died without having rendered an account either as executor or as tutor, and—on the 24th of April 1870, James and Squire Lusk filed in the district court for the parish of Carroll, a suit against his succession, in which they claimed as due to them by the deceased, as their tutor, the sum of ten thousand dollars. That suit was tried without opposition, and they obtained against said succession a judgment for $5495. That judgment was signed on the 5th of December 1870, and therein their legal mortgage is recognized as having taken effect and bearing on their tutor's property since the first of May 1853. At the date of said judgment, James Lusk was twenty-four years of age, and Squire younger. The latter twice sold his interest in said judgment; to his brother, on the 1st of November 1871; and, in that year, without mention of either the day or the month, to Warren M. Benton. Of these two transfers, not one was recorded.

On the 30th of January 1864, Robert C. Gayle, who—in 1853—had been appointed as tutor to James and Squire Lusk, sold to said Benton the plantation described in plaintiff's petition, and the succession of Gayle being insolvent, plaintiff seeks to subject the plantation thus sold to the satisfaction of his and his brother's legal mortgage, which—he alleges—has been duly recorded.

Benton is dead. In answer to plaintiff's demand, the first administrator of his succession admits that the deceased purchased from Gayle the plantation already referred to, but avers that he did so in good faith, without notice of the claim of James and Squire Lusk, and specially denies that any evidence of that disputed claim was ever recorded.

He also contends that—if it was recorded—the deceased has purchased from Squire Lusk, for one thousand dollars, his and his brother's interest in the judgment which the latter is attempting to enforce against the property of said deceased's succession, and that the transfer of that interest, if null as to James, is binding as to Squire. That, besides, plaintiff's demand is fraudulent and collusive.

In a supplemental and amended answer, the last administrator of Benton's succession contends:

1. That the judgment of the 5th of December 1870, which is the foundation of this suit, was rendered by a court having no jurisdiction of the matter in dispute and is an absolute nullity.

2. That when—in 1870—they sued the succession of their tutor, James and Squire Lusk were both over thirty years of age, and that

their claim and mortgage—if any they had—were then barred by prescription and extinguished by peremption.

3. That said judgment was obtained by fraud and collusion with the administratrix of the succession of Gayle.

To the filing of the amended answer, plaintiff's counsel objected, on the ground that it raised new issues and contradicted the original answer, in which one of the administrators of the succession of Benton has claimed, as belonging to it, the judgment assailed as an absolute nullity by the last and amended answer. Plaintiff's objection was overruled and he excepted.

In December last, plaintiff's demand against the succession of Benton was allowed, and the plantation bought by said deceased from Gayle ordered to be sold to satisfy said demand. From that decree, the administrator has appealed.

The amended answer was properly admitted, and for one reason: plaintiff contests the reality of the apparent transfer to Benton of his brother's interest in the judgment of the 5th of December 1870, and claims himself the very same interest, under a sale from his brother to him. By the decree appealed from, he alone is recognized as the transferree and owner of the whole of said judgment, and the last administrator of Benton's succession was not bound by any mistaken admission of his predecessor, and by the fact that the latter attached to his answer a document, the recitals in which were not substantiated, and which may have been but the form, the *projet* of a transfer.

It is evident that the district court had no jurisdiction of the suit of James and Squire Lusk against the succession of their tutor, for what he owed them in that capacity; and that they should have proceeded in the parish Court against the administratrix of said succession, to compel her—as such—to file an account of the tutorship of Gayle. It is only in that jurisdiction that his liabillty as tutor can be ascertained and fixed. C. P. 998; 29 A.

In the suit of James and Squire Lusk against the succession of Gayle, mention is made in the statement of facts that a certificate from the Recorder showing the registry of the evidence of their legal mortgage against their tutor, was offered and received on the trial—Besides, it does not appear that the rights and actions of plaintiff are barred by prescription, and they seem so legitimate that we are not disposed to conclude him by our decree.

It is therefore ordered that the judgment appealed from is annulled and reversed, and this case dismissed at plaintiff's costs in both Courts.

It is further ordered that plaintiff's right to institute new proceedings against the succession of Robert C. Gayle and Warren M. Benton, is specially reserved.

No. 6954.

S. T. AUSTIN, JR., VS. CITIZENS' BANK AND SHERIFF.

A mortgage creditor may proceed directly against the property subject to his mortgage, even though the property may have been sold for taxes, and the tax title be in the name of a third person, when it appears from the evidence that such title is a fraudulent simulation, and that the original mortgage debtor, who had colluded with the purchaser at the tax sale, is still the real owner of the property.

APPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough*, J.

J. M. Kennedy and *Thomas J. Semmes* for plaintiff and appellee.

Armand Pitot for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. In February 1872 Jane Austin bought a plantation situated in Carroll parish from the Citizens' Bank for about twenty thousand dollars, of which four thousand dollars was paid in cash or its equivalent, and the residue was on time. A mortgage and the vendor's lien was retained by the Bank, and the purchaser besides assumed the obligations of a previous mortgagor of the same property, and renewed all the stipulations relative to stock notes, pledge, etc. usually made by that Bank in its sales and mortgages. No other payment of any portion of the purchase price was made, and in March 1876 the Bank proceeded to foreclose its mortgage through an order of seizure and sale, when the execution of that process was arrested by an injunction, obtained at the instance of the mortgagor's son. That is the suit now before us.

It appears that Mrs. Austin neglected to pay the taxes on the property, and in January 1875 it was sold by the tax collector and purchased by one C. E. Moss, who procured from the Auditor a confirmation of his tax title in the following November, and in January 1876 sold to the plaintiff in injunction. The petition alleges the plaintiff's ownership by this chain of title, avers that it is valid and *bona fide*, that he is in no manner bound to pay the debts of Mrs. Austin to the Bank, and that the seizure by the Bank of his property, thus honestly and fairly acquired, to compel the payment of the price which his mother is alone bound to pay, is a hardship and grievance, wantonly inflicted upon him, which he prays may be assuaged by a judgment against the wrong doer for five thousand five hundred dollars as damages.

The Bank answers, that the plaintiff is not the legal and *bona fide* owner of the property, that he and his mother concocted the scheme, by and through which a nominal title was vested in him, for the purpose of defeating, or attempting to defeat, its mortgage and vendor's rights—that its mortgagor, the mother of the plaintiff, implored time and leniency from the Bank, and even after the tax sale, of which she knew,

asked for further delay of the enforcement of the mortgage, without acquainting her creditor with the pretended alienation by a tax sale, and for the purpose of deluding the Bank until that sale should be confirmed by the Auditor—that the plaintiff was the business manager, as well as son, of the mortgagor and debtor, through whose fraud and ill practices, which were participated in by her, the apparent title was acquired by him, which was in fact a simulation, the real title as well as possession remaining in the mortgagor, and Moss being interposed to impart a semblance of reality to the transition of title, who never had possession of the property and never pretended to exercise any control over it. Further defences are made, resting upon the pledge of the Bank, the relation of the State to it, etc. which need not be detailed.

Moss intervened, alleging that he was the creditor of plaintiff in injunction, and had his vendor's lien and mortgage on the property to secure the payment of the price for which he had made the sale of January 1876, and prayed that the plaintiff be decreed to be the owner of the land subject only to his mortgage. His intervention is signed by an attorney, bearing the same name as the plaintiff.

The fraud and cozenage of the transaction is manifest at every stage of it. Mrs. Austin induced the Bank, in personal interviews with its President, to forbear pressing the collection of its debt. The note maturing in May 1873 had been long overdue, but her solicitations prevailed, and the leniency, touchingly besought, was gracefully and compassionately granted. The taxes of that year, due in 1874, were left unpaid, and plaintiff told the collector to sell the place for them, and Moss says that the plaintiff told him just before the tax sale he (plaintiff) wished witness would buy the place, though he adds with artless candor, the plaintiff never told him to buy it for him (the plaintiff) nor for any one else in particular. And so when it was sold in the following January (1875) Moss bought at $365. During that year the President of the Bank renewed his demands upon Mrs. Austin for payment in a more peremptory manner than before, and in October, after the purchase by Moss of the plantation, Mrs. Austin writes—"I can only state that now I have no money, not having commenced to gin the crop yet, but I expect to be in the city in Jany. and hope to be able to make satisfactory arrangements then." Nothing is said about the tax sale.

A few days after this letter was written, the Auditor was applied to for the confirmatory title, and it was made, and Moss who had not taken possession before, obtained a judicial order therefor, and did take possession then according to his own account. It seems to have been done so quietly that the tenants of the place were not aware of it. Less than ninety days intervened between the date of the Auditor's title to Moss, and Moss' sale to Austin. The quantity of land was eighteen hundred

acres. The price of this last sale was six hundred dollars cash, and one thousand dollars in a year.

Moss thinks, but is not certain, that the tax collector himself made the public auction at the tax sale, and adjudicated the property to him, but if mistaken, the deputy did it, and he accounts for the non-production of the requisite number of advertisements of the sale by stating the custom of the collector there to be to make one advertisement by means of a printed slip, called an 'extra' of the local newspaper, but he is not sure that such slip was issued in this case, and it is not produced. The collector, testifying, says he had no communication with Mrs. Austin about the taxes or the sale, but only with her son, the plaintiff, to whom he said, 'if you are not going to pay the taxes, I will sell," and who answered 'go on and sell.'

The statement of the case, and the recapitulation of the evidence, foreshadows our judgment. The plaintiff intrenches himself behind our ruling in Lannes v. Work. Bank, 29 Annual, 112, and insists that his title must be held good until it is annulled in a direct action. But that principle holds good only as to those titles that are *bona fide* and were acquired without fraud, or that are real and not simulated. Unquestionably a purchaser at a tax sale may acquire a good title to a valuable property for a small price, if the requisite formalities have preceded and attended the sale. If the owners of property, and owers of taxes, will now persist in withholding from the government their just and lawful contributions to its support there is a way provided to compel the payment of them by a forced sale. Every country that relies upon legally imposed taxes, instead of forced loans and arbitrary exactions, for its maintenance and sustenance, recognizes and enforces the duty of the owner of property, which is protected, to assist in the support of the government that protects it.

But no government will permit its machinery, constructed to enforce the payment of public dues to the fisc, to be used to manipulate a fraud, and if the purchaser is a party to the fraud, he must share its punishment. It might be very different if he were wholly disconnected and unacquainted with it.

The purchase by Moss was nothing more nor less than a purchase by Mrs. Austin, the debtor and mortgagor, through her son, the plaintiff. The money paid, as the price at the tax sale, was only what she, as owner of the property, owed the State, and what she honestly and in good conscience ought to have paid without, and before, and to prevent a sale. If she could not pay it, the debt being *exigeant* and of so high a rank, she should have acquainted her creditor and mortgagee with its imminence, instead of observing the suspicious reticence which characterized her conduct. The creditor's rights, as mortgagee and vendor,

can not be imperilled by the mortgagor's collusive combination with others to interpose an apparent, but fraudulent obstacle in his way in enforcing those rights.

The injunction was improperly issued, but the defendant omitted to ask for damages. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and the injunction sued out by the plaintiff is dissolved, and his cause is dismissed at his costs. It is further decreed that the Citizens' Bank, defendant, recover of the plaintiff the costs in the lower court and the costs of appeal.

No. 5497.

EDWARD CONERY VS. ROTCHFORD, BROWN & CO.

No valid judgment can be rendered against any of the individual members of a former commercial partnership, who have not been cited, on the confession of an agent of the former firm, made after the dissolution of the firm. Such a judgment is null and void.

A judgment absolutely null, may be attacked collaterally, in any form of proceeding, by any one having the least interest to have the nullity pronounced.

In a suit to revive a judgment the defendant may allege and prove any fact showing the absolute nullity of the judgment. A judgment absolutely null and void, can not be revived. It is essential to the revival of a judgment that there should be a valid and subsisting one, which is a fact for the plaintiff to establish.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

John M. Bonner for plaintiff and appellant.

Merrick, Race & Foster for defendants.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by DEBLANC, J.

EGAN, J. This is a proceeding under article 2813 of the R. S. of 1870, and article 3547 of the Rev. C. C., to revive a judgment of the Second District Court of Orleans, alleged to have been rendered in December, 1863. The statute provides "that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law to the defendant, or his representative, from the court which rendered the judgment, *unless defendant or his* representatives *show good cause why the judgment should not be revived.*" The cause shown by the defendants in this case is that the judgment is absolutely null by reason of the defendants never having been cited, and because the firm of Rotchford, Brown & Co. was dissolved by the death of Johnson, one of its members, in July, 1863, sev-

eral months before the filing of suit or rendition of judgment, which was rendered solely upon the confession of one R. A. Bourk, claiming to be the agent of the firm of Rotchford, Brown & Co.

The evidence discloses the death of Johnson at the date named in the answer; that there was no citation to the firm nor to any of the individual members; and that the judgment was based solely upon the written confession of Bourk, who claimed to act under and by virtue of a power of attorney given in 1858, by the *firm of Rotchford, Brown & Co., and not by the individual members.* The original petition did not pray for citation to a judgment against the firm, but only to and against the individual members, none of whom, as we have seen, were cited, and one of whom was at the time dead. Bourk answered for "the defendants," confessing and consenting to judgment as prayed for, which was accordingly entered *against the individual members of the firm in solido,* and not against *the firm.* The power of attorney to Bourk was from the firm *eo nomine;* was signed by but one member of the firm for it, and contained no stipulation or authorization for any purpose from the individual members of the firm to act for or represent them in any manner whatever, and no judgment was prayed for or rendered against the juridical being, the partnership, which alone he was ever authorized to represent for any purpose. It is therefore not necessary to inquire, under this state of facts, whether, had such judgment been rendered after the dissolution of the firm by the death of Johnson, without the knowledge of Bourk, its mandatory, it would have effect, nor whether he had, under the mandate, power to confess judgment. It may, however, not be out of place to remark that it was expressly held by this court in Brashear vs. Dwight, 2 A. 404, that the presumed continued existence of the firm for the purpose of its obligation, by reason of dealings without notice of dissolution, which can only be maintained upon the doctrine of the united agency of the partners, is very distinct from "the manner of bringing the partners of a dissolved partnership into court." In that case the plaintiff, one of the members of a commercial firm, enjoined the execution of a judgment against the firm, upon the ground that he had never been cited, and had no knowledge of the suit until the seizure of his property by the sheriff, and that the citation was served upon one of his partners after the dissolution; and the court held that he was entitled to personal citation, and that the judgment could not be executed against him. It needs no citation of authority for the proposition that a partnership is an "ideal" or juridical "being," as perfectly distinct from the individuals who compose it as one individual person is from another, as was said in Tury vs. Harris, 10 A. 625; and that a power of attorney or mandate from the partnership gives no power to represent the partners as individuals. This was expressly

ruled in regard to the same power of attorney in Johnson vs. Brown, 18 A. 337, in which case one of the present defendants was sole defendant. There was then no citation to or representation of any of the defendants in the original suit in which the judgment was rendered, the revival of which is here sought.

"Citation being the essential ground of all civil actions in ordinary proceedings, the neglect of that formality *annuls radically* all proceedings had, unless the defendant have voluntarily appeared to the suit and answered the demand." C. P. article 206. The nullity may be alleged even collaterally in any form of proceeding, by any one having the least interest to have the nullity pronounced. 1 N. S. 9; 21 A. 26; Williams vs. Clark, 11 A. 761; 24 A. 252; 8 N. S. 145; 6 L. R. 577.

In order to constitute a suit or action there must be at least two parties present or represented. C. P. article 99; 6 N. S. 517; 4 L. 158; 5 L. 424; 17 L. 479.

No valid judgment can be rendered against a party where there is no suit, nor where he has not been legally cited. 17 A. 91; 21 A. 613; same 630; Michie vs. Brown & Co. et al., 20 A. 75, a case where citation was served at the place of business of the firm after its dissolution and without notice of dissolution upon an agent of one of the partners, who was also chief clerk of the firm, and the court held that "the citation was insufficient and the judgment without effect."

It is elementary that suit can not be brought against a dead man, and our own Code of Practice points out the mode of proceeding where one dies against whom there is a cause of action. Article 120. It is, however, urged by counsel that article 2813 of the R. S. and article 3547 of the R. C. C. only fix the prescription of judgments, and the mode of arresting that prescription; and that under this proceeding to revive a judgment, it can not be annulled or pronounced null. That is very true as to all *relative nullities*, but not as to absolute nullities, such as the want of citation, without which there was and could be neither suit nor valid judgment, as we have seen. It is essential to the revival of a judgment that there should be a subsisting one. That the party seeking revival has such valid judgment is an essential allegation and fact to be proven in a proceeding to revive it; and if it be essential both to allege and prove its valid existence, that fact may be disproved by the defendant, and certainly constitutes not only "good cause" against the revival, in the language of the statute, but the best possible cause (i. e.) that what has the form of and appears to be a valid and subsisting judgment is not so either in fact or law.

It would indeed be a vain thing to vex the courts with inquiry and the defendant with citation if he were not allowed to contest the very existence of the thing sought to be revived, and equally vain would be

the revival if, in fact, the judgment had no real existence, or force in law as such. Courts of justice deal with the substance and not the shadow of causes. It can not be for a moment doubted that a party condemned without citation or hearing could sue to have that fact judicially determined, and yet more evidently that he may use the same fact as an exception to preserve his rights if sued. C. P. article 20. This he may do at any time the judgment so obtained is sought to be enforced against him, for any purpose or in any manner; and even could it be held that he must bring such suit within a fixed time, as it can not by the express terms of article 612 C. P. Nowhere and to no class of cases is more applicable the maxim: "*Quæ temporalia sunt ad agendum perpetua sunt ad excipiendum.*" We have been referred by plaintiff's counsel to the cases of Drogue and Moreau, 23 A. 173; Carondelet Canal Navigation Company vs. De St. Romes, 23 A. 437; and McStea vs. Rotchford, Brown & Co., decided by the present court, and reported in 29 A. p. 69. These are all suits to revive judgments. The first case decides nothing except that in a proceeding to revive a judgment the question whether it was rendered *upon sufficient evidence* can not be inquired into. The case was twice before our predecessors, and is first reported in 21 A. p. 639, from which it appears that it was remanded because the record did not contain satisfactory evidence of *the existence* of the judgment and of its ownership by the plaintiff, it appearing that the judgment was rendered by default and *no citation* appeared in the record as originally sent up; a fact which the court considered, as we do in the present case, essential to the *existence* of the judgment. The present court also held in a case not reported, decided at Monroe in July last, that in a proceeding to revive the evidence upon which the judgment was rendered, the basis of the claim sued on could not be inquired into. In the St. Romes case the defendant averred that she was not legally cited and had not signed nor authorized the signing of the obligation sued on. The court said: "The record shows she was legally cited," and that the other ground of defense should have been established before judgment, and was not a defense in such action. The 29th A. case of McStea vs. Rotchford, Brown & Co. is the only one which seems to support the views of the plaintiff's counsel. An evident error crept into the opinion in that case in regard to the decision in the St. Romes case, in which as we have seen the court did not, as stated in the opinion in the McStea case, "reject" the plea of want of citation, but on the contrary said that "*the record disproved the truth of the plea.*" There was at the time considerable hesitation on the part of some members of the court as to the decision itself, and it will be observed that it was said "*perhaps* a total and entire want of citation to any one might be pleaded," and the effect of the decision was carefully guarded and con-

fined to the arresting of prescription, without in any manner validating the judgment if affected with nullities. Further reflection and examination of authority in the present case leave upon our minds no room for doubt upon the subject. The want of citation in the original suit affects the judgment with such absolute nullity that it may be pleaded even in an action to revive under the statute for the arresting of prescription, and constitutes good cause why no judgment of revival should be rendered.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is affirmed with costs of both courts.

MANNING, C. J. I adhere to the doctrine of the previous cases, and enforced with some elaboration in McStea v. Rotchford, 29 Annual, 69, and re-affirmed in Burnside v. Rotchford and Pace v. Marbury, both decided last year and unreported.

There can be but one issue in a suit to revive a judgment, and that is whether it exists—not whether it ought to exist, or ought ever to have been rendered, but simply and solely whether such a judicial act was ever done as rendering it. And this is obvious to my mind when you consider how and why a suit for revival is instituted. A suit of that kind was unknown to our law until a few years ago. The first one ever instituted was probably in 1861, and they became necessary because an Act of 1853 had taken judgments out of the category of imprescriptible things: That law made a judgment prescriptible by the lapse of ten years, and if it had stopped there, there would have been no means of averting prescription, for while the law has always declared that notes and mortgages etc shall be prescribed, it has in the same breath told you how to prevent its acquisition. Therefore because the act of 1853 made a judgment prescriptible, it had to provide the means of averting prescription, and that is all it does. That is its sole object, and its title is terse and significant—'an act relative to the prescription of judgments.' Acts 1853, 250.

When then you admit any other issue in a suit for the revival of a judgment than judgment *vel non*, you apply the statute to other purposes than those it was designed for. If you permit a party to plead causes of nullity you virtually construe it as an amendment to art. 556 of the Code of Practice, which has for its object the designation of the modes of annulling a judgment.

I must also maintain the correctness of the interpretation put upon the St. Romes case in the opinion read by me in McStea v. Rotchford, and I do this with great deference to the contrary views just expressed by my colleagues. The enunciation there made that "the object of this

proceeding is merely to keep in force the judgment rendered in 1859 by interrupting prescription," contains the gist of the controversy, and in my judgment is the true exposition of the law, and it has been so held in every case by this court until the present one.

If there had never been any prescription applied to judgments, there would never have been any occasion to revive them. The suit to revive is merely the means, and the sole means, to prevent prescription, and the only inquiry in such suit is, was such judgment ever rendered? A judgment of revival does nothing more than decree that such judgment had been theretofore rendered, and does not preclude any attack upon it from any quarter for any cause save only prescription, which the statute of 1853 was specially designed to save.

On Rehearing.

DeBlanc, J. In 1863, on the 7th of December, a judgment rendered two days before in favor of Conery and against the defendants, was signed by the Judge of the second district Court.

In 1873, on the 30th of January, Conery instituted an action, for the use of Charles Gallagher, to have said judgment revived. This action is brought against the succession of Joseph H. Johnston, Philip Rotchford, an absentee, and Shepherd Brown, a resident of the City, who heretofore composed the commercial firm of Rotchford, Brown & Co.

The granting of plaintiff's application is opposed, on the grounds:

1. That the judgment sought to be revived was rendered without citation to the interested parties, on the confession of one Bourk, then pretending to be, but who was not the agent of said firm.

2. That—to the knowledge of Bourk, Conery and Gallagher—that judgment was rendered after the dissolution of said firm by the withdrawal of Rotchford and the death of Johnston.

The time when Rotchford withdrew from the partnership was not shown on the trial, but it was shown that Joseph H. Johnston died on the 31st of July 1863, four months and five days before the rendition of the judgment which plaintiff is attempting to revive.

On the 15th of March 1870, Charles Gallagher addressed a note to Bourk, the agent of said firm, to enquire whether he knew, when he was cited in that capacity, in December 1863, that Joseph H. Johnston was dead. Bourk answered in writing that he did not. The letter and the answer were introduced in evidence, without objection on defendant's part.

On the trial, plaintiff's counsel holding a document, said to Bourk, who was then on the stand as a witness: "Look at this, Mr. Bourk." The witness examined the document, did not swear that his signature was attached to it, or that he had ever seen it; and—without any fur-

ther examination tending to identify the paper which he then held, plaintiff's counsel offered it in evidence as "*written memorandum marked A.*" That memorandum is Gallagher's letter to Bourk and the latter's answer to it.

The agent's incomplete declaration on this important point leaves the impression that he knew, when he confessed the judgment, that Johnston was dead, the partnership dissolved, his mandate at an end. If so, the judgment sought to be revived has never had any legal existence: but plaintiff's and defendant's failure to either verify or contradict the contents of the memorandum now before us, compels us to remand this case.

If, by the parties' course, we were not precluded from referring to a petition copied in the transcript and which forms the very basis of Conery's judgment, we would certainly have adhered to our first decision: but our attention has been tardily called to the fact that—instead of relying, as they should have done, on the pleadings filed in Conery's suit—the parties have selected and placed before us but fractions of the same, and—in so doing—removed from the range of our consideration the petition alluded to.

We deem it proper to state that—in passing on an application to revive a judgment, the Court—unless restricted by the parties' course and by an exclusive statement of facts, has the right to and should consider—whether actually introduced or not—every pleading filed in the suit in which the judgment was obtained.

It is therefore ordered and adjudged that our former decree is set aside, the judgment appealed from avoided and reversed, and this case remanded to the lower Court to be proceeded in according to law; the costs of the appeal to be paid by plaintiff.

ON REHEARING.

MANNING, C. J. I am constrained to dissent from this judgment also, because I think the plaintiff is entitled to a revival of the original judgment as prayed, and as this case overturns our jurisprudence on this question, I will once for all give the reasons for my construction of the Act of 1853.

I base my construction of it both upon reason and authority.

Upon reason, by ascertaining its true intent and meaning in that way, pointed out by the Great Commentator as one of the surest and safest means of learning it. "The most universal and effectual way of discovering the true meaning of a law, says Sir Wm. Blackstone, when the words are dubious, is by considering the reason and spirit of it, or

the cause which moved the legislator to enact it, for when this reason ceases, the law itself ought likewise to cease with it." 1 Com. 61. And in another place he says, it is useful and often necessary, in order to arrive at the true meaning of a new law, to ascertain what was the defect in the old law that had to be remedied, and to remedy which the new law was made. And again, a non-enacting part of a law, as the preamble, is often called in to help the construction of an act of parliament.

How much more shall the title of a law be called in to help the construction of one of our statutes, when by express constitutional command, every law can embrace but one object, and that object must be expressed in its title. Const. 1852 art. 115. That was the organic law in force when in 1853, the legislature passed 'an Act relative to the prescription of judgments.' Acts, p. 250.

The old law was, that judgments were imprescriptible, or to speak more accurately, no fixed time had been set for the prescription of a judgment *eo nomine*. The object of the new law was to fix a time—to establish with certainty a period, the lapse of which would affect judgments as notes, or other obligations were affected by the lapse of time—and thus to introduce a new rule or principle into our law *quoad* judgments. If it had then been contended, under the Act, that one might attack a judgment because of alleged nullities—that you might inquire whether the judgment ought to have been rendered—that you might shew a defective citation, or an illegal consideration for the contract which the judgment gives effect to, or that a document, such as a power of attorney, in evidence on the trial when that judgment was rendered, was void—or that any other evidence then used was inadmissible, or that all of it together was insufficient—if any attempt to annul the original judgment for any of these, or other like reasons, had been made, the answer would have been that the object of the Act is not the annulment of judgments—that it can not embrace more than one object, which is the prescription of judgments, and that object is expressed in its title, and I can not perceive why this objection, which would have been unanswerable then, has lost its force from the mere incorporation of this Act in the Revised Statutes without its title, as are all other statutes.

If the intent of the legislator had been to provide by this act a new mode of annulling judgments, or a new mode of revising or reversing them, its title would have been, 'an act relative to the prescription of judgments, and to the manner in which they may be annulled, and to provide a mode of reversing them otherwise than by appeal.' The Code of Practice had definitively set out the four modes by which judgments could be revised, set aside or reversed, viz, by a new trial, by an appeal, by an action of nullity, and by rescission. art. 556. And it had

also defined the causes for which this third mode might be employed. arts. 605—7. But by construing this act of 1853, so as to let in by way of cause shewn to a demand for revivor, the defences that either were not made, or were unsuccessfully made, to the original action, is not only to construe it as providing a new and additional mode of annulling a judgment, but also as providing and authorizing a method of reversing a judgment, which, until this case, was supposed could only be done on an appeal.

What then is the justification of this construction? My brethren rest it upon the clause—unless the defendant shew good cause why the judgment should not be revived. What is the use of enacting that a judgment may be revived unless good cause be shewn why it should not be, if in the proceeding for its revival you are not permitted to shew all good causes?

The first answer to this question, which contains as in a nutshell the whole argument for the construction of the statute now adopted, is that already mentioned, viz, that you must construe the statute by reference to the state of the law existing at, and the circumstances surrounding and attending its passage, and when these so manifestly and unerringly point to a particular and special thing as the sole object of the legislature in its enactment, you can not, consistently with the undisputed rules of construction, apply it to other objects. And the force of this consideration is redoubled, and the point or idea, or principle stands out in bolder relief when it is perceived that disregard of it revolutionizes the whole theory of legal construction, and displaces the order and regularity and gradation of judicial proceedings, for when was it ever broached before, that where a party refused to take the next step after a judgment had wrongfully condemned him, viz to appeal for its reversal, after a new trial had been denied him; and when he neglected or abandoned his remedy by an action of nullity, that he could, under cover of a statute made for another purpose, accomplish what until then could be accomplished only by an appeal or by an action of nullity.

But another answer is, that analogy and a comparison of other systems of law in the parts corresponding to this novel feature in our own, shew us what this act means.

At common law, writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and extinct. But, as provided by statute 13 Edw. 1. c. 45, a writ of *scire facias* will be granted after that time has passed, "for the defendant to shew cause why the judgment should not be revived." I have quoted the exact language of Blackstone in this last sentence, 3 Com. 421, and the reproduction of

these identical words in our statute of 1853, is not an accidental circumstance. The process mentioned in the statute equally well displays the kinship of our act. It would seem that it did not even contemplate a suit, but only a 'citation' to the party to shew cause. These indicia shew that, when the legislature had in view the application to judgments in our system of those rules, which had obtained elsewhere, and for the first time created for them a presumption of payment which until then it ignored, and was preparing a law to give effect to this presumption, that it sought guidance from the parallel provision of a system of law, in use in the adjoining and other States, and adopted the same, or a kindred, proceeding here to effect what had been long effected there, and no one will argue that because it did not call it a *scire facias*, therefore it is not substantially the same thing. The whole system of recording evidences of title to property is of American origin, and in most of the States it is called 'registering,' and the officer who performs that duty is called a 'Register,' but it would scarcely be argued that because we call him 'Recorder,' and his work 'recording,' that there is any difference in the nature of the functions.

I have said that I based my construction of this Act upon authority as well as reason.

1863 is the first and earliest date when any judgment could be prescribed in this State, and the first suits for revival were therefore commenced a year or two before, and hence we find no decisions in this State upon the statute we are considering, until the resumption of this court's business after the close of the war. In all of the decisions, without exception, until the present case, the doctrine has been held and maintained that the sole object of the statute of 1853 was to apply prescription to judgments, and to specify and formulate the manner of averting it. We held in an unreported case at Monroe last summer, where the defendant attempted to shew for cause why a judgment should not be revived, that the consideration of the note for which it was rendered was illegal, that he could not be permitted to go into that defence, and this was in harmony with McStea v. Rotchford, 29 Annual, 69. which was itself but a reiteration of the principle previously adjudicated, but perhaps not till then so sharply defined. Since the opinion in this case was read on the first hearing, another case presented the question of revival of a judgment which had been rendered against one defendant upon a citation addressed to, and served upon another defendant, and the majority of the court held this want of citation could be inquired into in the suit for revival. These two cases are the only departure from the rule established by all the previous decisions.

I think the solitary question that a court can consider in an action of revivor under this statute, is—was the judgment rendered, the revival

of which is sought; and where the original plaintiff brings the action for revival, the only evidence necessary to entitle him to a judgment is a certified copy of the original judgment rendered in his favor.

If that judgment ought never to have been rendered,—if it contains extrinsic or intrinsic vices which destroy its legal existence—the party, against whom it is rendered, may have it reversed on appeal, or may annul it by an action, and to these methods alone he is remitted for relief. He can not avail himself of this peculiar proceeding, provided by a special statute for a special purpose, to accomplish what other and general laws have afforded him ample means and opportunity to do.

No. 7068.

SUCCESSION OF WALTER O. WINN.

When it appears that neither creditors, nor other parties in interest have been cited to oppose a tableau of debts filed by an executor, and that there are no funds to distribute, and no funds had been collected or disbursed, the homologation of such a tableau is not binding on the creditors, or heirs, and they can not be called in by mere publication to establish or oppose it.

A succession can not be bound by a tableau filed by the attorney at law of the executrix, who is absent from the State, and when it appears that the attorney was not specially authorized to file the tableau, and that the executrix was ignorant of what was put down on it.

It is only a creditor who has obtained a legal acknowledgment of, or a judgment recognizing his debt, that is entitled to provoke a sale of succession property to pay his debt.

APPEAL from the Parish Court of Rapides parish. *Clements*, J.

James G. White, *Michael Ryan*, and *Robert P. Hunter* for appellees.

R. A. Hunter and *R. J. Bowman* for executrix appellant.

The opinion of the court was delivered by

EGAN, J. The plaintiffs in the rules claim to be creditors of the succession: Ryan & White for $2000 for services as attorneys in the succession; Mrs. Barlow for $1000 also for services as attorney rendered to the succession by her deceased husband, H. C. Barlow; Solibellos for $4000, evidenced by note subject to a credit. Winn died in 1861; his succession was opened in 1862. In 1869 a tableau of debts was filed by the attorneys for the then executrix, Mrs. Winn, now wife of Richards, upon which appear the claims of the several plaintiffs in the rules as debts of the succession. It was homologated by the parish judge, H. C. Barlow, who himself figured upon it as a creditor for the same debt now claimed by his widow, plaintiff in one of the rules.

There were a large number and amount of other claims on the tableau, but it does not appear that there were any funds to distribute; on

the contrary, the evidence both on the face of the tableau and otherwise shows the absence of funds. The succession, formerly a very large one, consisting of lands, slaves, etc., is shown to be now insolvent. Mayfield, who claims to be a creditor to a large amount as holder of promissory notes of the deceased, opposes the demands of the plaintiffs in the several rules on various grounds, similar to those set up by the executor. They in turn denied that he was a creditor, and averred that if he ever had been his claim was prescribed. The executor resisted the rules upon the ground that until the plaintiffs had been recognized as creditors by a valid judgment or by an acknowledgment of the executor according to law they were not entitled to be heard or to interfere in the succession. That the tableau of debts upon which they based their claims was an absolute nullity. First, because the executrix had left the State and was a non-resident when the tableau was filed without leaving an agent to represent her, and that neither she nor her attorneys could acknowledge claims by filing a tableau of debts; second, because Barlow, the judge who homologated the tableau, was a creditor upon and interested in the tableau; third, because the tableau being approved, the parish court was without jurisdiction; fourth, because the homologation of a tableau being an *ex parte* proceeding is not binding on creditors; fifth, because no services are specified for the charges of the attorneys, and no evidence offered to support the tableau.

None of the creditors or other parties in interest were cited in the matter of the tableau. It does not appear that there were any funds to distribute, or that any had been collected or distributed. It was therefore not such a tableau as could be made binding by homologation upon either creditors or heirs, nor one in regard to which they can be called in by publication to establish or oppose. Succession of Hart, 8 R. 121; Succession of Day, 2 An. 895; Hickman vs. Flemisker, administrator et al., 12 An. 268. But were it otherwise, Judge Ryan, the attorney who filed the tableau, testified on the trial that the executrix was absent from the State when the tableau was filed by him for her, and that she never saw the tableau or any of the claims upon it, and he is not shown to have had authority to acknowledge them for her. The claims of the plaintiffs in the rules do not appear to have been acknowledged in the manner provided by law. C. P. arts. 985, 986. And as was very properly decided in the Succession of Poussin, 27 An. 296, an attorney at law, merely as such, can not allow claims which the legal representative of the succession never heard of, nor bind the succession by filing a tableau upon which they figure without the knowledge of the executor or administrator. In the same case it was also properly held that a tableau filed under such circumstances does not dispense with that legal acknowledgment provided for in the articles of the Code of Practice just

quoted. In the Succession of Connolly, 5 An. 753, it was held that where it is denied that one claiming to be a creditor is such (as is done in the case at bar), he can not in the absence of proof of some legal recognition of his claim interfere in the administration of a succession, in which others are interested, to recover damages and dismiss an administrator from office for failing to deposit moneys in bank; that such action can only be urged by those whose rights as creditors are legally established. We think the same principle applies equally in the present case. Mrs. Winn was dismissed from office and another executor appointed, against whom these rules are taken. If the plaintiffs are creditors at all their claims are not liquidated or acknowledged as required by article 985 of the Code of Practice. The executor refuses to recognize or approve them, and, on the contrary, denies their existence. Their only right then is to sue to obtain judgment as in other cases. C. P. 986. It is only such creditor as has obtained either that legal acknowledgment or judgment recognizing his debt who has the right to submit his claim to the judge of probates that it may be ranked among the acknowledged debts of the succession, C. P. 985, who can obtain its payment according to article 987 C. P., or provoke the sale of property to pay debts under article 990 of the Code of Practice.

It is also denied that Mayfield is a creditor, and averred that if he ever was his debt is prescribed. He claims that the question of prescription was judicially determined in his favor in a suit brought by him to remove Mrs. Winn from the administration of the estate, and that his debt, which is evidenced by several promissory notes, has been legally acknowledged both by the former and present executor. The evidence supports the latter allegation; but we do not consider the adjudication in the amotion suit as determining finally for other purposes and against other creditors or parties interested the matter of prescription. The judgment of the court below dismissed his opposition and made the rules absolute so far as to order the executor to sell property for the payment of debts. It is unnecessary under the view we take of the case to consider the other points raised or the various bills of exception in the record.

For the reasons stated the judgment of the court below is avoided and reversed, and it is now ordered and adjudged that the several rules which were all tried together be and they are discharged at the costs of the plaintiffs; that the opposition of Mayfield being only incidental to the rules be also dismissed at his cost. That the right of the several claimants, including Mayfield, to assert their claims according to law, if any such they have, and of the succession, and all parties in interest, to contest the same, and each of them, be reserved for future adjudication.

The Chief Justice recused himself in this cause.

No. 7047.

STATE EX REL. CARONDELET CANAL AND NAVIGATION COMPANY VS. EDWARD PILSBURY, MAYOR, ET AL.

The act of the Legislature, passed at the extra session of 1877, abolishing the office of Park Commissioners of the New Orleans Park, and transferring all of their powers and duties to the Common Council of New Orleans, did not have the effect of extinguishing by confusion any judgment which said commissioners had obtained against the said city, or of relieving the Common Council from providing for its payment, in the manner pointed out by law.

A judgment creditor of the city of New Orleans who has registered his judgment in accordance with law, is entitled to a mandamus to compel the auditing and disbursing officers of the city respectively to warrant for and pay the same, or so much thereof as there may be a special fund in the city treasury to pay such judgment; and no misapplication of such fund by any, or all of the officers of the corporation, can hinder or defeat the rights of the creditors entitled to be paid out of such fund.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

H. D. Ogden and *C. G. Ogden* for plaintiff and appellee.

B. F. Jonas, city attorney, for defendants and appellants.

The opinion of the court was delivered by

EGAN, J. This is a mandamus suit to compel the erasure from the books of the auditing officer of the city of New Orleans of a judgment in favor of the Commissioners of the New Orleans Park, registered July 1, 1873, in accordance with the provisions of the second section of act No. 5 of the extra session of 1870, and also to compel the payment of a judgment for $12,500 with five per cent interest from February 22, 1864, registered subsequently under the same act.

The defendants except—

First—That the court is without jurisdiction to issue the writ of mandamus to any officer of the city of New Orleans to compel the payment of any sum of money alleged to be due, and that none of the defendants except the Administrator of Finance is charged by law with the duty of paying money, and then only upon the proper warrant as prescribed by law.

Second—That there is no ministerial duty imposed by law upon any of your respondents to pay the alleged judgment of relators in the manner prayed for in the petition.

Should these exceptions be overruled, and not otherwise, respondents answer that there is no money in the treasury, not otherwise appropriated, to pay the judgment of the relators. There was judgment below decreeing and ordering the erasure of the registry of the judgment of the Park Tax Commissioners and the payment of the judgment of the relators. From this the defendants have appealed.

The ground upon which the relators claim the erasure of the judg-

ment referred to is that the office of Park Commissioners was abolished by act eighty-seven of the extra session of 1877 and the powers and duties conferred upon them by law were by said act conferred on and transferred to the City Council of New Orleans, to whom all the books, papers, and assets have been transferred, and that therefore the judgment in question has been extinguished by confusion, the city of New Orleans having become by the effect of act eighty-seven creditor as she was formerly debtor of said judgment.

Confusion takes place when the qualities of debtor and creditor are united in the same person. C. C. 2217.

The office of Park Commissioners was created by act eighty-four of the extra session of 1870, which is entitled "An Act to establish a public park for the city of New Orleans, and to provide means therefor." This act provides for the levy and collection by the city of New Orleans of an annual tax of one eighth of one per cent for ten years to carry out the purposes of the act. The park, *its funds*, and all matters connected with its management, establishment, police, and control are all placed by the act under the exclusive management and control of a board of five commissioners, appointed by the Governor for five years. The powers conferred are very full, including the purchase and expropriation of lands, the borrowing of money for the construction of the park, and with that view the issuance of their corporate bonds or promissory notes, and the power to grant mortgages, to secure the same, to sue and be sued, etc. That they did exercise the powers conferred is shown by the fact of their having obtained this judgment against the city, the erasure of which is now sought, and also by the evidence offered by the relators that they had in obedience to act eighty-seven of 1877 turned over their books, papers, etc., to the City Council.

It is not pretended and can not be successfully argued that act eighty-four of 1870 was repealed as a whole by act eighty-seven of 1877. Indeed, the very title and terms of the latter act preclude that idea. C. C. art. 23; 4 R. 77; 3 An. 399. It only abolishes the special park tax, (the annual levy and collection of which for ten years was provided for in the former act), and also the office of Park Commissioners, and in express terms confers "*all the powers and duties*" *of the Commissioners under that act upon* the City Council of New Orleans. It undoes nothing that has been done by the Commissioners, who may for aught that appears in this record have issued their bonds, notes, and mortgages, borrowed money, and purchased or expropriated lands and constructed the park. This very judgment may be the means designed and expected to pay indebtedness so incurred, or at all events may furnish the means of future purchase or construction by the City Council, who are made the new officers or agents to act in lieu and stead, and with all the powers

and duties formerly exercised by the Park Commissioners. It is manifest then that there is good reason why the judgment in question should not be considered extinguished or abolished any more than any other asset or property of or incidental to the City Park. It may be that the act eighty-seven creates the anomaly of imposing apparently inconsistent duties upon the same set of officers already clothed with the power and duty to administer the affairs of the city generally, and that they might not now be able by suit to enforce against the city any of the rights or obligations of the Park Fund, but it by no means follows that they as representing the city are relieved by act eighty-seven of the duty of seeing that this like any other judgment against the city is paid whenever there are funds for the purpose, as is, indeed, specially provided by act eighty-four of the extra session of 1870. The City Council of New Orleans are the officers and agents or rather the agency through which the city acts, but they are by no means the city itself, which is composed of all the inhabitants. We think, then, there is wanting that identity of person as creditor and debtor which is necessary to the extinguishment of the judgment by confusion. One person, the debtor, is the city of New Orleans, and the other person, the creditor, is the ideal, intangible being or thing *the City Park Fund*, even though the City Council be as they are made the trustees or agents at one and the same time of both the debtor and the creditor. No such consequence of extinguishment of that fund can follow from an act which merely deprives it of the sustenance of further taxation and commits its administration to other hands.

As to the first ground of exception: We held in the case of the State at the relation of the same plaintiffs vs. the Mayor and Administrators of New Orleans, 30 An. 129, that "perfect as the right of the relators is under the law to have their registered judgment provided for in the annual budget, there is no means or process by which it can be enforced otherwise than by mandamus." In the State ex rel. Strauss vs. Brown, Administrator, 30 An. 78, the relator proceeded by mandamus to compel the payment of pay-rolls not in judgment and based upon claims accruing in 1876, subsequent to the passage of act No. 5 of 1870, and we held he could not do so. The present case is, however, essentially different. The relators' claims originated long prior to that act. They have resorted to the ordinary action as required by it, and obtained and registered their judgment in accordance with its provisions. The remedy by fieri facias is denied them, and would probably be ineffective any way, the duty of the City Council to budget for their judgment has been already decreed in the former case, and performed as appears by this record, and nothing now remains but the plain ministerial duty on the part of the auditing and disbursing officers of the city respectively to warrant for and pay the same or so much thereof as there may be money in the

treasury to pay. The evidence discloses the aggregate registry of judgments against the city, including relators', up to February 5, 1875, to be $96,740 32, that of relators being the last. They are required to be paid in the order of their registry. It appears from a statement in the record that payments have been made upon other judgments but none on that of relators. Other statements show collections and disbursements and large amounts appropriated toward current expenses. As, however, we have refused the erasure of the prior registry of the judgment in favor of the Park Tax Commissioners, we are unable to ascertain from the evidence, as it stands, the existence of funds in the treasury to meet relators' judgment. We, however, regard the answer of the defendants that "there is no money in the treasury *not otherwise appropriated*," as evasive and not satisfactory; and we shall remand the cause that a more full, perfect, and satisfactory statement and more full and satisfactory evidence may be made and offered as to what amount of money *has been actually received* into the city treasury on account of the fund applicable by law to the payment of judgments since the date of the registry of that of relators and how the same and every part thereof has been applied. In doing so we will announce that in our opinion the relators who have obeyed the requirements of the first section of act number five of 1870, by resorting to and obtaining judgment "in the ordinary form of action," and registering the same in the proper office, according to section two of the same act, can not be deprived of all remedy to compel the performance of the duties of the City Council, and of those members of it who are charged by law with the custody and disbursement and giving the necessary warrants for the disbursement of the fund provided for their payment. That remedy we think is by mandamus as to all who have plain and imperative duties to perform in the premises. If the writ be directed to several acting in different capacities, but the action of all or of any is necessary for the doing of any thing necessary toward the payment of relators' judgment, each is bound to obey the writ according to the functions or duties assigned to him or the whole collectively, if necessary, as we held in the thirtieth Annual case of the same relators; see Moses on Mandamus, p. 199. High, on Extraordinary Legal Remedies, says: "Mandamus has been fitly termed the spur by which municipal officers are moved to the performance of their duty, and it may be affirmed as a general rule sanctioned by the best authorities that where a plain and imperative duty is specifically imposed by law upon the officers of a municipal corporation so that in its performance they act merely in a ministerial capacity, "the writ is freely granted in all such cases, the ordinary remedies at law being unavailing." Section 324. By article 831, C. P., the writ may sometimes issue even where there are other

means of relief, while this writ is made by the provisions, articles 829 to 844, C. P., inclusive, specially applicable to cases of this kind. As we have already intimated, where all the other requirements of act number five of the extra session of 1870 have been complied with by persons having claims against the city *we can not* so interpret its provisions as to deny the right to mandamus; to do so would, we think, extend its meaning and object to an unwarrantable and unconstitutional extent; and to deny to its creditors, who have resorted to and exhausted the legal remedies pointed out in the act, all remedy against the negligence, unfaithfulness, or inaction of the city officers, or for the enforcement of their rights. This can not be done, and the interest, both of the city and its creditors, requires that it should not be allowed.

High says—continuing the section just quoted—"Where county commissioners are required by a plain and positive statute to set aside a certain portion of county funds annually for a specific purpose, and have refused to perform this duty, they may be compelled to act by mandamus, and so, where under the statutes of a State it is made the imperative duty of town authorities to appropriate and pay over a certain per centage of the taxation of the town for the support of teachers' institutes, the payment may be enforced by mandamus, there being no other adequate remedy by action at law, or otherwise." We regard act number five of 1870 as having been intended to correct the great and very common abuse of resort to the writ of mandamus to enforce against the city summarily, and without opportunity for the ordinary means of contestation, claims of a class for which there exists other and ordinarily adequate remedy by ordinary action, which will afford such opportunity for contest, and that it is but little more than the application of the general rule which High, in section 339 of the same work, says is too firmly established to admit of doubt or controversy; that if there be any other adequate and specific remedy, such as an action at law against the corporation, by which relief may be had by the aggrieved claimant, mandamus will not lie to compel municipal authorities, or their auditing boards, or officers, either to audit or pay claims against the corporation. This rule, he says, is but the application of "a principle underlying the entire jurisdiction by mandamus." In section 344 he says further, however, that "this rule is to be accepted with the qualification that the existing legal remedy shall be adequate to meet the exigencies of the case." In section 351 the same author says: "As regards the mere act of drawing a warrant on the treasurer or other municipal officer charged with payment after a demand has been properly audited and allowed," the case stands upon a different footing "from those where that has not been done, and in such case the amount of indebtedness due from the corporation being definitely fixed by the proper

authority (here by the court), there remains only the ministerial act of drawing the necessary warrant for its payment, and mandamus is the appropriate remedy to compel the performance of that duty." And again, in the same section, "Where money has been raised by taxation for the payment of a specific class of creditors, and is in the hands of the officer entrusted by law with the duty of making payment, the writ will lie; *the remedy by action against the officers being regarded as inadequate*," a remark which may well be applied to tne action in damages, against the municipal officers and their sureties, provided by the fourth section of act number five of 1870, before quoted, "where the creditor has been unjustly delayed in the payment of his judgment, or where an unjust preference has been given to other creditors." Indeed, the right to do both or either, we think, can not be questioned. The remedies are cumulative.

No one contends for, and all the authorities forbid, resort to the writ of mandamus where nothing is to be accomplished by it; and it is in general true that if a corporation or officer whose duty it is to pay money has n't it that is sufficient answer to the writ. Moses, however, lays down the rule to be, and we think it is correct, that "if one whose duty it is under the law might have had funds had he not misapplied them, he is as much bound to pay as if he had them." "Therefore, when public moneys are raised by taxation for specific purposes and placed in the hands of the county" (for which we may here read the city) "treasurer, to be paid out on the orders of certain auditing boards, and the treasurer pays out the money for other purposes than those for which the money was raised, he may, notwithstanding, be compelled to pay the order drawn on him to satisfy claims for which the money was raised;" and he cites a number of authorities in support of this proposition of common sense and common honesty.

As we have already seen that the relators may have equal remedy by mandamus against any or all other officers having duties to perform in connection with the payment of their judgment, we will now say that the same principle may be applied with equal propriety to all other officers whose action is necessary, as to the city treasurer, so far as relates to the performance of the duty assigned to him, or them, and that the misapplication of any specific fund by the act of any or all of the officers of a corporation can not defeat or hinder the rights of those entitled to it. We mean no especial stricture upon the municipal authorities of New Orleans, but the practice has been so common of late of dealing indiscriminately with all classes of funds in the towns, parishes, and cities of the State, without regard to the uses to which they are devoted by law, or the purposes for which they are drawn from the pockets of the tax-payers, that we deem this a fitting occasion to

announce our views of the law on that subject. We think the City Council were properly brought before us in regard to the denied erasure of the registry of the judgment in favor of the Park Commissioners, and we are not prepared now by reason of the character of their answer, and from the evidence in the record to say how far they may be properly before us for the other purposes of the case. We therefore hold that question in reserve for future adjudication, should it become necessary.

For the reasons stated in this opinion, it is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and set aside, that the demand of the relators for the erasure of the registry of the judgment of the Park Commissioners against the city of New Orleans be and it is rejected, and that for the other purposes of this case it is remanded to the court below for the reception of further and fuller answers and evidence as herein before indicated, and to be proceeded with according to law and the principles of this opinion.

It is further ordered that the appellee pay the costs of appeal.

No. 6921.

JOHN K. JONES VS. TRUSTEES OF THE CONGREGATION OF MOUNT ZION.

Defendants, (having been sued in a corporate capacity), after appearing in their corporate name, and filing an exception, and an answer, and plea in reconvention, are estopped from disputing their corporate capacity.

Ministers of the Methodist Church are entitled to recover for their services, as ministers, whatever salary their congregations may have contracted to pay them.

The mechanic who builds a church for a certain congregation, is entitled to the mechanic's lien on the church, and the ground, belonging to the congregation, on which the church is situated, to secure the payment of what is due him for his work.

APPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie*, J.

Walter Guion for plaintiff and appellant.

R. N. Sims for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues to recover, first, his salary as minister for the years 1873, 1874, 1875, and 1876; second, for his wages as a mechanic in the erection of Mount Zion church, with privilege thereon, and on one acre of ground upon which it is situated; third, to annul as fraudulent and simulated a sale of said church and lot, made by defendants to one Christian.

He alleges that the defendants are a corporate body, duly incorporated under the laws of the State by notarial act. He prays that defendants be cited through its President, Thomas Kennedy, and for judgment for amounts as claimed.

"The trustees and congregation of Mount Zion Church of Napoleonville" appeared by counsel, "solely for the purpose of urging the exception * * * that they have not been cited, &c."

Subsequently defendant withdrew this exception, and filed an answer; first, denying generally plaintiff's allegations; second, that "they, the trustees and members of Mount Zion Church of Napoleonville," are governed by the rules and discipline of the Methodist Episcopal Church; third, they deny that they have ever been incorporated under the laws of the State, but have associated themselves together for the worship of God, according to the faith of said Church; fourth, they deny plaintiff's right of action, and aver that no judgment can be rendered against them; fifth, they admit that they contracted with plaintiff to build the church, but allege that he failed to fulfill his contract—leaving certain work in the interior of said church undone; that they had paid him for the work done and owe him nothing; sixth, they admit plaintiff's services as minister of said church for years 1873 and 1874, but deny that they owe him any money for salary as such; they deny that under the regulations of the Methodist Church he has any action against them therefor; seventh, they allege that plaintiff was treasurer of the church and received and used all the contributions received thereby, from members, fairs, &c.; eighth, they finally accuse him of apostasy, and with leading his flock from the folds of Methodism to Congregationalism, and with breeding strife and contention, and inciting insubordination. Whereby they claim damages to amount of $1000, and pray judgment therefor in reconvention.

On these issues the case was tried. There was judgment for defendant, and plaintiff appeals.

The ground assigned by the judge *a quo* for his decision was that the notarial act of incorporation of the "Trustees and Congregation of Mount Zion Church of Napoleonville" had never been approved by the district attorney, or, on his refusal, by the judge.

We think that after appearing in their corporate name, and excepting to plaintiff's suit, and withdrawing the exception, then answering by a general denial, and a plea in reconvention, defendants are estopped from disputing their corporate character. Litigants can not be permitted "to blow hot and cold" in the same breath. Whilst it may be true that the act of incorporation was and is informal, and whilst the incorporators themselves might not be permitted to claim and exercise for their own advantage or emolument corporate powers, it does not follow

that they may not, by their acts and dealings, as well as by their pleadings, estop themselves from taking advantage, for their own profit, of defects in their charter.

The evidence in this case satisfies us that the "Trustees and Congregation" of said Church contracted with the plaintiff to build their church, and to serve them as a minister therein. We are satisfied that he built the church with his own labor, and acted as the pastor for the time claimed, and that, except as stated by him, he has not been paid therefor. The Church is composed of colored persons, and the attempts of some of the witnesses to explain the deviations of the pastor from the true Methodist faith are more amusing than lucid. The gravamen of their charge is, that he read to them out of a "new book"—without, however, being able to state even the name of that book, or any points of doctrine it contained.

It is further urged, however, that the plaintiff can not recover his salary, because of the following rule of the discipline of the M. E. Church:

"Effective men who have not been able to obtain their allowance from the people among whom they have labored may present a claim to the conference, to be paid out of the money at the disposal of the conference, and such claims may be paid, or any part thereof, as the conference may determine. IN NO CASE, *however, shall the Church or conference be holden accountable for any deficiency as in case of debt.*"

We are at a loss to see how that provision prevents a Methodist minister from suing those who have contracted to pay him for his services. It only directs that when ministers have been unable to obtain their allowance from their congregations, they may present a claim therefor to the conference, but it shall not be taken or construed to be a debt of the Church or conference. In other words, the allowance may be asked as a boon, but not demanded as a right from the Church at large.

We would be very loth, upon principles of natural justice and equity, to allow so unmeritorious a defense to deprive a man not only of compensation for his services in a most useful and honorable profession, but also of the fruits of his toil and labor as a mechanic. Those who rely upon technicalities to defeat undeniable and just demands, should be careful to bring themselves within technical rules. The defendants have failed to do this, and in casting "a drag-net," they must not be surprised if they occasionally catch more than was intended. They have not commended themselves or their case to favorable consideration by the course pursued. Their attempt to put the church property out of reach of plaintiff's just demands for building it, by making a fraudulent and simulated sale thereof to one of their own trustees—a

transaction so transparent that on trial their counsel admitted it to be a pure simulation—would indicate a broader apostasy from the true faith of their Church than they have been able to fix on plaintiff himself. The judgment appealed from is erroneous, and must be reversed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed. And it is now ordered and decreed that the plaintiff, John K. Jones, do have and recover of the Trustees and Congregation of Mount Zion Church of Napoleonville the sum of one thousand and thirteen dollars and fifty-five cents, with legal interest from judicial demand. It is further decreed that the mechanic's lien claimed by plaintiff, upon the church building and one acre of land on which said building is situated, described in plaintiff's petition, be recognized and made executory to pay and satisfy four hundred dollars principal of the amount above adjudged to plaintiff, with the interest thereon as above stated, and that said building and lot be sold to pay by preference the amount of said lien, to wit: $400 with interest as stated. It is further decreed that the notarial act of date July 15, 1876, whereby said trustees and congregation pretend to have sold to Archy Christian said church and lot of ground, be and the same is declared fraudulent, simulated, and void. It is further decreed that defendants pay costs of both courts.

No. 6965.

MRS. MARY F. BLOUIN ET AL. VS. LIQUIDATORS OF HART & HÉBERT.

The mere fact that a creditor accepts the voluntary surrender of his debtor will not stop interest from running on his debt, or divest any pledge he may have.

The written agreement of a debtor who has borrowed certain bonds, to return bonds of the same description, for the same amount, at a certain term, is not a promissory note for the amount of the bonds. The obligation is to return the specific bonds at the time fixed, or pay their value at that time.

The fact that the stock of a corporation is only transferable on the books of the company, does not prevent a stockholder from validly *pledging* his stock, by merely delivering to his creditor the *certificates* of his stock. A transfer of the stock on the books is not necessary to perfect the pledge.

A creditor holding the mortgage note of a third person as collateral security, is compelled to credit the debt due him with only the net sum he was legally able to collect on said notes.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

E. D. Favrot and *Herron & Bird* for plaintiff and appellee.

Samuel P. Greeves and *Favrot & Lamon* for defendants.

The opinion of the court was delivered by

MARR, J. On the first of January, 1875, Mrs. Mary Frances Blouin,

wife of Joseph D. Blouin, lent to Hart and Hébert, bankers of Baton Rouge, nine 5-20 U. S. bonds, of 1867, eight of which were for $1000 each, and one was for $500, for which they gave her their writing, in the form of a promissory note, bearing interest at eight per cent after maturity, at one year, for $8500, payable in U. S. 5-20 bonds, of 1867, "with $7000 of Baton Rouge Gas Light Company stock as collateral security, which are to be returned with the note, when paid, to S. M. Hart as his property:" and, on the same day, Hart and Hébert executed and delivered to Mrs. Blouin their promissory note for $500, payable on the first of January, 1876, with eight per cent interest from maturity.

The Gas stock was represented by two certificates, one for eighty, and the other for two hundred shares, of $25 each; which were delivered to Mrs. Blouin, together with a note of Father Delacroix, for $1800, secured by mortgage on three lots of ground in Baton Rouge.

In the fall of 1875, Hart & Hébert suspended; and on the seventh December, by Notarial Act, they surrendered and conveyed their property and assets, which were, nominally, largely in excess of their liabilities, for the benefit of their creditors, who appointed a Board of Liquidators to manage and administer the property. In this Act all the liabilities and all the assets and property surrendered are set forth and described; and it is stated that the shares of Gas Light Stock and the mortgage note of Delacroix were pledged to Mrs. Blouin as collateral.

In November, 1875, Joseph D. Blouin brought suit on the mortgage note, and obtained judgment on the confession of Father Delacroix, with recognition of the mortgage. Execution issued on this judgment, and the mortgaged property was seized, and, two thirds of the appraised value not having been bid at the first offering, it was sold on the first of April, 1876, for $500, on twelve months credit.

In November, 1876, Mrs. Blouin brought this suit to recover the balance due her on the two obligations, one for $8500, the other for $500, subject to a credit of $434 25, proceeds of sale of the Delacroix property, and $1582, paid to her on account by the Liquidators, on sixth June, 1876. She prays that her right to hold the stock in pledge be recognized, and that it be sold in satisfaction of her judgment and costs.

The Board of Liquidators deny that the stock was validly pledged to plaintiff; and aver that it is their property and should be returned to them. They also aver that if plaintiff should prove her demand, she is bound to credit it with the whole amount, principal and interest of the Delacroix note; and if she should fail to prove her demand, then the note belongs to them, and should be returned to them.

The judgment of the District Court was in accordance with the prayer of the petition, except that it allows the full amount, principal and interest, of the Delacroix note as a credit. The defendants appealed;

and appellee, in her answer prays that the judgment be so amended as to allow $434 25, the amount actually realized on the Delacroix note, as a credit, instead of the full amount of said note and interest.

Appellants complain in this court:

1: That interest should stop from the day when plaintiff, as one of the creditors of Hart & Hébert, accepted their voluntary surrender.

2: That the amount due on the first of January, 1876, was the full value of the note for $8500, in legal tender notes, then and now the currency of the United States.

3: That the Gas Light Stock is transferable only on the books of the company, on the surrender of the certificate: That the title of Hart & Hébert was never divested; and that defendants as assignees of Hart & Hébert are entitled to the stock.

4: They also insist that the judgment of the District Court charging plaintiff with the full amount of the Delacroix note is correct. That in his suit on the note J. D. Blouin alleged that it had been pledged to him as collateral; and the money advanced not having been paid, he has become absolute owner, and is entitled to the proceeds; and that Mrs. Blouin is bound by the statements and admissions of her husband, because the fact that she has credited her demand with the proceeds, shows that the suit was brought by him in her interest.

First. The assets and property surrendered by Hart and Hébert, at the estimated value, are greatly in excess of the debts; but, whether plaintiff is to be paid in full or *pro rata*, her debt is the aggregate of principal and interest; and we know no reason or rule which requires her to give up the interest, as justly her due as the principal.

Second. The writing, obligation for $8500, is not a promissory note: It is a promise to return to Mrs. Blouin United States five-twenty bonds of 1867, calling for $8500. That is, Mrs. Blouin lent to Hart & Hébert bonds of that description, for that amount, and bonds of the same description, for the same amount were to be returned to her at the end of the year. The bonds were worth more than currency; and by the terms of the contract Hart & Hébert were bound to return to her the specific things promised, or their value, at the date at which they should have been returned.

Third. The certificates of stock were delivered to Mrs. Blouin, and pledged to her as security. Hart & Hébert could not, by any proceeding, have taken these certificates out of the possession of Mrs. Blouin without having first paid the debt due her in full. It is true, the stock is transferable only on the books of the company; but that simply means that the company will not recognize any one as the owner of stock who is not the transferee, on the books of the company, of the person to whom the certificates were issued; but this has nothing to do

with the rights which other persons may acquire, as between themselves and the stockholder, by the pledge and delivery of the certificates.

The Board of Liquidators can not claim this stock. In the act of surrender, their title, it is stated that the stock is pledged to Mrs. Blouin; and an extract from the minutes of the Board, of sixth January, 1876, is conclusive:

"J. D. Blouin was authorized to sell the Gas Stock held by him as collateral from Hart & Hébert, at public sale, by an auctioneer, by advertising fifteen days, and without resorting to judicial process."

FOURTH. There is no pretense that the Delacroix note was given or accepted in payment. It was held by Mrs. Blouin as collateral. When Blouin brought suit on it, he described himself as owner, and so he was, so far as the legal title was concerned. If this note had been paid in full, all the proceeds would have been applied to the debt which it was pledged to secure; but it does not thence follow that Mrs. Blouin was bound to allow the whole face of the note and interest as a credit, when she realized on it only $434 25. By prompt action her husband endeavored to collect this note; and at the smallest expense. He obtained a confession of judgment; and he subjected the mortgaged property. It was twice offered, and sold at the second offering on twelve months credit for $500, which must be assumed as the highest price that could have been obtained. It is not suggested that there has been any fault or laches on the part of plaintiff; nor that Father Delacroix has either means or property to pay the balance: nor is it said or shown that there was any means or process by which any more could have been realized on this note.

The Board of Liquidators knew that Blouin had obtained judgment on the note, as appears by an extract from the minutes of eighteenth December, 1876:

"It was resolved that Mr. Blouin be authorized to sell the judgment that he holds against Father Delacroix at public sale."

Blouin was one of the Board of Liquidators. As such he was bound to use proper diligence in collecting the assets and applying them to the payment of the debts. In addition to this his wife was a large creditor; and it is not reasonable to suppose that he would have asked, or that the other members of the Board would have granted permission to sell the judgment, if they had not been satisfied that it was good for nothing beyond the value of the property mortgaged to secure it.

We find no error in the judgment to the prejudice of defendants; but it must be amended in order to do justice to plaintiff.

It is therefore ordered, adjudged, and decreed that the judgment in so far as it allows, as a credit on the demand of plaintiff, "the sum of

eighteen hundred dollars, being amount of the Delacroix note and interest thereon from September second, 1871, to November, 1875," be avoided and annulled: that instead of that amount the judgment in favor of plaintiff be credited with the sum of four hundred and thirty-four dollars and twenty-five cents ($434 25), as of date first April, 1876, that being the amount realized by plaintiff on the Delacroix note; and, as thus amended that the said judgment be in all other respects affirmed with costs.

No. 6996.

E. S. ESKRIDGE AND HUSBAND VS. E. D. FARRAR, AGENT; AND MARY E OGDEN ET AL. VS. THE HEIRS ET AL. OF JOHN PERKINS.

The executor may prosecute to its final termination, an action instituted by the testator to annul a donation *inter vivos* made by him.

When parties, who have been instituted by a last will as universal legatees, or legatees under a universal title, assume the quality of such legatees, they become bound for the debts of the succession, and—saving the case of reduction—for the payment of the particular legacies.

When the condition on which a donation was made has not been complied with, the donation may be revoked, whether the property donated be in the possession of the donee, or of a transferee of the donee.

When neither error nor fraud is alleged by parties, they can not be relieved from the legal effects of their own acts, and declarations.

Heirs and universal legatees are personally bound, in proportion to the share each inherits, to pay the particular legacies. But they are bound only to the extent of the effects of the succession, and hence they may free themselves from paying the legacies by abandoning to the legatees, after the payment of debts, the effects of the succession.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough*, J.

Thos. P. Farrar, *J. R. Currell*, and *E. H. Farrar* for plaintiffs and appellees.

J. W. Montgomery and *T. J. Semmes* for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. John Perkins senior died in the State of Mississippi, on the 30th of November 1866, leaving as forced heirs: his son John and the children of his deceased son William. In December 1866, the last will of the said John Perkins senior was probated in Mississippi, its execution ordered in this State, and Abner N. Ogden and Josiah Stansbrough appointed as the executors of the same by the Judge of the 13th district of this State. By that will, the deceased instituted defendants his universal legatees, and charged his bequest to them with particular legacies in favor of plaintiffs, who now claim from said defend-

ants what they consider they are entitled to under the provisions of that probated and subsisting will.

Defendants appeared in Court through an agent, and—for answer to plaintiffs' demand—contend that the will of John Perkins senior is null and void, because it contains a prohibited substitution, and also because the particular legacies are largely in excess of the disposable portion.

They allege—besides—that, in April 1857, the deceased donated to his son John the Somerset estate, then valued at more than six hundred thousand dollars, and that one of the conditions of that donation was that his said son should—at the death of the donor—pay to them—the respondents—partly as a gift from him to them, and partly in satisfaction of their inheritance from their grandmother, the deceased wife of the said John Perkins senior, the sum of two hundred and forty thousand dollars. That, on the 11th of August 1869, in compliance with that condition, the donee of the Somerset estate sold them four of the plantations comprised in that estate, in payment of the aforesaid claim, which is specially referred to and re-asserted in the deceased's will.

In bar of plaintiffs' demand, respondents plead the prescription "of one and ten years, and prescription generally."

In the pleadings and in the arguments, two principal questions are presented:

1. Was the donation of April 1857, from John Perkins to his son, revoked either before or since the death of the donor?

2. Do defendants derive their title to the Somerset estate from that donation and the dation in payment from John Perkins to them, or from their ancestor's will?

If we could look beyond the evidence introduced by the parties, it would not be difficult to find that, in December 1865, John Perkins senior brought suit to revoke the donation made by him to his son in April 1857, that—by a decree of the 13th district court, rendered in November 1866, said donation was revoked—that said decree was reversed by this court in 1868, and the case remanded for the express purpose of allowing the creditors of John Perkins junior to intervene in that suit; and--here—returning to the Record, what do we find? That—in his last will, which bears the date of the 11th of June 1866, John Perkins senior declares that the Somerset estate had reverted to him and that he had sued to recover the same, on the ground of the non-fulfillment by his son of the conditions of the donation. He died six days after the signing of the first decree by which that donation was revoked.

What became of the twice remanded case? We are not informed;

but, on the 24th of April 1874—defendants, through their agent, ratified a compromise previously made by the executors of their grandfather's will, with the creditors of John Perkins junior. That compromise is not in the record. In and by the same act, defendants accepted from said executors, "all and singular the property of the deceased's succession, consisting of what is known as the Somerset estate, together with all and singular the personal property belonging to said estate and thereto attached, as well as all other property and effects of said succession under the administration and control of the said executors." When this delivery was made and accepted, Somerset had been and stood inventoried as belonging to the succession of John Perkins senior, since more than seven years; and this delivery was made and accepted on the express condition that defendants—as heirs and universal legatees of said deceased—would pay all the debts of the succession and discharge the legacies "in so far as the same are legal and binding on the property of said estate."

On the 20th of May 1874—less than a month after they had been placed in possession of Somerset, defendants mortgaged it to Mrs. Chaplain, to secure a loan of $28,000, and—in the act passed to that effect—mention is made that said property is encumbered with certain legacies well known to the mortgagee." The legacies thus referred to are certainly those made by John Perkins senior. If defendants acquired their title under the donation of 1857, how explain their assumption of debts and charges not imposed by that donation? How explain that they did not themselves collect, and allowed the executors of the now assailed will to receive and dispose of the revenues of Somerset, and sanctioned—not only the receipt, but the disposition made of those revenues—by their approval of the account rendered at their own demand by said executors?

It is contended, with a great deal of force and ingenuity that Somerset did not belong to the succession of John Perkins senior—that said succession had no real property in Louisiana, (and—if it did now own Somerset—this is true)—and that, in accepting from the executors the surrender of that estate, defendants merely took that which—since 1869—had been their property, under the dation in payment from John Perkins jr to them. If so, we are at a loss to understand why they incurred the trouble and expense of appointing an agent to settle—in this State—a succession which owned nothing in this State. That supposition can not be reconciled with and is repelled by every word of defendant's mandate to Farrar.

On March 25th, 1874, these defendants went before a notary in Paris, and appointed Judge E. D. Farrar their agent and attorney in fact, for the reasons and purposes set forth by them as follows:

"Whereas, the said Nora M. Perkins, Annie William Perkins and Blanche Z. Perkins are the universal heirs and legatees of John Perkins, Sr., deceased, whose estate has been opened and is now being administered in the State of Louisiana by Abner N. Ogden and Josiah Stansbrough, executors of the last will of said John Perkins, deceased;

And, whereas, it is desirable that said administration should be closed and terminated, and the *property of said estate turned over and surrendered to said heirs;*

And, whereas, there are debts due by and outstanding against said estate, and also legacies in favor of divers and sundry persons, and among them to Ellen M. Perkins, which legacies are, in whole or in part, unpaid;

And, whereas, certain obligations have been assumed by these appearers for the payment of certain sums to divers creditors of John Perkins, Jr., as shown and evidenced by an act of compromise with said creditors, of date in the year 1871;

And, whereas, in order to the prompt and speedy settlement of said debts and legacies, it may become necessary to dispose of portions of *the real estate* of said succession, and enter into compromises and transactions with said creditors and legatees;

Now, therefore, we do by these presents confer upon our said agent, Edgar D. Farrar, full and plenary power for the purpose herein above set forth, and authorize him particularly and especially,

1st. To institute and prosecute, in our names, all suits, etc. *

2d. To represent us, judicially or otherwise, in the final settlements of the accounts of said executors, and to compromise and compound with them, to grant them acquittances and discharges from their trusts in our names and behalfs, and to *receive and receipt for the property of said estate.*

3d. To acknowledge and bind us for the payment of any and all legacies and debts due by us or from the estate of said John Perkins, deceased, etc. * * *

4th. To sell or give in payment unto said legatees or creditors, or to sell to other persons such portions *of the real estate aforesaid*, as he may deem proper, etc. * * *

5th. To lease out any and all lands, etc. * * *

6th. To borrow money and contract debts, etc., and to execute mortgages to secure same.

What real estate of said succession, did defendants themselves authorize their agent to receive from the executors and to dispose of, in order to effect the prompt and speedy settlement of the debts and legacies alluded to in their procuration? It was undoubtedly the Somerset estate, or the whole of that power of attorney is meaningless.

We have referred to, but did not consider the evidence which might have been adduced of the institution of a suit to revoke the donation of 1857—but, taking the facts as they were elicited on the trial —we must consider and decide whether a suit commenced by a donor, for the revocation of a donation, on account of the non-performance of the conditions therein imposed, can be prosecuted—after his death—by the executor to whom he has given the seizin of all the estate of his succession. After answer filed, actions do not abate by the death of any of the parties, and the executor is bound to administer on all the property of a succession which is expressly declared in the will to belong to the testator, even on property claimed under an adverse title, and may maintain an action to annul a donation *inter vivos* made by the testator. C. P. 21; 6 L. R. 99; 7 L. R. 32.

In this instance, have the executors done so? Have they continued the suit which—in his testament—the deceased declared that he has brought and which is alluded to in Judge Ogden's letter to Eskridge? If they have, what has been the result? Has the revocation been pronounced? This important fact is commented upon by plaintiffs and defendants, asserted by the former, denied by the latter, but neither fully established by the first, nor completely contradicted by the others, and we are left in presence of the deceased's declaration that Somerset has reverted to him, and of the acceptance by and delivery to defendants of the legacy which the will contains in their favor.

Have they not—by that acceptance—by their declarations and their acts—assumed the quality of universal legatees or legatees under an universal title of John Perkins senior? If so, they are bound for the debts and charges of the succession, and—saving the case of reduction, for the payment of the particular legacies.

C. C. 1611 (1603) 1614 (1606); 2 R. R. 382.

It is not alleged that their acceptance was the consequence of any error of fact—of any fraud practiced, or violence exercised against them, and they can not now dispute its validity. They have—in judicial proceedings and in an authentic act—assumed the quality of heirs and universal legatees, and their acceptance is the simple and express one referred to in the 988th article of the Revised Code.

Defendants' counsel rely on article 1890 of said Code, which provides: "that a person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked."

Applying that article to this case, they say: the stipulation made in favor of defendants in the donation of 1857, was accepted by their tutrix, and their interest can not be affected by any judgment of revoca-

tion that may have been rendered in a suit to which they were not parties.

If that stipulation stood alone: were it the only charge imposed upon the donee, that argument would present an important question; but the first, the paramount obligation of the donation from the father to the son, was that—from the first of January 1858—the son would pay to his father, during the natural life of the latter, an annuity of $15,000, and it is admitted that—at the death of the donor—of the ten instalments of that annuity which had then matured, not one had been paid. The donee was, or it appears was then owing the donor one hundred and fifty thousand dollars; and—inasmuch as the conditions of the donation had not been complied with, he was not the incommutable owner of the property comprised in the donation.

Demolombe, vol. 20, p. 573, number 610.

He—nevertheless—before he had himself acquired an indefeasible title to the property which he held under a conditional donation, transferred it to defendants who had thereon but an eventual right, one which depended on the execution by the donee of his principal obligation in that quality, which was to pay to his father an annuity of $15,000. When was that transfer made? After the institution of the suit in revocation, and—it may be—after those who opposed it had expressly or tacitly assented to that revocation, after a revocation which—we presume—must have been contested by others than the defendants—as, otherwise—the evidence of their contestation and of its results would have been introduced on the trial.

Demolombe—vol 20, p. 534 and 535—said: "Les charges, dans une donation, n'étant pas la cause principale de l'opération, mais ne formant que des clauses accessoires, on aurait pu douter si leur inexecution pouvait ouvrir, au profit du donateur, une action en révocation, et c'est ce doute que le législateur a résolu, etc."—and, at page 562—"Que le donateur ne puisse pas demander directement l'exécution des charges, qui n'ont pas été stipulées dans son intérêt, cela se conçoit; mais c'est là précisément un motif pour qu'il puisse demander la révocation pour cause d'inexécution de ces charges: aussi le texte absolu des articles 953 et 954 du C. N. lui accorde-t-il ce droit, pour tous les cas, sans distinction."

The same author indicates the difference between the revocation and dissolution of an act of donation.

"D'une part, on a dit qu'autre chose est *la résolution* de la donation, autre chose la *révocation!* Le donateur, qui stipule une condition résolutoire—comme, par exemple—le droit de retour, ne révoque point par là sa libéralité: il en limite seulement l'étendue par une clause concomitante et constitutive de sa libéralité elle même; et—dans ce cas—la donation,

après qu'elle a été résolue par l'évènement de la condition, n'en a pas moins reçu toute la plénitude d'exécution, dont elle était susceptible, dans la mesure où elle avait été faite. Très différente est la donation révoquée, qui, loin de finir conformément à la loi de sa constitution, finit, au contraire—par une déchéance qui implique, en quelque sorte, l'idée d'un effet manqué.

Demolombe, C. N. vol. 20, page 521, Coin-Delisle, art. 953, No. 2.

The acceptance by defendants' tutrix—not of a donation made to them, and in an act passed between them and their ancestor—but of a charge imposed in their behalf, in an act to which they were not parties—did not close the door against their ancestor's action for the revocation of the donation, on account of the non-performance of its conditions. R. C. C. 1559, number 3.

What is the position in which the defendants have placed themselves, in regard to the succession of John Perkins senior? In their procuration of the 25th of March 1874, to Edgar D. Farrar, they represent themselves as "the universal heirs and legatees of said deceased." In their petition of the 23d of April, alleging to be the beneficiary heirs and universal legatees of their grandfather, they asked of his executors a final account of their administration of his succession, and the delivery of the property thereto belonging. The account demanded was filed and approved—and, by a notarial act of the 24th of April—they, as heirs and universal legatees, took possession of all that composed said succession in Louisiana, and that was the Somerset estate, discharged the executors and bound themselves to pay the debts and legacies for which it was liable.

Whether they had or have on or in Somerset, rights derived by them, through their father and from their grandmother: whether they did acquire, by the dation in payment of the 11th of August 1869, an absolute title to that estate—the fact is there, staring us in the face, that—by the act of the 24th of April, they took—not under the dation in payment, but under the will, and—as against that act, its recitals and stipulations, they plead neither error nor fraud—Can we relieve them from the legal effects of their own admissions, from the legal effects of their uncontradicted declaration that they have claimed, been allowed and taken possession of the whole of the succession of John Perkins senior, including Somerset—from the legal effects of their absolute promise to pay the debts and legacies? We can not: but, to what extent are defendants liable for those legacies?

The Civil Code fixes the extent of their liability; it provides:

Art. 1633—The heirs of the testator, or other debtors of the legacy, shall be personally bound to discharge it—each in proportion to the part that falls to him in the succession.

Art. 1465—*The heir, or universal successor, is not bound for the legacies, except to the amount of the value of the effects of the succession*, and he can therefore free himself from them by abandoning to the legatees what remains of the succession after the payment of the debts.

Art. 1466—If it be the forced heir who makes the abandonment to the legatees, he has the right to reserve to himself, from the effects of the succession, the legitimate portion secured to him by law, and shall deliver up the balance to the legatees.

In his commentaries on article 1017 of the Napoleon Code, of which the 1633d article of ours is a literal copy, Marcadé said: "Puisque les legs ne peuvent se prendre que sur le disponible, et que les successeurs généraux ne les doivent que dans les limites du disponible qu'ils detiennent, comment voulez vous que l'héritier les donne encore après que la succession entière est épuisée? La qualité d'héritier pur et simple est ici insignifiante, et celui qui en est revêtu se trouve—quant à l'acquittement des legs—sur la même ligne que l'héritier bénéficiaire et les légataires universels et à titre universel. La distinction entre l'héritier pur et simple et les autres successeurs généraux n'existe que pour les dettes."

It was the evident intention of John Perkins senior to leave to the children of his deceased son William the largest share of his considerable fortune, but he had not foreseen the events which occurred after his death, which condemned the largest of our estates to a prolonged sterility, reduced their value and production—and converted once productive lands into real burdens. Trusting to the experience of the past, impressed with the recollection of the revenues derived from the cultivation of Somerset, he directed that the payment of most of his particular legacies should be made out of its future revenues.

Defendants' counsel urge that the legacies to plaintiffs can not be paid otherwise than as thus directed: that they are not payable out of the property generally, nor by a sale of any portion of the same. This argument is based on a clause in the will, in which the testator expresses "the desire that his property should be kept together *by his executors* for the benefit of his grandchildren and the payment of the legacies." The succession of John Perkins senior has been opened for upwards of eleven years: his universal legatees have received the property which composed it since four years, and the inevitable effect of the defendants' construction of that clause of the will, would be to postpone indefinitely the payment of the particular legacies. The instructions from the deceased *to his executors* might have been enforced during *their* administration and while they had the seizin of the succession; but they were not intended to suspend—at the will of his universal legatees—the execution of the other clauses of his testament. His most earnest wish

was to prevent the morcelling of Somerset, and yet, as to that estate, he advises that it be kept undivided as long as the law will permit.

"Particular legacies must be discharged in preference to all others, even though they exhaust the whole of the succession, or all that remains after the payment of the debts and the contributions for the legitimate portion, in case there are forced heirs.

R. C. C. 1634.

"In default of funds sufficient to discharge the debts and legacies of sums of money, the executors shall cause themselves to be authorized by the Court to sell the movables, and if they are insufficient, the immovables, to a sufficient amount to satisfy the debts and legacies.

R. C. C. 1668.

Was Somerset the separate property of John Perkins senior, or did it or any part of it belong to the community which existed between him and his deceased wife? If it was common property, and if, as such, any part of it passed to defendants' father or to them, they might—by proper steps—protect any title so acquired by them against the enforcement of plaintiffs' rights.

They are bound for the legacies only to the amount of the value of the effects of the succession, and they can free themselves from them by abandoning to the legatees after the payment of the debts and the reserve of their *legitime*, whatever may then remain of what they received from their ancestor's succession.

R. C. C. 1465—1466.

The prescription of one year urged by defendants is not applicable to plaintiffs' demand, and—considering the acknowledgments and promises made by the former in the act of the 24th of April 1874—that of ten years, if applicable, has been interrupted.

The prescription of five years opposed by plaintiffs to defendants' informal demand for a reduction of the legacies which they seek to recover, runs against minors only from the date of their majority. At the death of their ancestor, the universal legatees were minors—that is shown, and we are not informed when they became of age.

R. C. C. 3542 (3507).

This fact, and the fact that the evidence is too incomplete to justify the fixing of any reduction to which the defendants may be entitled, compel us to remand this cause to the lower court for a new trial—and, in so doing—we do not limit the scope of that trial.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is avoided and reversed, and this case remanded below, to be proceeded in according to the views herein expressed and according to law: the costs of the appeal to be paid by plaintiffs.

SPENCER, J. recused.

No. 7038.

MRS. S. C. F. LOGAN VS. HARRIET HERBERT ET AL.

A judgment can not have the force of *res adjudicata* as to one not a party to it.

Parol evidence, even when not objected to, is not admissible to prove that the owner of real estate agreed that it should be sold as the property of a third person.

In a suit to revive a judgment against a succession, the acceptance of service, and waiver of citation by the administrator will be deemed a good service, and will justify the judgment of revival.

A sale of property which had formerly belonged to a succession, (and which had been validly sold while the succession was in existence) made by the defunct administrator of the succession after it had been closed, and its assets partitioned, is absolutely void, and conveys no title whatever to the purchaser.

An unrecorded deed transfers the property to the purchaser as against all the world, *except* creditors of the vendor, and *bona fide* purchasers from him without notice.

The registry of a judgment against a party will operate as a legal mortgage on all the immovables of that party situate within the parish wherein the judgment is registered, whether the deed to such immovables is recorded or not; and such mortgage is good against every body that the judgment debtor's title to the immovables is good against.

The prayer of a petition that the sale of a certain immovable be declared void, and that the property *quoad* the plaintiff's rights be decreed to belong to a certain third person, will not, in the absence of any demand for a seizure and sale of the property, constitute the action an hypothecary one.

So far as relates to creditors holding antecedent mortgages on property, and their recourse on the property is concerned, judgments obtained by others against their debtor, estopping him from setting up ownership to the property, are not *res adjudicata* as to them.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Wedge*, judge *ad hoc*. Trial by jury.

D. C. Hardee for plaintiff and appellant.

W. F. Kernan and *T. B. Lyons* for defendants.

The opinion of the court was delivered by

SPENCER, J. In 1862 there was a probate sale of the property of Nancy Stevens, by Geo. W. Catlett, auctioneer. Among the property then sold was the land in controversy in this suit. It was adjudicated to Mrs. Fluker for $1275, one third of which was paid in cash, and the balance was represented by her two promissory notes at one and two years, as prescribed by the court. The auctioneer made out in due form his *procès verbal* of the sale, which was duly signed by Mrs. Fluker, but from some cause, perhaps the disorder of the times, he neglected to return it to the clerk's office. It was found among his papers in 1868, after his death, and put of record in 1870 in the recorder's office of East Feliciana.

In January, 1863, there was a final partition among the heirs of Ann Stevens, into which was carried the proceeds of these two notes of Mrs.

Fluker, which had been cashed by Dr. Barkdull, at the request of Dawson, the administrator of Ann Stevens. Mrs. Fluker went into possession of the land at once, and in 1867 gave H. H. Herbert permission to occupy and cultivate it. Dr. James D. Barkdull, the holder of Mrs. Fluker's two notes, died in 1865, and they were inventoried as part of his estate. After the war, in 1867, Mrs. Barkdull, representing her deceased husband's estate, visited Mrs. Fluker, and demanded payment of these two notes. She paid one of them. Subsequently Mrs. Fluker told Mrs. Barkdull that owing to her financial embarrassments she could not pay the second note. Mrs. Barkdull says that Mrs. Fluker told her "she could have the place sold for the second note"—the place she had given the note as part payment for.

On ninth February, 1867, Kernan & McVea obtained judgment against Mrs. Fluker for $3000 and interest, which was duly recorded in the mortgage office twenty-third February, 1867, and became a judicial mortgage on all her property in East Feliciana, where she resided, and where the land in question lies. The plaintiff, Mrs. Logan, a widowed daughter of Mrs. Fluker, subsequently bought this judgment, with full subrogation.

Mrs. Barkdull, when told by Mrs. Fluker to sell the land for the note, placed it in her attorney's hands with instructions to proceed to sell the place. But when the attorney went to get copy of the mortgage, in order to foreclose it, found that it was not of record in the recorder's or clerk's offices. Mrs. Fluker being heavily involved and sundry judgments against her, including that held by plaintiff, the attorney thought it useless to sue her on the notes, without having the benefit of the vendor's mortgage securing it. Whereupon, to meet this emergency, and escape the judicial mortgages, the attorney of Mrs. Barkdull, early in 1868, applied to Dawson, the defunct administrator of Ann Stevens, whose estate had been finally partitioned among her heirs five years before, and obtained his consent to file application in his name, as administrator, to sell the property over again as that of Ann Stevens. This, too, when the act of partition of the estate of Ann Stevens, on file, showed that the heirs had received and partitioned among themselves the price of this very land. But the order to sell was obtained, the property advertised, and sold to Mrs. Barkdull on fourth March, 1868, for $500. The particulars of this sale are established by parol, as the sheriff seems never to have made any return thereof of any kind.

On the seventh March, 1868, Mrs. Barkdull, by notarial act duly recorded, sold this land, with full warranty, to Harriet Herbert, a colored woman, who was represented by H. H. Herbert, of whom she was a servant and former slave. This H. H. Herbert and Harriet were at the time occupants of the premises by permission of Mrs. Fluker, who re-

sided at her homestead on the adjoining plantation. Mrs. Fluker testified that she never knew, heard of, or authorized the foregoing proceedings, and we are entirely satisfied of the truth of her statement.

But to proceed with this remarkable case. Mrs. Logan, some time after this sale to Harriet Herbert, issued execution on the Kernan and McVea judgment, and seized this land as the property of Mrs. Fluker, the judgment debtor. Harriet Herbert enjoined the sale on the grounds detailed above, averring her ownership, and pleading that Mrs. Fluker was estopped by her conduct and acts from claiming the land; that she had told Mrs. Barkdull to sell it, and could not now complain. Mrs. Fluker filed an intervention, which was never served or put at issue, and it is shown she was not allowed for that reason on the trial to offer evidence. The case was tried by jury, who found for plaintiff, and "dismissing the intervention." From the judgment on this verdict Mrs. Logan appealed.

The Supreme Court held that Harriet Herbert possessed under a title not simulated, and which could not therefore be attacked by seizure, and affirmed the judgment, "reserving to Mrs. Logan her right of action to cause the sale from Barkdull to Herbert to be annulled."

Subsequently Mrs. Fluker brought a direct action against Harriet Herbert to recover this land. On appeal this court, first March, 1875, held that the judgment of dismissal in above named injunction suit was *res adjudicata* against Mrs. Fluker.

It is useless for us to review these decisions of our predecessors, except to say that we do not wish it understood that we assent to the doctrines they announce.

The present suit is brought by Mrs. Logan against Mrs. Barkdull, Harriet Herbert, and Mrs. Fluker, to have said sale from Barkdull to Herbert decreed a nullity—to have said property decreed to belong to Mrs. Fluker and decreed to be subject to the payment of plaintiff's judgment and mortgage.

Harriet Herbert filed an exception, setting up the two judgments above discussed as *res adjudicata*, and that plaintiff's petition discloses no cause of action.

These exceptions were properly overruled. The plaintiff shows abundant cause of action. The plea of *res adjudicata* based on the suit of Fluker vs. Herbert is of course without force as to Mrs. Logan. She was no party to it, and being a mortgage creditor, whose rights antedate that proceeding, can in no sense be said to be bound by a judgment against Mrs. Fluker, her debtor.

In the suit of Harriet Herbert vs. Mrs. Logan (the injunction suit) the Supreme Court do not pretend to decide that Mrs. Logan did not have a mortgage on this property, or that it was not subject to her

mortgage, or that the sale from Barkdull to Herbert was valid. The decision was that Herbert held by a title which was not a simulation, and which could not be indirectly attacked by seizure. It expressly reserves her right to bring this suit; for if the proceedings by which Herbert claims Mrs. Fluker was divested of title were nullities, then plaintiff's right to subject it to her mortgage is indisputable. So far as Mrs. Fluker is concerned, she is of course, whether rightfully or wrongfully, cut off by said judgments from claiming any thing in said property; so that if it were to bring $50,000, neither she nor her heirs could claim one dollar of the surplus it brought over plaintiff's debt. The effect of the judgment prayed for would be to annul said sale and restore said property to Mrs. Fluker's estate, only *quoad* the plaintiff's rights.

The answer is a general denial, admitting possession, averring ownership by purchase from Mrs. Barkdull, who, it is alleged, acquired from the estate of Ann Stevens, which is claimed to have had the legal title when Mrs. Barkdull bought. That any equitable title existing in Mrs. Fluker at the date of Barkdull's purchase Mrs. Fluker "did forego, lose, and transfer unto your respondent by consenting and agreeing to the said sales, and by standing by and permitting and encouraging the same to be made. That this divestiture out of Mrs. Fluker was complete and entire long before any alleged rights of the plaintiff could or did attach to said land." She alleges the value of her improvements, prays that Mrs. Barkdull be cited in warranty, and "if respondent is evicted from said land and improvements that she may have judgment against her therefor," and that plaintiff's suit be dismissed and her claim rejected.

Mrs. Barkdull, cited in warranty, repeats and adopts Herbert's answer in substance, avers her title *bona fide*, and pleads the prescription of one and five years.

Mrs. Fluker having died, her administrator answered, claiming title; to which the plea of *res adjudicata* was opposed and is good.

There was judgment rejecting plaintiff's demands, and she appeals.

There are, in reality, but two vital questions in this case, which it is necessary to decide, to wit: First, is plaintiff's judgment still in force? and, second, was Mrs. Fluker at the date of, or subsequently to, the recording of plaintiff's judicial mortgage, on twenty-third February, 1867, the owner of this land? If she was, plaintiff's mortgage attached to it; and even if it be true that Mrs. Fluker did in March, 1868, "forego, lose, and transfer her rights, by consenting, agreeing, standing by, permitting and encouraging" the sale of the property as that of the estate of Stevens, still she could not in that way or any other divest plaintiff of her rights upon the property. It would at most amount to an alienation by the debtor. We regard it therefore, so far as relates to existence

of plaintiff's hypothecary rights, as immaterial whether or not Mrs. Fluker did in fact so divest herself of the property. But we *will say, en passant*, that in our opinion the parol evidence allowed to be offered in this case to establish her consent that this property be sold as Stevens's was clearly inadmissible, especially as no fraud or deceit is charged or pretended against her. If such evidence can be resorted to to divest one of title to real estate, then all I have got to do is to buy your property from a third person, and prove by parol that you consented and agreed to it. We will say further that even if admitted without objection (which it was not), the evidence wholly fails to establish the fact. The most that can be made out of it is that Mrs. Fluker told Mrs. Barkdull to make her money out of the land, she was unable to pay the note. This certainly was no authority for the proceedings taken.

As to the question of the existence of plaintiff's judgment and mortgage, it rests entirely upon the objection that in the suit for its revival Calhoun Fluker, administrator, was not served with citation, but accepted service of the petition and waived citation. We see no possible reason for doubting that this was a good service and justified the judgment of revival. Why should the costs of a service of citation have been imposed upon the estate? There is no pretense that the debt was not an honest and just one, or that it had ever been satisfied. It would be monstrous to maintain that because the Code says one *may revive a judgment by citing the debtor*, that therefore an answer or acceptance of service would be ineffective as a basis of such revival. Art. 177 C. P. forbids such a conclusion.

As to Mrs. Fluker's ownership of this land on twenty-third February, 1867, it is difficult to see how it can be questioned. Nobody disputes, on the contrary every body admits, that she acquired it at probate sale in December, 1862, from the estate of Stevens. Nobody pretends that the sale to her was not regular, legal, and *bona fide*. Nobody disputes the fact that the heirs of Stevens received and partitioned the proceeds of this sale among themselves five years before Mrs. Barkdull's pretended purchase. Nobody disputes that Mrs. Barkdull and her attorney, and Dawson, the administrator, and H. H. Herbert, who did all this business for and in the name of his servant, Harriet, all knew perfectly well that Mrs. Fluker owned and had continuously possessed this land since 1862. Mrs. Barkdull held her two notes for the price and collected one of them. Herbert was Mrs. Fluker's tenant. Nobody pretended that these notes of Mrs. Fluker were debts of Mrs. Stevens. Yet, in the face of these facts, these parties enact the farce of putting up this property as belonging to the estate of Stevens, which had, five years before, sold, and received the price of it; and they tell us they did

so to pay Mrs. Fluker's note! Is it necessary for us to say or cite authority to show that such proceedings are absolutely void, and vested no title whatever in Mrs. Barkdull? If Mrs. Barkdull ever had the shadow of a title to that property, she did not get it by that sale from the estate of Stevens. We have seen that if she ever acquired a title from Mrs. Fluker she did so after plaintiff's mortgage had attached. But we have also seen that, *in fact*, she never derived or had any title from Mrs. Fluker. Even the parol evidence, illegally admitted, utterly fails to show that Mrs. Fluker ever sanctioned or knew of this transaction. But it is said the deed from the estate of Stevens to Mrs. Fluker was not put of record until 1870, and that of Harriet Herbert from Mrs. Barkdull was recorded in 1868, and that the oldest recorded title must prevail; that Mrs. Logan's mortgage could not attach until Mrs. Fluker's title was recorded, and that before it was recorded Mrs. Fluker had been divested of her title by the proceedings narrated above.

To this we answer, first, that Mrs. Fluker never was divested of title; and, second, that an unrecorded deed transfers the property to the purchaser just as effectually as a recorded deed, as against all the world, *except* creditors of the vendor, and *bona fide* purchasers from him without notice.

Mrs. Barkdull was neither a creditor of Mrs. Stevens (Mrs. Fluker's vendor) nor an innocent purchaser from her. She was no purchaser at all. One who has never been owner can not confer ownership upon another. Mrs. Barkdull never had any right of ownership, and could convey none to Harriet Herbert. The latter, besides, was herself, through her agent H. H. Herbert, perfectly cognizant of all the facts. She was therefore not even a possessor in good faith. Even if she were, good faith in a purchaser can not make a good title out of a bad one. The only effect of good faith is to shorten the period for acquiring title by prescription, and to entitle the party to fruits, and certain rights and indemnities for improvements.

The proposition of defendant's counsel that Mrs. Logan's mortgage could not attach to the land until Mrs. Fluker's title was recorded is utterly inadmissible. It attached the moment it was placed of record, because Mrs. Fluker was then the owner—and it was effective and good against every body that Mrs. Fluker's title was good against. We have seen that her title was, without registry, good against the world, except creditors of and *bona fide* purchasers from her vendor.

This view renders it unnecessary to decide the point raised by defendant, as to the effect of Mrs. Fluker's deed not being stamped, before its registry, since in our view the deed was good against the defendants Barkdull and Herbert without registry. But we may as well say now that we think the objection without force or merit.

The objection is made in the brief, but not in the pleadings (unless the exception "no cause of action" be its equivalent), that this is the hypothecary action, and that there is neither allegation nor proof of the demands and notices required by law in such cases.

We have stated the prayer of the petition. We do not think it is the hypothecary action. The petition does not ask for the seizure and sale of the property, but that the sale from Barkdull to Herbert be declared void, that the property, *quoad* the plaintiff's rights, be decreed to belong to Mrs. Fluker, and that it be decreed subject to plaintiff's judgment. Creditors are authorized by law to exercise the rights and actions of their debtors in cases like this. 2 An. 782. They are not barred or estopped from so doing by the acts or pleadings of their debtors, only when and to the extent that in such acts or pleadings the debtor may be considered as representing them. Now the debtor in so far as relates to creditors holding antecedent mortgages and their recourse upon the mortgaged property does not represent them, and judgment against such debtor is not *res adjudicata* as to such creditors; as it would be against mere ordinary creditors in the absence of fraud by the debtor. See Marcadé, v. 5, pp. 181–5; also, 9 L. 298; 4 R. 26; 3 A. 230; 6 A. 462; 12 A. 873.

The hypothecary action proceeds upon the hypothesis that there has been *a real alienation* of the property *by the mortgage debtor*. This suit proceeds upon *the contrary hypothesis*, and as the decrees of this court holding Mrs. Fluker to be estopped from claiming title are not *res adjudicata* against plaintiff, plaintiff may show that those decrees are unfounded, unjust, and untrue. Mrs. Logan could, it is true, have acquiesced in the validity of defendant's title, originating in the adjudged divestiture of Mrs. Fluker in 1868, *and still have maintained* the hypothecary action, as that title originated subsequent to the attaching of her mortgage. But she has also the right to have this adverse title, which is set up as a hindrance to the exercise of her right, adjudged null and void as to her, to the end that she may seize and sell it as the property of her debtor.

Nor must plaintiff's action be confounded with the revocatory action, technically so called. That action has for its object the annulment of acts and contracts made by the debtor in fraud of the rights of creditors. Plaintiff in this case does not pretend any such state of facts. On the contrary, she asserts that her debtor never did, in truth and fact, sell or dispose of this property; that she was rather the victim than the perpetrator of illegal and wrong doing. We have seen that while Mrs. Fluker's mouth is judicially sealed, and while she is not permitted to gainsay Harriet Herbert's title, the plaintiff is at liberty to dispute it, and to show that it never had a legal existence. We think the plaintiff

has made out her case, and that as to her defendant's title is null and void, and that plaintiff has the right to proceed against said property as that of her judgment debtor, for the satisfaction of her mortgage rights. Under the views we take the prescription of one and five years pleaded by Mrs. Barkdull against plaintiff is inapplicable.

The defendant has prayed for judgment over *against her warrantor* for the amount and price paid, $500, and for the improvements put upon the place. The evidence as to improvements is not sufficiently definite for us to pass intelligently upon their value. We will reserve defendant's rights in that regard against her warrantor, who, she alleges, is liable to her therefor.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be avoided and reversed, and it is now ordered, adjudged, and decreed that there be judgment in favor of Mrs. S. C. F. Logan and against the defendants, declaring the title of Harriet Herbert, derived from Mrs. L. P. Barkdull, of date seventh March, 1868, to the lands described in plaintiff's petition to be null and void as regards plaintiff. That the plaintiff, Mrs. Logan, do proceed to the execution of the judgment in the case of "Kernan & McVea vs. Mrs. J. A. Fluker," No. —, on the docket of the district court for East Feliciana, to all intents and purposes as though said Mrs. Fluker's estate was still owner and possessor of the said land, and that the same be and is declared subject to plaintiff's judicial mortgage resulting from the registry of said judgment on twenty-third February, 1867. It is further ordered that plaintiff recover of the defendants the costs of both courts. It is further ordered, adjudged, and decreed that the defendant, Harriet Herbert, do recover of her warrantor, Mrs. L. P. Barkdull, the sum of five hundred dollars as the price of said land, with five per cent interest from judicial demand till paid, and all costs of this suit; and that said Herbert's right to sue said warrantor for damages and improvements be and the same is reserved to her.

No. 7002.

ISAAC D. BROWN VS. JOSEPH BESSOU, ADMINISTRATOR, ETC.

Where an heir who opposes the account filed by his former tutor, admits that he had received a certain sum of money from his tutor, but alleges that it was derived from a source different from the one set forth by the tutor, he must prove his allegation, or otherwise his admission will dispense the tutor from any other proof.

A judgment can not allow interest that the plaintiff has not claimed.

The legal mortgage of minors on the property of their tutors, is good, as against the tutors, their heirs, or partners in community, without being registered.

A tutor can not be held for more than he collected of a certain debt due the minor, when it is not shown that the debt was worth more than he collected.

Brown vs. Bessou.

APPEAL from the Parish Court of Iberville. *Crowell*, J.

Augustus and *E. B. Talbot* for plaintiff and appellee.

Barrow & Pope for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The plaintiff, alleging that James A. Ventress, who had been his tutor, had died without rendering an account of his tutorship, though largely indebted to him in such capacity, sued the administrator of his succession to compel him to render an account of the dealings of his decedent in the tutorship, the plaintiff having become of age. An account was filed accordingly by the defendant in his capacity of administrator, which after contestation and opposition was made the basis of the judgment of the court below after certain amendments and corrections. From this judgment the administrator has appealed.

The first error complained of is the striking out and disallowing the item of nine hundred dollars, charged under the head of passive mass, chapter two of the account, as having been paid by the tutor to the minor. The opposition to this item admits the receipt of the amount, but alleges that it was paid to the plaintiff on account of his share or interest in the crops of the Manchac plantation. If this were so, under their pleadings it was incumbent on the plaintiff to have shown it. He has not done so, and the admission that he received the money sustains that item of the account and dispensed with other proof. 4 R. 145; 18 L. 11; 14 An. 861; 27 An. 537; 26 An. 630. There is, however, evidence outside of the admission of the plaintiff to support this item. There was offered in evidence a draft for $800, given by the deceased to the plaintiff on his commission merchant about the date of this charge, and which figures in and is charged nowhere else in the account.

The witness Barrow swears that during the life of Ventress the latter had this item put down on a memorandum account against his ward precisely as it is here charged, and that he used that memorandum, which was since lost, in making up this account. It is shown that Ventress was a very careful, accurate man of business. He is now dead, and no one but the plaintiff is left to testify, and he has failed to establish the grounds of his opposition, even by his own evidence. The judgment must be corrected in this particular.

The second error assigned is the allowance of interest on the judgment from dates not definitely fixed by the proof, and from dates anterior to that asked for by the plaintiff, who prayed that interest might be allowed him from the date of the death of Ventress, and can not therefore recover more. See petition, record p. 2.

Article 552 of the Code of Practice provides that "interest shall not be allowed by the judgment unless the same have been expressly claimed,

and then only in cases in which the law permits such interest to be stipulated." One can not have judgment for more than he claims. 10 An. 485. The judgment must be corrected in this respect also.

The third error alleged is the allowance of the legal mortgage of the minor on the property of his tutor from the date of his appointment, March 16, 1865, because of the absence of proof of registry prior to the first of January, 1870, to preserve the same.

This position is correct so far as the interests of creditors of Ventress are concerned or may be affected. There is, however, as argued by plaintiff's counsel, no evidence of the existence or amount of debts against the succession, nor is it pretended that it is insolvent. The mortgage was certainly good without registry as against Ventress himself, and is equally good against his heirs or partner in community. The judgment should be modified in this respect, so that the mortgage may not affect the rights of creditors.

The plaintiff asks us to amend the judgment by allowing him the amount of a note of James Ward for $2000, and by reducing the amount allowed to the attorneys who filed the account. We think the account allowed on this latter item, $250, was reasonable and properly allowed. As to the Ward note, the evidence in regard to that is that Ward lived in Mississippi, where he was sued by Ventress and judgment recovered; that execution issued, and the property seized was bought in for Ventress at $250. There is nothing to show that it was worth more or that more was realized from it. And it is shown that Ward became a bankrupt, and that ended the collections on the judgment. The accountant has charged the estate in favor of the plaintiff with $833 73 on account of his interest in this note, which is more than would appear to be due from the evidence. It is probable that the property bought for $250 may have been sold for more, and that Ventress therefore very honestly charged himself with the excess, though of this there is no evidence. We see no reason to disturb the judgment as to this item, of which as charged the plaintiff can not complain.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be so amended as to allow the item of nine hundred dollars in the account as having been paid to the plaintiff, charged under the head of passive mass, chapter second of the account as stated; that it be also amended so as to allow interest at five per cent per annum upon the amounts decreed in favor of the plaintiff from the date of the death of James A. Ventress, to wit, the —— day of ——, 18—, instead of from the dates allowed and fixed in the judgment, and that it be also amended, so that the legal mortgage of the plaintiff against the property of his deceased tutor shall not have effect or operate to the

prejudice of creditors of the decedent, James A. Ventress, or of the succession; and it is further ordered and adjudged that as thus amended the judgment appealed from be affirmed, and that plaintiff and appellee pay the costs of appeal; and as the record before us does not disclose the date of the death of Ventress, the case is remanded to the court below to receive evidence on that point only.

No. 7004.

BEN. GERSON VS. G. W. & G. M. HAMILTON.

Where the language of a guaranty addressed to a factor is, "I am willing to go his security for the amount of twenty-five hundred dollars," it is not what is termed a *continuing* guaranty. It only embraces the first $2500 of money advanced, or goods furnished to the person in whose favor the guaranty is given. The factor thus guaranteed is legally bound to apply to the guaranteed debt, and for the discharge of the guarantor, the first payments received by him from the person in whose favor the guaranty was given.

APPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *McVea*, J.

Barrow & Pope for plaintiff and appellant.

Favrot & Lamon for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Plaintiff seeks to recover of G. W. Hamilton, as drawer, and G. M. Hamilton, as guarantor, the amount of a draft on him to the order of Meyer Weil, for $876 53, dated tenth February, 1873, at ninety days, which, he alleges, he paid at maturity.

The petition charges that G. M. Hamilton, in a letter addressed to plaintiff, of date October 15, 1872, guaranteed and bound himself as security for the payment of the said draft, and all advances made by him to G. W. Hamilton to the amount of $2500; and that the draft sued on formed part of the advances mentioned and contemplated in the letter of guarantee.

G. W. Hamilton admits his signature to the draft, but denies that plaintiff is the owner for a valuable consideration, or that he is in any manner legally bound to pay the same to plaintiff, or any one else, because it was never protested for non-acceptance or non-payment.

G. M. Hamilton admits his signature to the letter of guarantee, wherein he made himself responsible to plaintiff for goods and merchandise to be sold to his son by plaintiff to the amount of $250 0.

He also pleads settlement by him and payment of balance due by his son to Gerson, on March 21, 1873; and settlement on March 17, 1874,

of balance due by him to Gerson, on his own account, except $10 11, which he tenders.

The letter of guarantee is as follows:

"WEST BATON ROUGE, OCT. 15, 1872.

"BEN GERSON, ESQ.—

"*Dear Sir:*

"As you have promised to advance my son George, I am willing to go his security for the amount of twenty-five hundred dollars."

On the nineteenth of October, 1872, an account current was opened by Gerson with G. W. Hamilton, which amounted, on the debit side, up to February 1, 1873, to $6199 40, consisting of time drafts accepted, sight drafts paid, merchandise, and a small amount in cash, closing with balance in favor of Gerson, $1924 65. On the seventeenth of March this balance had increased to $2076 05, to which interest up to January 1, 1874, was added, $135 16, making total $2211 21. G. W. Hamilton sold goods for $1000 to Baum, which Baum agreed to pay to Gerson on the first of January, 1874. Gerson accepted this in deduction of the amount due by G. W. Hamilton, and for the remainder, $1211 21, G. M. Hamilton drew on Gerson to the order of G. W. Hamilton, payable January 1–4, 1874. This draft was charged to G. M. Hamilton on the account of Gerson; and the balance shown by that account up to March 17, 1874, was paid in part, say $784, leaving balance unpaid $10 11.

On October 27, 1872, G. W. Hamilton purchased a quantity of goods of Meyer Weil, and he made other purchases, at different dates, up to February, 1874, amounting to $876 53. It was in settlement of this account that the draft sued on was given, February 10, 1873.

G. M. Hamilton denies liability on this draft, on the specific grounds:

1: That the amount was not claimed by Gerson as due by him when the final settlement of liability under the guarantee was made, and the balance $1211 21 paid:

2: That the amount guaranteed was reached before the draft was drawn;

3: That G. W. Hamilton paid to Gerson for indebtedness incurred since the subscription of the letter of guarantee, October 15, 1872, an amount far in excess of $2500.

The testimony proves the truth of all these grounds; and we think they are a complete bar to plaintiff's action against G. M. Hamilton.

The counsel for plaintiff contend that the letter of October 15 was a continuing guarantee; and they rely on Williams v. Reynolds, 11 La. 230, and Menard v. Scudder, 7 An. 386. In the first of these cases Reynolds wrote to Williams, guaranteeing his endorsement for Reynolds & Ayars, to the extent of $5000. A month later, in November, 1832, he wrote again to Williams, saying: "I intend this as a standing accommodation

to them, (Reynolds & Ayars); and I now offer you a further guaranty for your endorsement to the extent of $5000, on bills of exchange they may have occasion to draw, on account of shipments they may make from time to time; *these guarantees to continue and be in full force until the* first day of January, 1834."

Of course, this was a continuing guarantee; and defendant was held liable to Williams for his endorsement for Reynolds & Ayars, for $5000.

In the other case, the guarantee was in these words: "I do recommend my friend, Mr. J. B. Scudder, of the parish of East Baton Rouge, a planter, and any funds that he may raise on acceptances, in case he does not pay, I feel bound to pay." This also was held to be a continuing guarantee; and McCalop, the guarantor, was held liable for advances made to Scudder from the note, December, 1849, up to the death of McCalop, in July, 1850, it not having been otherwise revoked.

There is no analogy between these cases and the present case. Hamilton, the father, limited his guarantee to the sum of $2500. Within less than a month, on the first of November, that limit had been exceeded by a few dollars; and the account continued until the total debits were $6199 40, on the first February, and the total credits to same date, $4274 75.

We incline to the opinion that G. M. Hamilton was not legally bound to pay the $1211 21, under his letter. Gerson had the right to look to him as security for the advances made by him, on the faith of the letter, up to $2500; and he was bound legally, *ex æquo et bono* to apply to the debt, and for the discharge of the guarantor, the first payments received by him from G. W. Hamilton. The father must be presumed to have had some knowledge of his son's means and resources: and to have given the guarantee for the limited sum of $2500, because he had confidence in his son's ability to make good advances to that amount.

The draft sued on has no mark or indication that Gerson accepted it; and Pelant, one of the witnesses, says it is to his knowledge that Gerson refused to pay it. It is remarkable that the draft nowhere figures in the accounts of Gerson. He and Weil testify that Gerson introduced G. W. Hamilton to Weil, and told Weil that he would be responsible for Hamilton's purchases. Weil sold goods to Hamilton; and they were charged to Hamilton; and it is strange, if Gerson was bound as security for Hamilton, that the draft was not accepted by him. He and Weil both say that Gerson paid the amount; but they do not say when. On the sixth of February, 1874, Gerson wrote to G. M. Hamilton, saying that he had proceeds of one bale cotton shipped by G. W. Hamilton, which "stands to credit his account against his draft drawn on me in favor of Meyer Weil, which I was in honor bound to pay. I introduced him to Meyer Weil, and became at once responsible for one half he pur-

chased. * * * * This draft stands open against him with a credit of one bale cotton."

Whatever may have been the obligations assumed by Gerson to Weil, there is nothing to show any corresponding obligation on the part of G. M. Hamilton. The account of Weil was not guaranteed by him. He intended to bind himself as security to Gerson; and he chose to limit his liability to $2500. When that amount was reached on the debit side of the account of Gerson, and a corresponding amount on the credit side, the liability under the letter was at an end; and G. M. Hamilton was discharged.

G. W. Hamilton is bound for the debt liquidated by the draft. The original consideration was fully proven, not denied; and the liability was neither novated nor paid by the draft, which Gerson did not accept, and which Hamilton had no reason to suppose Gerson would either accept or pay for his accommodation. It is immaterial to inquire whether Gerson paid the draft, or whether Weil placed it in his hands for collection for his account and benefit. The District Judge correctly gave G. W. Hamilton credit for proceeds of the bale of cotton; and rejected the demand against G. M. Hamilton.

The judgment appealed from is therefore affirmed with costs.

No. 7070.

CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER-HOUSE COMPANY VS. JOHN LARRIEUX. THE SAME VS. JOHN GISCH ET AL.

On the trial of motions to dissolve injunctions not issued against money judgments, damages are not to be allowed. The defendants in such injunctions are left to their recourse on the bonds.

A reconventional demand for damages can not be separately tried, and the judgment rendered on such a demand can not be separately appealed from. It must be tried and appealed with the main suit.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Robert Mott for plaintiffs and appellees.

E. K. Washington for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff in these two suits (consolidated in this court by consent) sets out its rights and privileges, and enumerates the fines and forfeitures consequent upon their violation. It then charges, in the first named case, that John Larrieux, for the reasons stated, owes it $1509 30, for which judgment is asked. And, coupled with this demand, an injunction was asked, and obtained, restraining him from doing cer-

tain acts alleged to be in violation of its exclusive privileges. In second named suit the allegations are similar, with prayer for a judgment for $750, and injunction for like purpose.

In both cases the defendants filed motions to set aside the injunctions, on the ground that similar injunctions were then pending between the same parties in the third district court, and that this proceeding in the fifth district court was in violation of act 86 of 1870, regulating jurisdiction in such cases. Larrieux prayed in his motion for $250 special damages against plaintiff and surety, on the injunction bond, and "legal damages" not stated. Gisch & Kerner prayed in their motion to dissolve for $250 special damages, and $600 legal damages against plaintiff and its surety.

These motions were tried, and sustained "in so far as to dissolve the injunction herein issued, with costs."

The defendants appealed, and claim that the court should have awarded them damages, on sustaining their motions and dissolving the injunctions, of which damages they claim to have made proof.

We think the court did not err, as it is well settled that on trial of motions to dissolve injunctions not issued against money judgments, damages are not to be allowed. The sureties are not parties in such cases. The party is left to his recourse on the bond. 3 A. 476, and cases there cited; 28 A. 859; 29 A. 630—634. The dissolution of the injunctions in these cases did not terminate the suits. Plaintiff's demands to recover $1509 30 in the one case, and $750 in the other, were not dismissed, and were still pending. Defendants' demands for damages were reconventional demands, to be tried, if permissible or not objected to, with the principal demand. The general rule certainly is that demands in compensation and reconvention can not be tried separately from the suits in which they are pleaded. If defendants are embraced within any exception to this rule, their counsel has not directed our attention to the law establishing it, and it is unknown to us.

It is therefore ordered and decreed that the judgment appealed from be affirmed, with costs to be paid by appellants.

ON APPLICATION FOR REHEARING.

This record contains two suits; one against John Larrieux, and one against John Gisch & W. C. Kerner.

If the papers, before being copied into this transcript, had been shaken up in a bag, and then drawn out by a blind man, and copied in the order drawn, confusion could not have been worse confounded than this transcript presents.

It seems that there was, lurking amid this confusion, a motion to

dismiss, and that the cases were not submitted on the merits. We overlooked the motion and decided the cases. The rehearing is granted.

ON REHEARING.

The plaintiff moved to dismiss the appeals, because the judgments were not such as justified appeal, and worked no irreparable injury; and "because the transcript is such a confused mass that neither the court nor the counsel for appellee can ascertain what the case before the court is."

As we have already, by dint of perseverance and hard work, *ferreted* out the case before us, we pass this last ground *sub silentio.*

As stated in our previous opinion, the plaintiff sued out injunctions against the defendants, butchers, prohibiting their violating its alleged chartered privileges. It also demanded a money judgment against Larrieux for $1509 30, and one against Gisch & Kerner for $750, for alleged infractions of its privileges, etc.

In both cases the defendants filed motions to dissolve the injunctions, on the ground that similar injunctions were then pending between the same parties in the third district court, and that the injunctions in the fifth district court were in violation of act 86 of 1870, regulating jurisdiction in such cases.

Larrieux, in his motion to dissolve, prayed for $250 special damages against plaintiff and surety on the injunction bond, and for "legal damages," in an amount not stated. Gisch & Kerner, in their motion to dissolve, asked for $250 special damages, and $600 "legal damages" against plaintiff and its surety. Those motions were tried and sustained, "in so far as to dissolve the injunctions herein issued, with costs." The defendants appeal, and allege that the court should have awarded them damages, which they claim to have proved.

The motion to dismiss these appeals must prevail. It is well settled that, on trial of motions to dissolve injunctions not issued against money judgments, damages are not to be allowed, and that the sureties on the bonds in such cases are not parties to the suits. The party is left to his recourse on the bond. 3 A. 476, and cases cited; 28 A. 859; 29 A. 630—634.

But, in this case, the dissolution of the injunctions did not even terminate the suits. The cases are still pending on plaintiff's claim for $1509 30 against Larrieux, and for $750 against Gisch & Kerner.

Perhaps defendants might, in their answers, set up their damages by way of reconvention; but, if that be permissible, the reconventional could only be tried with principal, demand.

The district court had no legal right to consider the demand for

damages, on the motion to dissolve the injunctions properly refused to pass upon it. Its judgments concluded no one on the question of damages, and worked no irreparable injury to appellants, who, as we have seen, may assert their rights at proper time, and in proper form. The cases in 12 A. 767 and 755 have no application here. Those were cases tried *on the merits*, and the damages claimed not noticed in the decrees. Such decree was, of course, *res adjudicata* to a subsequent suit.

If the district court could not legally entertain defendants' *motion for damages* this court can not, and an appeal to it is, therefore, a vain thing, and not maintainable.

The motion to dismiss the appeals is sustained at appellants' costs.

No. 6966.

ROSE L. GOUX ET AL. VS. JOSEPH MOUCLA.

Where there is an administration of a succession, the estate does not legally pass to a tutor, until the administrator renders his final account.

When the same person is at the same time administrator, and also tutor of a part of the heirs, his possession of the estate must be held to be as administrator.

The bond of an administrator inures to the benefit of the heirs, as well as of the creditors of the deceased.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Voist*, J.

E. J. Joffrion, *L. J. Ducoté*, and *H. C. Myers* for plaintiffs and appellees.

A. & W. Voorhies for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Claudine Berge died in 1857. She was three times married, leaving one child by her first husband, Penchene, and three by her second husband, Goux. Her third husband, Benjamin P. Delavallade, survived her. At her death the first named child, a daughter, was a major and married; the other three minors. The husband, Delavallade, was appointed on seventh December, 1857, dative tutor without bond of the three minors Goux; and on tenth December, 1857, was appointed and qualified as administrator of his deceased wife's estate, giving bond as such with Joseph Moucla and Laurent Normand as sureties.

In 1869 Benj. P. Delavallade filed what purports to be final accounts as administrator, one of the community existing between him and his deceased wife, and one of the separate estate of the wife. These accounts were opposed by Rose L. Goux, one of the heirs, and her husband. The pleading, proceedings, and evidence in these oppositions were not offered in evidence, only the accounts and the judgment on

the oppositions. The judgment is elaborate and prepared with precision and intelligence, and was, we must presume, rendered on proper issues and with proper parties. It decrees against the accountant on the account of the "community" a balance of $1507 30, one half of which he is adjudged to pay to the heirs of Claudine Berge, say $753 65, and on the account of "separate estate" of the wife, it decrees a balance against him in favor of said heirs of $2176 39

Making total..... $2930 04

and costs. This judgment was rendered fifth June, 1871.

In 1875 execution issued against Delavallade on this judgment, and his property was seized and sold, realizing net $1126 75. It was bought by plaintiffs in the present suit and bid paid by credit on the writ.

The present suit is brought by Rose L. and Louis Paul Goux (the third child having died intestate and in minority), to recover of the defendant Moucla, as surety of the administrator, the balance of said judgment. Ernestine Penchene, child by the first marriage, intervened and claimed to be owner of one fourth of her mother's estate, and one sixth of her deceased half sister's share therein, and asking to have the plaintiffs charged with the property of the administrator bought in by them.

The defendant answered by general denial, but admitting that "said Delavallade was duly appointed and qualified as administrator of the succession of Claudine Berge on tenth December, 1857, and that he and Normand signed the bond as sureties, etc.," but denies liability, since "said Delavallade as administrator aforesaid rendered a final account of his administration of said succession on the fifth of June, 1871, at which time the responsibility of said administrator as well as those of his sureties was duly shown and ceased as to said plaintiffs particularly, for whom said Delavallade was dative tutor." That the bond "was given exclusively for the benefit of the creditors of said estate," and when they were paid the bond "was null." He pleads in this court the prescription of four, five, and ten years.

There is no attempt on the part of the surety to show that the judgment against Delavallade was excessive, but that the amount due to the plaintiffs is due by him as tutor, and that the suretyship does not extend to the acts of the tutorship. Delavallade seems to have acted, during his administration from 1857 to 1871, in both capacities, but it must not be forgotten that a large portion of this estate belonged to the intervenor, a child of the deceased, and never under his tutorship. There were several thousands of dollars of debts. In fine, it is proved, and is besides admitted by the defendant, that Delavallade rendered his account as administrator; that he was duly appointed and qualified as

such. Under these admissions, it does not lie in the mouth of defendant to deny that letters of administration were issued to him, or that he administered as administrator.

When there is an administration, the estate does not legally pass to a tutor until the administrator renders his final account. Where the same person is administrator, and also tutor of a part of the heirs, his possession of the estate must be held to be as administrator. Of one of the heirs he was, in this case, never tutor, and of one of them, Rose L. Goux, and perhaps of the other, his tutorship had ended before his account as administrator was rendered. The bond of an administrator inures to the benefit of the heirs as well as of the creditors of the deceased.

It is suggested that there is no proof that the remedies against the principal have been exhausted. No such defense was made in the pleadings, and no proof offered to show that Delavallade (who is now dead) had other property. The return of execution against him unsatisfied creates a contrary presumption.

We see no error in the judgment as against the defendant, and think the plea of prescription not well taken.

The judgment as between plaintiffs and intervenor can not be amended, as the intervenor has not appealed or sought any modification as to her.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs.

No. 6985.

LEHMAN, ABRAHAM & CO. VS. MRS. YETTE LEVY AND HUSBAND.

The suit of a creditor to annul a conveyance of property by his debtor, for any ground of fraud (except the one of giving an unjust preference by an insolvent debtor) is only prescribed in one year from the time the creditor has obtained judgment against the debtor.

Where a *dation* in payment by a husband to his wife, is attacked, after the wife's death, as fraudulent, the husband is a competent witness for the wife's succession, to prove the amount, and verity of his wife's claims against him.

The validity of a *dation* in payment made by the husband to the wife, to satisfy a judgment obtained by the wife against him, will not be impaired by the fact that the judgment was a mere consent one, resting on no evidence, when it is shown *aliunde* that the wife's claims, on which the judgment purported to rest, are legal, and real; such for example, as claims for her dotal, or paraphernal effects, alienated by the husband.

Neither the pecuniary embarrassment, nor the actual insolvency of the husband, is any obstacle to a transfer by the husband to the wife, in good faith, for the replacing of her money, or property, used, or alienated by him.

A judgment of separation of property between husband and wife which is not executed, is utterly null and void.

The failure of a wife to execute a judgment of separation of property, which she has obtained, will not impair or prejudice any claim she may have against her husband.

It will be assumed that the property transferred by the husband to the wife to replace her dotal or paraphernal effects, is fairly appraised in the act of transfer, until the contrary is shown by the party attacking the transfer.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Brame*, special judge.

Wedge & Moore for plaintiffs and appellants.

W. F. Kernan and *T. B. Lyons* for defendants and appellees.

The opinion of the court was delivered by

MARR, J. In June, 1875, Lehman, Abraham & Co. recovered judgment against Abraham Levy, on which they caused execution to issue, under which the sheriff seized, and was about to sell certain real property. Mrs. Yette Oppenheimer, wife of Levy, enjoined the sale, claiming to be the owner, in virtue of a *dation en paiement*, made to her by her husband in February, 1875. Thereupon Lehman, Abraham & Co. brought this suit against the husband and wife to subject the property.

The petition charges, substantially, that the judgment in favor of Mrs. Levy against her husband, on account of which the *dation en paiement* was made, was "fraudulent, simulated, null, and void; entered into collusively between Levy and his wife to shield his property from the pursuit of his creditors, and to defraud them of their just rights."

Petitioners deny that Mrs. Levy had any paraphernal or other rights or claims against her husband, and they allege, that, "if she ever had any such claims the same were long since paid and satisfied by judgments obtained and executed against her husband, in the District Court of West Feliciana parish, and in number 319, Sixth District Court, for the parish of Orleans."

Mrs. Levy died shortly after this suit was brought; and the husband, Abraham Levy, made party in his capacity as executor, answered by general denial, and the plea of prescription of one year. The judgment of the District Court was against plaintiffs, rejecting their demand, and dismissing their suit; and they appealed.

Yette Oppenheimer was the widow of Israel Adler, who died in 1850, or 1851, leaving two minor children, issue of the marriage. At probate sale she purchased his interest in the commercial partnership of which he was a member, at the appraised value $8935 39, of which one half belonged to her as widow in community, and the other half to the two children. She and A. Levy, one of the partners of her husband, continued the business until January, 1853, when he purchased her interest for $12,000, represented by two notes for $6000 each.

In January, 1853, she married Abraham Levy, who was engaged in mercantile business, in partnership with one Bosch. Levy purchased the interest of Bosch; and, at the request of Mrs. Levy, A. Levy anticipated the maturity of the two notes, and gave a sight draft on Oakey & Hawkins for $11,880, the amount less discount. The money, it seems, went into the hands of Abraham Levy, and was used in paying Bosch.

In March, 1856, Mrs. Levy brought suit, in the District Court of West Feliciana, against her husband, for a dissolution of the community and separation of property, on account of his alleged pecuniary embarrassment; and in April, 1856, she recovered judgment, decreeing the dissolution of the community, and the separation of property; giving her the administration of her paraphernal property; and placing the tutorship of the minors under her separate administration and control. There was also judgment in her favor, in her own right, for $6000, with interest, from the date of the judgment, and in her capacity as tutrix for $6426, with interest.

Execution issued on this judgment, on the twenty-ninth April; and on the twenty-fourth May it was returned by order of plaintiff's attorneys. No subsequent proceedings seem to have been taken in the case.

In February, 1869, Mrs. Levy brought suit in the Sixth District Court for the parish of Orleans, against her husband, whom she described in her petition as being "of the city of New Orleans." She alleged his indebtedness to her in the sum of $6000, for money received by him belonging to her, as charged in her first suit; and in the additional sums of $800, for her half of proceeds of sale of real estate received by him in 1867, and $700 for money received by him for the sale of her furniture. She alleged also his pecuniary embarrassment; and that she desired to conduct mercantile business on her own account, and in safety from the pursuit of his creditors: and she prayed for separation in estate, that "the community existing between them be dissolved, and that she be authorized to act as a public merchant and transact her own affairs." She also prayed for judgment against her husband for seven thousand five hundred dollars, with interest from judicial demand.

Levy did not appear; and default was taken against him. It was proven that he was insolvent and under protest, and there was final judgment against him, and in favor of his wife, according to the prayer of the petition. Execution was issued on this judgment, which was stayed by order of plaintiff's attorneys; and was returned when it had expired. Nothing more was done in this case, except that the judgment was recorded in West Feliciana parish, in the Book of General Mortgages, on the thirteenth October, 1873.

Levy and his wife returned to West Feliciana, it does not appear at

what time; but he purchased real property there in 1871; and it seems that his mercantile business in Feliciana was continued while he was at New Orleans, in 1869. On the ninth December, 1874, Mrs. Levy filed an affidavit, which was registered on that day, and recorded in the Book of General Mortgages on thirty-first December, in which she stated that she had brought into marriage paraphernal property, the sum of $6000, being the one half of the amount paid by A. Levy for the purchase of partnership property: that in 1869, her husband received $800, from the sale of certain real estate in the town of Clinton: that the aggregate of his indebtedness to her was $6800; and that she made this affidavit for the purpose of preserving her legal mortgage on the real estate of her husband.

On the eleventh December, 1874, Mrs. Levy brought suit against her husband, in the District Court of West Feliciana, alleging his pecuniary embarrassment, and his indebtedness to her. That she had paid her children, out of the $12,000 originally due her by her husband, their half of the price of the assets of the succession of their father, Israel Adler, $4467 69, leaving balance due her by Levy, on that account, $7532 30; in addition to which he owed her $900, her half of the price of real estate belonging to her and her children, sold in January, 1867, received by him, making total indebtedness $8432 30. She also stated that her mortgage for the sum of $6800 was duly recorded against her husband on the eighth December, 1874; and she prayed for a separation of property, and the dissolution of the community: that she have the administration of her own affairs; and that she be permitted to be a public merchant. She also prayed for judgment against her husband for $8432 30; and that her legal mortgage be recognized, to date from December 8, 1874.

Levy answered, on the same day, by general denial; and final judgment was rendered and signed the next day, twelfth December, 1874, in accordance with the prayer of the petition.

Execution issued on this judgment, which was recorded in the Book of General Mortgages on the sixth January, 1875; and the sheriff seized some lots, with the buildings and improvements on them, on the twenty-fourth February, the return day of the writ. The seizure was preserved by the sheriff by retaining a copy, and the writ was returned. On the same day, February 24, 1875, by notarial act, Levy sold and conveyed to his wife all his real property, at prices agreed upon between them aggregating $5500, and all his household and kitchen furniture, at prices aggregating $600, making total of $6100, to be credited on her judgment of December 12, 1874, and which she acknowledged receipt of in part payment and satisfaction of that judgment: and on the twenty-fifth February he sold and conveyed to her, by act before the same

notary, his horse, buggy, and harness, and two mules, for the aggregate sum of $340, which she acknowledged receipt of as an additional credit on her judgment.

We do not think the action brought by plaintiffs in this case, to subject the property, was prescribed. Article 1987, of the R. C. C., requires that suit to set aside a contract, on the single ground of the giving of an unjust preference by an insolvent debtor, shall be brought within one year after the making of the contract; while article 1994 requires suit to set aside fraudulent conveyances on other grounds to be brought within one year after the creditor has obtained judgment against the debtor. The judgment in favor of Lehman, Abraham & Co. against Levy was rendered and signed on the fifth June, 1875; and this suit was brought on the tenth, and citation served on the seventeenth May, 1876; See Petit v. Creditors, 3 La. 29; Tennessy v. Gonsoulin, 11 La. 424.

On the trial of this case Abraham Levy was offered as a witness, and his testimony was objected to, on the ground that the husband is incompetent to testify on behalf of his wife's interest; and that his testimony is inadmissible to establish the amount and verity of his wife's claims against him.

Article 2281, R. C. C., declares that "the husband can not be a witness for or against his wife, nor the wife for or against her husband." The wife died, and the husband was made party as her executor; and he appeared and answered in that capacity. He could not have testified for or against her while she lived; but we do not think the rule of exclusion applies to cases in which the husband or the wife, surviving, is called as a witness to testify for or against the succession or the heirs of the deceased spouse.

The testimony of this witness shows that the wife did not enforce her judgment obtained against him in 1856, because he arranged with his creditors: and that she did not execute her judgment obtained in 1869 for the same reason. "Pecuniary embarrassment" seems to have been Levy's normal condition; and whenever his creditors undertook to press him, he interposed an effectual barrier against their attacks. A suit by his wife for separation of property and dissolution of the community; judgment for her paraphernal rights, with recognition of her legal mortgage from the date of the marriage, and execution in the hands of the sheriff, kept them at bay, and enabled him to arrange with them on his own terms.

If these parties had not been husband and wife, we should not hesitate to say that they had combined and colluded, since 1856, to cheat and defraud his creditors, and to declare all the contracts and judgments between them simulated and void. But the wife, in legal contem-

plation, and as the truth is usually, is but the instrument in the hands of her husband when she is a party to his fraudulent devices; and her actual rights can not be prejudiced by conduct which, in a person, *sui juris* could not be characterized otherwise than as fraudulent, and void as to creditors.

The record does not show that any testimony was offered in the suit in which the judgment of December 12, 1874, was rendered; and it was simply a transaction between the husband and wife, a consent suit and consent judgment. This is not material, since that judgment, if it had been rendered on sufficient proof, would not have concluded the creditors as to the reality or the amount of the wife's claims.

The *dation en paiement* purports to have been made in consideration, and in satisfaction in part of that judgment. The judgment might be without effect as to creditors, it certainly does not conclude them; but the *dation en paiement* might be valid, because its validity would not depend on the judgment, but on the reality of the claims on which the judgment purports to have been rendered.

The R. C. Code, article 2446, specially authorizes the transfer of property, by the husband to the wife, "even though not separated, when it has a legitimate cause, as the replacing of her dotal or other effects alienated." Rabassa v. Casteen, 5 An. 493.

The embarrassment of the husband is the sole ground on which the wife is authorized to demand a separation of property. The greater the embarrassment, the greater the danger to her rights, and the greater the necessity for the separation. Mere pecuniary embarrassment, which may be only temporary, is not so serious as actual insolvency; and neither the one nor the other is any obstacle to a transfer by the husband to the wife, in good faith, for the replacing of her money or property used or alienated by him. See Judice v. Neda, 8 An. 485, which interprets Lefebre v. Montilly, 1 An. 42.

The plaintiffs in this case attacked the *dation en paiement* on two grounds: 1: that the judgment and transfer under it were simulated, fraudulent, and void: 2: that the claims of the wife, if she ever had any, were paid and satisfied by the two judgments obtained in 1856, and 1869.

Two essentials are requisite for the validity of a *dation en paiement* by the husband to the wife: 1: That the husband should be really indebted to her: 2: That the fair value of the property given in payment should not exceed the amount actually due to her. It was the business of plaintiffs attacking the contract, to have charged, distinctly, the causes for which they demanded its nullity; and as there is no allegation, and no evidence tending to show, that the property transferred was worth or could have been sold for more than the amount at which

it was taken and received by the wife, it must be assumed that the valuation in the contract was fair.

The failure of the wife to enforce the judgment of 1856, did not pay or satisfy her claims against her husband: It simply made that judgment void; and left the parties in community, with the actual claims of the wife still existing. The judgment of 1869 did not dissolve the community, because it was not executed, but was, in fact abandoned. The community still existed; and the husband was still the debtor of the wife.

The husband had means, perhaps sufficient to have paid the wife in full, at the time the executions were issued in 1856, and 1869; but if his other creditors chose to relieve him of his pressing embarrassments by indulgence and by granting him terms, it would be a cruel law that would compel his wife, under pain of the forfeiture of her claims and rights, to proceed with her execution to sell him out, and thus deprive him of the means of pursuing his business.

The plaintiffs alleged the payment and satisfaction of the wife's claims; and they took upon themselves the burden of establishing this by proof. They have failed to offer any proof of payment; and the inquiry is, therefore, narrowed down to the question of the reality of the wife's claims.

The testimony taken on the trial shows a larger amount of indebtedness than that claimed in the suit of the wife in 1869. The witness testified with respect to the amount originally received by the husband; but the wife in her petition of December 11, 1874, admitted payment by her husband of $4467 69, on account of the original debt of $12,000, reducing that debt to $7532 30; and, in addition to this she claimed $900, for her half of property sold in January, 1867, received by him. In her suit in 1869, she stated that this amount was $800; and she fixed it at that in her affidavit of December 8, 1874. There is in the record proof that he received, and gave his receipt as tutor, for the proceeds of that sale, paid to him by the sheriff, $600, cash, and two notes of McVea and Kernan for $600 each, at one and two years. It is safe to assume that the statement that he received $800, on account of his wife's half, is not exaggerated; but it is not necessary for the purposes of this case to fix the exact amount. It suffices to show the actual indebtedness of the husband in an amount equal to the value of the property given to her in payment; and that was shown by the proofs in this case, and also in 1856, and 1869.

The value of the property, as accepted by Mrs. Levy, and credited on her judgment, was $6440: or $360 less than the amount due her, fixing it at $6800.

The *dation en paiement* did no more injury to the creditors than

would have been done by the sale of the property by the sheriff. The only difference would have been that the property would probably have sold for less than the $6440; and the additional costs and expenses would have diminished the proceeds to be applied to her debt. There could be no good reason why the husband might not validly do, by voluntary contract, that which the law would have compelled him to do by judgment and execution. The claims of the wife had privilege and priority over the debt of plaintiffs; and, though the conduct of Levy would authorize and require the closest scrutiny of his dealing with his wife, the rights of her succession and heirs should not be prejudiced by his frauds actual or intended.

The judgment appealed from is therefore affirmed with costs.

No. 6992.

SUCCESSION OF JACOB HOOVER ET AL. VS. Z. YORK AND E. J. HOOVER, EXECUTORS. A. G. OBER, INTERVENOR.

The parish court has exclusive jurisdiction of suits to annul wills, and set aside the probates of the same.

The nullity of proceedings for the probate of a will, and of the orders in execution of it must be sued for in the court which decreed the probate, and made the orders.

If different causes of action be alleged in a suit brought in a probate court, of some of which causes the court has jurisdiction, and of some, not, it should take cognizance of the former causes and reject the latter.

Where a court has once acquired jurisdiction of a suit, that jurisdiction will be maintained. It can not be impaired by a claim in reconvention, or intervention, of which the court has not original jurisdiction.

A demand in intervention must be before the court in which the main action lies, and must follow that jurisdiction when it is really incidental and collateral to the main suit.

One whose title to lands (worth over $500) depends on the validity of a certain will, may intervene in a suit brought in the parish court to annul the will, in order to set up, and vindicate his title, and the intervenor's title being thus put at issue, the plaintiff may contest it to show that the former had no right to intervene. But no inquiry into the validity or enforcement of mortgage claims on such lands, set up by the plaintiffs, will be allowed.

A parish court which is without jurisdiction of a suit brought before it, has no authority to issue an order to transfer the suit to the district court. It has only power to dismiss the suit.

APPEAL from the Parish Court of Concordia. *Hough*, J., acting for parish judge, recused.

George S. Sawyer for plaintiff and appellant.

O. Mayo for intervenor and appellee.

The opinion of the court was delivered by

EGAN, J. This peripatetic suit appears to be as vexed and unhappy

as those spirits of the ancients which appeared on the banks of the mythical river Styx without the obolus. According to the representations of counsel it was originally instituted in the parish court, removed thence to the district court, twice to the Circuit Court of the United States, and each time remanded to the State court; dismissed on exception from the district court, and again brought up for consideration in the parish court from which it now comes on appeal to us. It was originally instituted by the plaintiffs, claiming to be heirs of Jacob Hoover, deceased, against the defendants, executors and instituted heirs, under a will made by him, in order to set aside and annul the will and the probate thereof, and to have petitioners declared entitled to the succession and property as heirs at law. Ober intervened and joined the defendants in resisting the demands of plaintiffs, alleging that he was interested and had a right to do so by reason of his being the purchaser of valuable real property, the title to which depended upon the maintenance of the validity of the will. The plaintiffs answered the intervention at great length, attacking the title of Ober on various grounds, and asking to be allowed to enforce certain alleged mortgage rights as against him.

The parish judge being recused on account of personal interest, the district judge was called to preside in the parish court, whereupon Ober, the intervenor, moved and the court ordered, that so much of the plaintiffs' answer to the intervention as seeks to set aside the title of Ober to the lands purchased by him under the will of decedent and to enforce a mortgage on the same be stricken out and disregarded as not germain to this action and as being matter over which the parish court had no jurisdiction; and further ordered that the issues be confined to the nullity of the will and the probate thereof and the question of "*res adjudicata*" raised in the answer of the defendants and the petition of intervention. The plaintiffs' counsel filed an exception to the authority of the district judge to take cognizance of this case in the parish court and prayed that it be transferred and assigned to the docket of the district court, there to be tried by jury, a right to which is claimed by the plaintiffs. The judge overruled the exception and motion to transfer, and it is from this ruling and that to strike out and disregard portions of the answer to the intervention that the present appeal is taken. The plaintiffs' counsel has favored us with an elaborate argument and reference to authorities, most of which we consider it unnecessary to review.

This suit proper was simply to annul a will and the probate of a will and to have certain persons plaintiff declared heirs and entitled to take as such. This was purely a probate proceeding and cognizable alone by the parish court in which the succession was opened. It was a matter incidental to the opening and settlement of the succession. Con-

stitution, article 87; Code Practice, article 928 to 943; same, 1000 to 1003; same, 921 to 925. Courts of probate have no jurisdiction except in the cases determined by the law. C. P. 925. The nullity of the proceedings for the probate of the will and of orders in execution of it must be sued for in the court which rendered them. C. P. 608; 15 An. 81. This proposition however is so rudimental that citation of authority is unnecessary. If different causes of action be alleged, of some of which the probate court has jurisdiction, and of others not, it should take cognizance of the former and reject the latter. Taylor vs. Hollander, 4 N. S. 537; Ager vs. Dunning, 7 N. S. 660.

A claim in reconvention can not alter the rule or affect the jurisdiction of the main action. Flood vs. Shamburgh, 3 N. S. 622; Duncan vs. Duncan, 14 L. 556. When the jurisdiction of the court where the suit is brought has once attached it will be maintained. Bayne vs. Fox and Fox vs. Bayne, 5 R. 2. The demand in intervention must be before the same court in which the original action is brought, and must follow that jurisdiction (C. P. 392) which can not be affected or objected to on account of the intervention. See Kenner vs. Holliday, 19 L. 154. The intervention can not affect either the jurisdiction or authorize interference between the original parties or the pleading of exceptions to dismiss the action. 8 M. 55; 4 N. S. 488; 3 L. 183; 8 R. 123; 3 A. 222. The rights of the intervenor are limited to the protection of his own interest. 5 N. S. 501. If he have such interest he may intervene. C. P. 390. In the case at bar this is all that the intervenor has done, and for the protection of that interest he has joined in the defense, and in asking the rejection of the plaintiffs' demands. He has not asked the probate court as an original or independent matter to pass upon the title to real estate of value beyond its jurisdiction, but only alleges title in himself to lands conveyed by the will, the maintenance of the validity of which he alleges is essential to his title. The allegation of title to lands is merely incidental, to show interest in the pending controversy and consequently his right to intervene. For this purpose and to this extent the parish court had jurisdiction of the question of title as incidental to the main action to which the intervention was only incidental and subsidiary. C. P. 101. All judges possess the powers necessary for the exercise of their respective jurisdictions, though the same be not expressly given by law. C. P. 130. While therefore the probate or parish court could not directly pass upon the matter of title to lands above the value of five hundred dollars, having jurisdiction to annul its own decrees and in the matter of heirship and succession and the validity of the will when directly attacked, it was competent and had jurisdiction to take cognizance of the title so far as it affected the right to intervene and came in question collaterally. "*Quando lex aliquid concedit concedere*

videtur et id quod devenitur ad illud." See 8 N. S. 520; 5 R. 284; 8 R. 488; 3 A. 582. This was the extent and limit, however, of its jurisdiction as to the matter of title to the land, as to which or the assertion and enforcement of mortgage rights over it where the value, as in this case, appears to have been several thousands of dollars, the parties were necessarily remitted to the court of ordinary jurisdiction. The court below therefore did not err in refusing to take jurisdiction for such purposes, which were not incidental or collateral to the main action before it. We think, however, that so far as it was necessary to contest the right of Ober to intervene, in other words, his interest in the pending controversy, that the plaintiffs have a right to contest his title or the fact of his having any title to lands once the property of the succession but no farther, and for no other purpose. Under the adjudications quoted and the principles announced they should be allowed to do this, and while in the main the ruling of the judge *a quo* in regard to the answer was perfectly correct, it must be modified to this extent if it conflicts with this right of the plaintiffs. We think the parish court was the court of proper jurisdiction to hear and determine the real substantial controversy between the parties, and that it could and should pass upon all incidental questions necessary for such consideration, and to that extent only. If, however, it were without jurisdiction it could not even make an order transferring the cause to the district court, but could only dismiss it. Roman vs. Roman, 4 L. 203.

The case of De Lizardi vs. Gossett, Executor, 1 An. 138, is much relied on by the plaintiffs. One of the creditors of a partnership sued the executor of a deceased partner *in commendam* in the probate court of Orleans for an unpaid balance of capital promised to the firm of which there were other creditors. The plaintiffs were nonsuited for want of jurisdiction in the probate court to distribute the fund. The case was appealed, and meanwhile, under a change of constitution, the Second District Court of Orleans, having general jurisdiction, became the successor of the court of probates. On appeal, while admitting the want of jurisdiction in the probate court, this court, invoking the authority of article 21 of the Civil Code to proceed and decide according to equity, and assuming the silence of the law on the subject, reversed the judgment below and remanded the case to the Second District Court to take order for the distribution of the fund due by the succession among the partnership creditors.

It appears to us that the jurisdiction of this court being derived solely through an appeal from a court without jurisdiction of the case it could make no order except simply to review the action of the court below, which was solely on the question of jurisdiction, and that the judgment given on appeal involved *the assumption of original jurisdic-*

tion by this court. At all events, the case is without authority here, as the parish court still exists with undiminished and unchanged jurisdiction within which comes the case at bar; and as the law is not silent and does make provision for its disposition there is no room or place for the application of the principle of article 21 of the Civil Code, which we have never before known applied to the jurisdiction of a court.

The case of Prentice vs. Waters, 3 N. S. 522, was decided under the express provisions of a statute which took away the jurisdiction of the court where the suit originated and conferred it upon another, and the court said that though the legislature had not pointed out expressly the mode of transferring the record, the latter court having jurisdiction virtually possessed the means of exercising its jurisdiction, which must be by the record being sent to it. The appeal was from the rescission of an order to transfer the record to the court having jurisdiction. There is no similitude to the case at bar, and therefore the case quoted is without authority here. The case of Fairniquet vs. Perkins, 7 Howard 167, was of a transfer from the probate to the district court, and the Supreme Court of the United States said: "*It was a transfer of a litigation by consent* from a tribunal confessedly without authority to decide it to a tribunal in every respect competent to take cognizance of the subject matter, whose peculiar provision and duty it was to take cognizance of it. The exception resolves itself at the utmost into matter of form, which the parties were competent to waive, and which they did waive; for it is expressly stated upon the record that the removal of the cause from the court of probates to the district court was by the consent of all concerned." It can not be pretended that the forms of pleading may not be dispensed with by suitors. This case also originated under the system prevailing in Louisiana prior to the constitution of 1845. In the case at bar both of the essential conditions of that case are wanting: First, there is no consent, but on the contrary a refusal to consent to transfer; and, second, the court in which the suit was instituted has jurisdiction to hear and determine all the issues germain to it. The case of Gaines vs. Chew, 2 Howard 640, is against rather than in favor of the position of plaintiffs, as it holds after a recital of the articles of the Code of Practice that the court of probates in Louisiana had *exclusive jurisdiction* in the proof of wills; "and that where a will had once been admitted to probate, a claim that it had been revoked by a subsequent will, and the latter alone is operative, can not be made effectually, so as to set up title under the latter will, save in a court of probate." Of this case it may be also remarked that it originated under the system prevailing in Louisiana prior to the constitution of 1845.

The court below did not err in the present case in taking jurisdiction and refusing to transfer the case to the district court. Neither did it err

in its ruling in regard to the answer of the plaintiffs to the intervention so far as by that ruling it refused to hear or entertain at the instance of plaintiff any inquiry into or enforcement of mortgages upon the land claimed by the intervenor, or into the matter of title at all, further than as incidental to the question of interest of the intervenor in the plaintiff's demands and the validity of the will and its probate. In other words, our opinion is that in answer to the allegation of title by the intervenor the plaintiff should be allowed to aver and show any *absolute nullity* in the title set up or the absence of all color of title for the purpose of contesting his right to intervene—his interest in the cause, but no further, and that the plaintiffs must be remitted to a direct action in a court of ordinary jurisdiction to contest or attack the title of the intervenors to any greater extent or on other grounds. Indeed, they have themselves no interest in this suit to do more, for if, as alleged by themselves, the title of the interveriors is derived through the instituted heirs, and it shall be deemed that they had themselves no title because of the nullity of will, their only muniment, it will necessarily follow that the title of the intervenors will fall with that of those from whom they have derived it, unless protected by prescription.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so far modified as to permit the plaintiffs to contest the title of the intervenor only to the extent and for the purpose of disproving any interest in him in accordance with the principles of this opinion and no further, and that in all other respects it is affirmed, and that appellees pay costs of appeal.

On Application for Rehearing.

This application affects only the question of costs of appeal, with which the appellees were charged by our decree, as is now urged by counsel erroneously. The brief of counsel and the rapid succession in the transcript of the entries in regard to the ruling of the judge *a quo* on the motion to strike out part of plaintiff's answer to the intervention and refusing to transfer the case to the district court together with the intimate relation of the two orders led us to consider the appeal applicable to both, and hence as a consequence of the modification of the former to charge the appellees with the costs.

We had some hesitation at the time in even considering an appeal from the motion to strike out, and only did so at all owing to the relation to and dependence upon each other of the two orders complained of. Intervenor's counsel however insists, and we think correctly, that the appeal relates really only to the refusal to transfer the case.

A rehearing is therefore granted to correct our decree in the particular mentioned.

ON REHEARING.

It is ordered and adjudged that our former decree be so amended as simply to affirm the order appealed from refusing to transfer the cause, and that appellants pay costs of appeal.

No. 5441.

MRS. EMILY L. HART ET AL. VS. ST. CHARLES STREET RAILROAD COMPANY.

When the charter of a corporation provides that in case any subsequent increase of the capital of the concern is authorized, notice of sixty days shall be given of such increase, within which time the stockholders shall have the privilege of taking additional shares, proportioned to the amount of their stock, and that any shares, not taken at the expiration of that time, may be disposed of by the directors for the benefit of the association,

Held—That in order to entitle a stockholder to demand said additional shares, it must appear that he applied for the shares, and paid over or tendered the money, necessary to purchase the same, before the expiration of the sixty days: or before the expiration of any additional delay, which may have been given by the corporation to enable the stockholders to exercise said privilege.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier*, J.

Finney & Miller, *John H. New*, and *E. E. Moïse* for plaintiffs and appellants.

Breaux, Fenner & Hall for defendants and appellees.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the rehearing by MANNING, C. J.

SPENCER, J. Plaintiffs owned, as surviving widow and heirs of Henry Hart, who was one of the original corporators of the defendant railroad, 818 shares of its capital stock.

The eighth article of the charter of said company is as follows:

"These articles of association may be modified or altered, and the capital stock may be increased to any sum not exceeding two millions of dollars, in the manner provided by law, with the consent of two thirds in amount of all the stockholders, obtained in general meeting convened after thirty days' notice. Whenever any increase of capital shall be duly authorized, sixty days' notice shall be given in two newspapers published in the city of New Orleans, within which time stockholders shall have the privilege of taking additional shares in proportion to the amount of their stock, and any shares not taken at the expiration of that time may be disposed of by the directors, for the benefit of the association, but at not less than par value."

In accordance with said article the capital stock of the company was increased on August 5, 1873, $100,000, in shares of $50 each.

Notice to the stockholders was duly published for sixty days, to the end that they might exercise their "privilege of taking additional shares in proportion to the amount of their stock."

On September 29, 1873, the board of directors passed a resolution "that the time for *subscription* to the stock authorized to be issued," etc., "be extended thirty days, and interest at the rate of eight per cent per annum be added after October 4, 1873." Notice of this extension was duly published by the secretary, who substituted the words "payment for," in lieu of the words "subscription to" the stock.

On November 3, 1873, the board of directors again passed a resolution extending "the time for the *subscription* to the stock" until November 15, 1873.

Notice of this extension was also published by the secretary, who again substituted "payment" in place of "subscription."

It is admitted on all hands that no particular form or manner was prescribed for "taking" or "subscribing to" this stock by the original stockholders. Being subscribers to the original stock, and under the charter entitled to the privilege of "taking" the new stock in proportion to the stock already held by them, no subscription book would seem to have been necessary, or was used.

Plaintiffs claim that, as owners of the 818 shares of the original stock, they were entitled, under the charter, to take 163 shares of this new stock, at par. That they had, in due time, signified their intention to exercise their privilege to do so, and had accordingly tendered the amount necessary to pay for their said shares. That the president and directors unlawfully refuse to issue and deliver them the certificates for said stock, or to recognize their right thereto.

The defendants answer in substance, that the privilege claimed by plaintiffs is, by the charter, expressly limited to sixty days from date of publication of notice to the stockholders of the increase of stock; that the stock can not be taken without payment being made for the same; that plaintiffs failed to take the stock covered by their privilege within the time limited, or any authorized extension thereof, but, on the contrary, admitted their inability to take and pay for the same within said period, and only made a tender of the money after said delay, and all extensions thereof, had expired; that thereby their said privilege was forfeited, and the stock to which plaintiffs would have been entitled became the property of the association.

There was judgment for defendant, and plaintiffs appeal.

We find the facts to be as follows: 359 shares of this new stock had never been issued or disposed of by the company. On the fourteenth

November, 1873, the day before expiration of the last extension, the plaintiff, Mrs. Hart, representing herself and children, went to the president and notified him. *verbally*, at the office of the company, that she claimed her privilege of taking 163 shares of the new stock, and would be prepared to pay for it within two or three days. She was told that she had delayed too long, and given to understand that she could not "take" the stock unless it was paid for at once, although no such requirement was found in said resolutions; and although, so far as we can see, the board of directors had never, by any formal action, imposed such restriction upon the right of subscription. She persisted, and on the twenty-second November made a formal tender of the money, and demand for the stock, which was refused. Thereupon she brought this suit.

There is and can be no dispute that plaintiffs had the privilege, within sixty days after publication of notice, of "taking" 163 shares of this stock, at par. We think it also clear that under the charter the board of directors had the power to extend the time for "taking" this stock; and that the board did, in point of fact, *extend that time to November* 15, 1873, by passing resolutions extending the time "for subscription" thereto. We think, also, that the words "taking stock," and "subscription to stock," in their ordinary use and acceptation, are synonymous, and mean practically the same thing. *The board of directors, in this case, manifestly so understood it*, for in their resolutions for extension they say the "*time for subscription*" is extended. Of course the secretary could not, by any authority he had, substitute "payment" for "subscription," unless they mean the same thing. We do not think that the usage or etymology of these words make them synonymous. We know that, in point of fact, in transactions of the nature of those we are considering, the "subscription to," "the taking of," the stock most generally, if not always, precedes any payments. The payment is *the consequence* of "the subscription," of "the taking." When we are told that a man has "subscribed to" or "taken" stock, we understand that he has agreed and bound himself to take and pay for it—not necessarily or *even usually* that he *has paid* for it. So that there remains to discuss the two questions: First, did the plaintiff's acts and declarations on the fourteenth November amount to a subscription, i. e., to an agreement on her part to take the stock, and if so, second, did she forfeit her subscription by failing to tender the money on or before the fifteenth November?

In our opinion the first of these questions must be answered in the affirmative, and the second in the negative. The legal status of affairs was this: The company, by its directors, had formally offered to its stockholders the privilege of "subscription" to its stock at par until

fifteenth November *without* specifying *any particular mode* of subscription, or fixing *any special conditions thereto*, except the payment of eight per cent interest from October 4. Plaintiff clearly had the right, up to November 15, "to subscribe," to accept this offer, so tendered. She did accept it verbally—no other way being prescribed—and thereby became bound by its terms; and she must be considered as having subscribed for 163 shares on the fourteenth November; and when we say she had the right *to subscribe* we do not mean that she had a right to require the delivery of the certificates of stock before payment. Here, we think, is the capital error in defendants' argument: it consists in *confounding the right to subscribe*, with *the right to delivery and possession of the stock*. Having subscribed, she could only be put in default by *a formal* tender and demand for payment. There is no pretense that such tender and demand were ever made. Hence the question as to whether she forfeited her rights by non-payment does not arise, since she was not put legally in default.

We conclude, therefore, that plaintiff's demand is well founded, and, therefore, that the judgment appealed from should be reversed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed and set aside; and it is now ordered and decreed than plaintiffs are entitled to 163 shares, of fifty dollars each, of the new and increased stock of the St. Charles Street Railroad Company, directed to be issued by resolution of the company, of date July 28, 1873, together with all dividends accrued thereon, and that said plaintiffs be decreed owners of said shares, and that said company issue to them certificates therefor, upon said plaintiffs paying to said company fifty dollars per share for said stock, with eight per cent interest from October 4, 1873. It is further ordered that defendants pay costs of both courts.

CONCURRING OPINION.

MARR, J. In my opinion, by the terms of the charter of the defendant company, article eight, the stockholders had the right in preference to all other persons, during the prescribed delay, to take shares in the increased stock, in proportion to the shares of original stock owned by them respectively: and, as no new subscription or other special formality was required for the taking of such new shares, the declaration by a stockholder to the representatives of the corporation within the prescribed delay of his intention to avail himself of this right and privilege would constitute a taking of the designated number of shares in the new stock, an acceptance by the stockholder of the benefit, the offer made by the corporation to each stockholder, as required by the charter,

which would authorize the corporation to treat and deal with him as a stockholder, to the extent of the new shares as well as the old shares, and would compel the stockholder to pay the par value.

In the several resolutions of the Board of Directors the word "payment" does not occur; and the secretary had no power to bind the stockholders by using the expression "the time for the *payment* for the stock," instead of the words "*taking* additional shares," as used in article eight of the charter; or those used by the board of directors, "the time for the *subscription* to the stock."

As I understand the testimony the stockholders who availed themselves of this right to take the additional shares did not, in fact, make any new subscription. They paid for the shares, and certificates were delivered to them. I do not find in the proceedings of the Board of Directors any thing to fix the terms of payment for the new shares. I do find, however, that interest, at eight per cent was charged on payments subsequent to the fourth of October, 1873.

The fourth article of the charter provides, with respect to the original stock, that "thirty-five *per cent* of each subscription shall be payable at the time of signing the articles; and the remainder shall be paid at the time and in the manner directed by the Board of Directors: *Provided*, that not more than ten *per cent* of said subscription shall be called for at any one time, and not oftener than once within any thirty days."

If it be conceded that when the increase of the capital was authorized the directors were empowered to prescribe terms and times of payment for the new shares, different from those fixed in the fourth article of the charter, the intention to do this, and the carrying that intention into effect, must be manifested by the official, unequivocal, positive action of the Board; and that when the Board of Directors failed to fix the time, it was not competent for the secretary to do so.

In the absence of official action by the Board, prescribing different terms, making a new law applicable to the new shares, they would fall under the dominion of the organic law, article four, and would be subject to the restrictions which it imposes. I do not see how the mere increase of the capital could subject the stockholders, with respect to the new stock, to conditions not imposed by the charter or by-laws; or by some authoritative order of the Board of Directors; or could abrogate the law of the corporation limiting the power of the Board to calls of ten *per cent*, to be made not oftener than once in any thirty days.

I think, also, that this fourth article controls the action of the Board with respect to the additional capital in another particular. It provides that if any subscriber shall fail to pay punctually his installments as they mature and fall due, interest shall be charged at eight *per cent;*

and if he fails to pay within thirty days after the specified time of payment the Board of Directors may cause his shares to be sold, at auction or otherwise, after ten days notice by advertisement.

Mrs. Hart actually tendered, on the twenty-second November, in money, the whole amount of the par value of the additional shares to which she was entitled. This was, of course, a waiver by her of any right which she might have claimed under article four to pay in installments, but after having demanded the right to take the additional shares, the corporation had no right to deny her the privilege conferred upon her by the charter, article eight, without, at least, putting her in default, by a tender of the certificates, and demand of payment. It seems to me the Board could have proceeded, legally, only by a sale, for her account and at her risk, of the new shares to which she was entitled, as provided in the fourth article of the charter.

The cases cited from High and 11 Annual are applicable to cases of original subscriptions to stock. There can be no doubt that the taking of stock must be in such form as to bind both parties, the corporation to deliver the shares, the taker of the stock to pay the par value. I understand the eighth article of the charter to mean that, whenever the corporation shall exercise its right to increase the capital, the corporation, by the terms of the charter, makes in its aggregate capacity an offer to each stockholder, to take, during a certain prescribed delay, such number of shares in the increased capital as shall correspond with the number of shares of the original stock which he already owns: and that when a stockholder declares his intention to avail himself of this right, this is an acceptance by him of the offer, which binds him and binds the corporation.

Whenever the corporation, pursuant to its organic law, increases its capital, without changing that law with respect to the increase, the new stock falls under the dominion of the organic law, and is not distinguishable, and is not distinct from the original stock.

The case of the Vicksburg, Shreveport, and Texas Railroad Company vs. the Parish of Ouachita, 11 An. 649, is not, in my opinion, applicable to this case. The police jury of Ouachita, by ordinance of twenty-seventh June, 1853, agreed to subscribe for a certain number of shares in the V. S. and T. R. R. Co. and levied a tax to make the necessary payments. The railroad company sued the parish to compel the payment of the installments due on the number of shares mentioned in the ordinance.

It appeared in evidence that the president of the police jury notified the president of the railroad company that this ordinance had not been ratified by the vote of the majority of the voters whose property was to be taxed to meet the installments: that this ordinance had been

suspended by a subsequent ordinance of the police jury: that the ordinance of twenty-seventh June, 1873, had not been passed by a majority of all the members elect of the police jury, as required by the act of 1847, page eighty-two, section 5; and that no subscription, or signing, by the police jury had been made, as required by the express provisions of the charter of the railroad company. Of course, as the court decided, "the assurance of the tax-payers, evidenced by a vote, was a *sine qua non*. The inevitable conclusion was that there was no contract binding the parish to the validity of the subscription, by the terms of the statute."

The difference between that case and this is too plain to require exposition. In that case there was no contract binding both parties: In this there was: In that case the subscription by signing, on lists in the hands of commissioner, or upon stock books of the company, was indispensable; while in this case, as we have endeavored to show, no new subscription was made or required.

I concur in the opinion of Mr. Justice Spencer, and in the decree as pronounced by him.

DISSENTING OPINION.

EGAN, J. In my opinion, the original stockholders who desired to subscribe for additional stock under the resolution of the board, stood, so far as the *mode* or *manner* of *subscription* is concerned, on precisely the same footing as any other person proposing or desiring to subscribe, the only difference in their favor being that original stockholders had an absolute right to subscribe to shares of the new stock in proportion to that already held by them *within a certain time*, and that other persons had not that absolute right, but, however desirous to subscribe, might have been denied the privilege of doing so by the officers of the corporation at any time that they might have chosen to withdraw the stock from sale, or indeed not to offer it at all.

If what was done and said by the plaintiff amounted to a subscription on her part, the same or similar acts and declarations on the part of another who had never been a stockholder, would have had the same legal effect so far as relates to the mere manner of making a subscription. In other words, if the stock was offered for sale generally to all persons, it would have required nothing more on their part to make a good and binding contract than was required of plaintiff, to whom, and to others in like situation, it was offered within the sixty days. This proposition will hardly be questioned, and can not be successfully denied. Nothing which would not constitute a valid contract or obliga-

tion on the part of another, could constitute one as to the plaintiff. The mere expression of her willingness or desire to take stock, or to make a further subscription, even if unaccompanied by any conditions, can not be considered as amounting to a subscription in any proper or legal sense of the term. That Mrs. Hart so understood at the time, is manifest from her asking further time to raise the money, that she might make her subscription, or take stock, after the time fixed by the charter, and the resolution of the board of directors. That such was the view taken by both parties at the time is evident, both by her application for the extension of time, and the refusal of the president to grant it.

Indeed, by her own showing, Mrs. Hart was *without power* to take the stock at the time, and had to await the action of a family meeting, and the order of the judge to enable her to do so. Even the power to subscribe was not conferred till after the expiration of the time within which the right was to be exercised. There was ample time to obtain this authority sooner, and within the sixty days. If it was not done, it was certainly not through the fault or neglect of the defendant. Suppose it had never been obtained at all, and that from decline in value of stock, or for some other reason, Mrs. Hart had stopped short in her efforts to obtain the advice of the family meeting, and order of the judge, or that they had refused to give it, could the subscription have been enforced by the company? To this there can be but one answer—that it could not.

It is conceded by plaintiff's counsel, indeed by both counsel, that no specific mode of taking this new stock was prescribed, and that no custom or usage of this or of similar corporations has been shown in evidence. In the absence of either, we are remitted to the general principles of the law of obligations to interpret the acts and language of the parties to this alleged contract, and their legal effect—as was said in the case of the Vicksburg, Shreveport, and Texas R. R. Co. vs. the Parish of Ouachita, reported in 11 A. 649. "Giving full weight" to the acts and language of the plaintiff, Mrs. Hart, "they can not be considered as constituting *per se* a subscription to the capital stock" of the defendant. It was at most only a proposition to contract, and upon terms different from those fixed in the charter, and the resolution of the board; but, in my opinion, it did not amount to so much, but only to an expression of desire to subscribe.

Redfield, on the Law of Railways—vol. 1, p. 128, sec. 37, par. 1, fourth edition—says: "The obligation resting upon the vendor of railway stock is to have, at the time specified in the contract for delivery, a good title to the requisite number of shares, and to manifest his readiness to convey;" and in par. 2 of same section: "The corresponding

obligations upon the vendee are, readiness to receive the proper conveyance (for which read stock) at the specified *time* and *place*, and to pay the price;" and, in note 4 of p. 131, cites Green vs. Murray, 6 Jur. 728, to the effect that "if stock is to be delivered on demand, it is necessary to show an actual request to deliver, in order to sustain an action for non-delivery." It may be conceded that a perfectly valid subscription may be made without payment at the time, provided any other mode of subscription is provided for or practiced; and in such case the terms subscription and payment would be by no means synonymous, and the latter might not be a prerequisite to the former. The plaintiffs' case assumes the obligation on their part to pay the par value of the stock in money. Our own Civil Code provides, article 2050, that "when no time is fixed by the parties for the performance of the obligation, it may be executed immediately, unless from the nature of the act a time either certain or uncertain must be implied. Thus, an obligation to pay money, without any stipulation for time, may be enforced at the will of the obligor." In this instance no other mode of subscription, or taking of stock, than by paying money for it existed, and the will of the officers, through whom alone the corporation could and did act, was not only made manifest that the price must be at once paid, but, in my opinion, the president had no power to comply with the plaintiff's request, and grant her further time after the lapse of sixty days. To do so he would have assumed to confer a right upon her upon terms and at a time different from that fixed in the charter and the resolution of the board. I think the interpretation of that resolution given by the secretary in his advertisement was the proper and legal one, and it is evident that both the president and the plaintiff so thought at the time.

"A proposition does not become an agreement till the party to whom it is made accepts it; and it must be accepted precisely as made." McDonough vs. Winchester, 1 L. 188. "The acceptance, to form a contract, must be in all things conformable to the offer; any condition or limitation contained in the acceptance, of that which formed the matter of the offer, gives him who makes the offer the right to withdraw it." C. C. 1805.

"The contract consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed." C. C. 1800. "This assent must be unqualified." C. C. 1801. "The will of both parties must unite on the same point." C. C. art. 1798. "Any modification or change of the proposition is considered as a new offer." C. C. 1806. "A consent to give any thing else, although of greater value than that contained in the offer, *or to give the same or a larger sum at a different time of payment, does not imply an assent to the offer, and there is, in that case, no obligation.*" C. C. 1808. "A subscrip-

tion for shares of stock is nothing more than a purchase or sale of stock, and the seller is not bound to make a delivery of the thing if the buyer does not pay the price, and the seller has not granted him any time for the payment." C. C. 2487. "In commutation contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default must *at the time* and place expressed in or implied by the agreement offer or perform that which, on his part, was to be performed, or the other party will not be legally put in default." C. C. 1913. "And though the contract be not commutative, or if commutative, the reciprocal obligations are not to be performed at the same time, yet the party wishing to put the other in default must be himself ready, and must offer to receive performance at the time and place stipulated in the contract, and he can not avail himself of any demand, or offer, at any other time or place." C. C. 1914. "An offer afterward comes too late." 19 A. 84; 20 A 505; same 291. "He must show both his readiness and ability to comply with his own obligation." 15 A. 675. The case cited from 11 A. of the Railroad Company vs. the Parish of Ouachita was a much stronger one than the plaintiffs'. There the police jury of Ouachita had, in pursuance of an act of the Legislature conferring the power, passed an ordinance which had been submitted to and ratified by the qualified voters providing for a subscription to 6000 shares of the stock of the railroad company, which, by a formal resolution of its directory, had accepted the ordinance as a subscription of stock, and sought to enforce it as such, and yet the court said, considering it as an ordinance legally adopted: "We can not consider its adoption as constituting *per se* a subscription to the capital stock of the company." The same principle is recognized in High's Ex. Legal Remedies, sec. 390, and p. 275, where it is announced in the text, and several decisions of other States quoted in support of the position, that a mere vote of municipal electors authorizing subscription to a railroad corporation, without the actual subscription by the officers of the corporation, is insufficient, and that mandamus will not lie in aid of the railroad to compel the officers to make subscription. The writer says the mere vote of the people authorizing subscription does not of itself constitute a contract with the railway; nor is it a proposition which can ripen into a contract upon the performance by the railroad of the conditions annexed to the vote; and "until the money is actually raised and the stock taken" it is no contract. If that be so on the one hand, is not the converse of the proposition equally true, and could the railroad company be compelled to issue the stock? To this there can be but one answer, in the negative. This shows that something more is required to constitute a subscription than a mere expression of willingness or purpose to make it; and it

would seem that even a mutual consent is insufficient, which was wanting in the case at bar, as those alone through whom the defendant company could speak gave no consent. I venture the assertion that no subscription or stock was ever before successfully claimed on so slender a basis, and certainly that no such mode of subscribing or taking stock was ever practiced with or by any corporation.

For the foregoing reasons I dissent from the conclusions of a majority of the court.

DEBLANC, J. I concur in the dissenting opinion of Mr. Justice Egan.

ON REHEARING.

MANNING, C. J. Whenever any increase of the capital of the defendant Company was authorized, notice of sixty days must be given, within which time, stockholders had the privilege of taking additional shares, proportioned to the amount of their stock. Any shares, not taken at the expiration of that time, might be disposed of by the directors for the benefit of the association.

The increase of the capital stock was authorized August 5, 1873, and notice was given of it. The time, within which the stockholders had the privilege of taking additional shares, expired on October 4th. A few days before that date, the Directors by resolution extended the time thirty days, i. e. to November 3d.

During this period of ninety days, the plaintiff neither took, subscribed, nor indicated a willingness, desire, or intention to take or subscribe the additional stock.

On Nov. 3d, the directors again extended the time to the 15th. of that month. On the 14th., the plaintiff went to the office of the Company, and verbally notified its President that she claimed her privilege of taking the additional shares of stock, and that she *would be* prepared to pay for them in two or three days. She was told that payment in two or three days would not answer—that the last extension of time expired on the morrow, and unless payment was made within that time, she could not have the additional stock. She made no payment, and tendered none then. On the 22d of that month she made a formal tender of the money, necessary to pay for her shares.

I think she was too late, and I use the singular pronoun, because the change of my opinion changes our decree. I do not base this upon any supposed or real identity of meaning of the words, 'take' and 'subscribe to', when used in reference to such a matter as this, nor upon the idea that either of these words means, or is synonymous with, 'pay for.' Neither do I attach any importance to the use by the Secretary of

terms, different from those appearing in the resolution of the Board of Directors. He could not change the action of the Board by adopting phraseology, not authorized by it.

Throwing aside verbal criticism, and inquiring solely what the parties must have understood by the articles of association, by the resolutions of the Board providing for an increase of stock, and for the time and manner in which the privilege of taking additional stock should be exercised, we think the attempt of the plaintiff to avail herself of this privilege was properly frustrated.

Why should the Directory have extended the time beyond the sixty days for taking or subscribing for the stock, if it was only designed to give parties an additional thirty days to say whether they would take it? Why should parties need additional time to say whether they wanted additional stock, if saying was the only thing to be done. The stock had become valuable. The original subscribers had carefully guarded their right to additional stock, proportioned to their original subscriptions, if an increase should ever be authorized. It was secured to them as a privilege. Each one would presumably desire to avail himself of this privilege, but every one might not be prepared to pay for the stock at once. The sixty days was given, and must have been given, not as a period of deliberation for each one to determine whether he would avail himself of this privilege, but as a period of preparation so that he could avail himself of it.

So too of the extension of thirty days beyond the time first accorded, and then, in order to afford another and last opportunity, a further extension of fifteen days was granted—evidently for the purpose of enabling parties to do something else, and something more, than merely declaring that they would take the stock, and pay for it when the condition of their finances permitted. It required no delay, and no extension beyond the sixty days fixed by the articles as the time of notice, to enable parties to say that.

It was not until the last day of the last extension that the plaintiff verbally notified the Company of her intention to take the additional stock, and when expressly informed then that she must pay within the time of the last and third extension, made no effort to comply with that just requirement. It was not until seven days after the expiration of the last extension that a formal tender was made of the money. Her rights were then lost. Therefore

It is ordered and adjudged that our former decree is annulled and set aside, and that the judgment of the lower court is affirmed with costs.

SPENCER, J. I dissent for the reasons stated in the original opinion.

MARR, J. I adhere to the opinion rendered in former hearing.

EGAN, J. I adhere to the views of this case presented in the dissenting opinion prepared by me when the case was first before us. That opinion was, however, prepared without having the record before me at the time, and I was thus led into a possible error of fact which does not affect the principles of the opinion, but which, while it strengthens the view of the case I then took, I still prefer to notice. I refer to the fact that instead of the terms of subscription being certainly as they would ordinarily be in law, cash, in the absence of mention of a time being given for payment, subscribers for the new stock were required to pay eight per cent interest after the expiration of the sixty days given by the terms of the charter. This either means, and I still entertain that view, cash, with the addition of interest calculated from that time to the time of taking the stock, or, at most, a credit of sixty days more upon condition of paying eight per cent interest on the amount. Either view would exclude all right in the plaintiff, who had assumed no obligation capable of being enforced in law to pay the eight per cent conventional interest of which nothing but written evidence is receivable under our law, C. C. art. 2924, and who therefore had no conveying right to the stock.

I concur in the decree against the plaintiffs' rights and in favor of defendants.

No. 5973.

ELIAS GEORGE vs. B. F. TAYLOR.

Where a defendant who is enjoined from collecting the fees of an office, bonds out of the injunction, the surety on the release bond will be bound for the whole amount of the judgment rendered in favor of the plaintiff on account of said fees, unless there be an agreement between the plaintiff and the surety lessening the surety's liability.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Kemp*, J.

H. H. Bryan and *E. F. Russell* for plaintiff and appellee.

McEnery, Ellis & Ellis for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 16th of March, 1870, Elias George was appointed as the Recorder of the parish of Tangipahoa. One Alpheus G. Tucker—the then incumbent—refused to yield and retained that office for ten months after plaintiff's appointment. It was only after the rendition of a judgment declaring Tucker an intruder, that George was inducted into said office.

Pending the intrusion suit, Tucker was enjoined from collecting the fees of the disputed office, and released that injunction on a bond subscribed by him, and by B. F. Taylor and others, as his sureties.

After he had filed his suit to recover the office of Recorder of mortgages, plaintiff—by a supplemental and amended petition—claimed,

from Tucker, sixteen hundred dollars, for fees alleged to have been collected by him during his intrusion, and for damages averred to have been caused by said intrusion. That demand was partly allowed: George obtained judgment against Tucker for one thousand and fifty dollars. Taylor—the defendant in this case—appealed from said judgment, which was affirmed by this court.

Is Taylor's liability as a surety on the release bond fixed by that decree and the fruitless attempt to execute it against Tucker? It would, undoubtedly, have been fixed by that decree, were it not that—during the pendency of the appeal taken by Taylor and of the present suit, the parties—through their attorneys—entered into an agreement, in and by which it was stipulated that—if the judgment appealed from by Taylor were decided against him, "*he would pay such amount of damages as said George may prove in this case.*" These are the very words of that agreement.

Taylor's appeal was decided against him; this suit—which had been suspended during the pendency of the appeal—was proceeded in, and a judgment of one thousand dollars rendered against Taylor, as the surety of Tucker. From that judgment—as from the other—he has appealed, and prays its reversal on several grounds, most of which have been passed upon and finally decided on the trial of his first appeal.

For one reason, we are constrained to remand this cause: the judgment of the lower court, which could have been obtained and based on positive proof, on a detailed statement of the acts passed, of the work done by Tucker during his intrusion, or by a production of said acts and work, and by its appreciation under the fee bill, was based on exclusively the declarations of witnesses as to what the office had brought before and since the intrusion, on Tucker's extra judicial and unsworn admission that said office was worth one hundred dollars per month, on uncertain opinions and vague estimates, to the introduction of which defendant objected, on the ground that Tucker's admission could not bind him, and that said opinions and estimates did not constitute the best evidence of the official work done and of the amount of fees received by Tucker.

Though that best evidence was accessible to, within the reach and in possession of plaintiff, defendant's objection was overruled, and he excepted. His exception was well taken, and—*for this and no other reason*—he is entitled to a new trial of this controversy.

It is—therefore—ordered, adjudged and decreed that the judgment of the lower court be, and it is hereby annulled, avoided and reversed, and this case remanded to the lower court to be proceeded in according to law and the views herein expressed; the costs of the appeal to be paid by plaintiff.

No. 6553.

M. M. ADA CALHOUN VS. MECHANICS' AND TRADERS' BANK.

A married woman will not be bound by her mortgage note executed by her authorized agent, when it appears that she was not authorized by the judge of her domicile to empower the agent to execute such a note, unless the holder of the note shows affirmatively that the consideration of the note inured to her separate benefit.

The agent of a widow, acting solely in virtue of a mandate executed by her while she was a married woman, can not bind her to any greater extent, as a widow, than he could have bound her as a married woman.

To maintain a proceeding *via executiva* against the property of a married woman, in virtue of a mortgage executed by her agent, either the act of the judge authorizing her to so empower the agent, or her ratification of the agent's act after she became a widow, or the fact that the debt inured to her separate benefit, must appear in evidence in the form of an authentic act, or of a judgment of some competent court.

The court can not, of its own motion, change the form of a proceeding from an executory, to an ordinary one. Such a change can not be made without the assent of the seizing creditor.

The executory proceeding may be arrested by injunction, and if, on being required, the defendant prove any of the facts set forth in article 742 of the Code of Practice, the order of seizure and sale will be revoked, and the plaintiff condemned to pay costs.

APPEAL from the Ninth Judicial District Court, parish of Grant. *Osborn*, J.

F. W. Baker and *W. S. Benedict* for plaintiff and appellee.

Singleton & Browne for defendant and appellant.

His Honor, FRANCIS A. MONROE, judge of the Third District Court for the parish of Orleans, called upon to supply the place of Chief Justice MANNING, recused, and to aid in determining the cause, pronounced the judgment and decree of the court.

MONROE, J. On the 27th of December, 1866, Mrs. Mary Smith Calhoun and her husband, Meredith Calhoun, appeared before the U. S. Consul in Paris, France, and executed an act of procuration by which they appointed their son, William S. Calhoun, their agent and attorney in fact, and authorized him to take charge of, and conduct, all business affairs pertaining to them in America, whether the same relate to real or personal property, or be of any other nature or kind whatsoever; further authorizing him "to sell, assign, and transfer any and all real estate, lands, tenements, and hereditaments, to them, or either of them belonging," and to mortgage or lease the same; "to make, execute, acknowledge, and deliver any contracts, agreements or covenants, and to sign, seal and deliver all conveyances, deeds, leases, mortgages or other instruments of writing necessary for the execution of the power" granted to him.

In 1869 Meredith Calhoun died in Paris, where he and his wife had

continued to reside, and, upon the 12th of May, 1870, Wm. S. Calhoun, the agent above mentioned, claiming to act under and by virtue of the power of attorney referred to, as the agent of his mother, executed three promissory notes of $5000 each, dated at New Orleans, May 12th, 1870, and made payable to his order as agent, upon November 1 and December 1, 1870, and January 1, 1871, respectively, which notes were indorsed by him, in conformity to their tenor, in blank, and were subsequently indorsed by one James N. Nevin.

In order to secure the payment of these notes, the said Wm. S. Calhoun, as agent, executed a mortgage upon four plantations in the parish of Grant, being a portion of Mrs. Calhoun's paraphernal estate; and known as the "Smithfield," "Farine," "Mirabeau," and "Meredith" plantations, respectively.

This act sets forth that said Wm. S. Calhoun appeared before P. C. Cuvellier, notary, in New Orleans, May 14, 1870, and declared:

"That he was the agent and attorney in fact of his father, Meredith Calhoun, who has since died, to wit: on or about the 14th of May, 1869, and as the attorney in fact of his mother, Mary Smith Calhoun, now the widow of said Meredith Calhoun, as will appear by an act of procuration from said Meredith Calhoun to said appearer, passed before me notary September 23, 1865, and by another act of procuration, executed jointly by said Meredith Calhoun and wife, at Paris, France, under date of the 27th of December, 1866, certified to by the Consul of the United States at Paris, aforesaid, and annexed to an act in this office, dated February, 4th, 1869.

"That said Mary Smith Taylor, widow of said late Meredith Calhoun, owns as her separate paraphernal property those certain plantations situated in the parish of Rapides aforesaid, hereinafter more fully described, the administration of which she has resumed and confided to the said appearer as her agent and attorney in fact. That for the purpose of working and successfully cultivating the said plantations during the current year, it has become necessary for said appearer in behalf of his said constituent to procure advances in money and supplies, which said advances James N. Nevin, merchant of this city, has consented to make to an amount not exceeding the total sum of $15,000."

Further proceeding, the act recites the delivery of the notes mentioned to the said Nevin, and purports to mortgage the four plantations belonging to Mrs. Calhoun in favor of any holder or holders of said notes "in order to secure the payment of said notes and all interest," etc., and also "any and all further advances which have been or may be made by said J. N. Nevin to said Mrs. Calhoun," etc.

In April, 1875, defendants herein obtained from the district court sitting for the parish of Grant an order for the seizure and sale of said

plantations, based upon the two notes, already described as maturing November 1, 1870, and January 1, 1871; and, in May, 1875, an injunction was issued from the same court, upon the application of the plaintiff herein, restraining the execution of said order.

It is this injunction which is now before the court.

Plaintiff in injunction alleges that Mrs. Mary Smith Calhoun died upon June 10th, 1871, and that petitioner and William Smith Calhoun are her sole children and heirs; and, that by notarial act of May 27th, 1873, petitioner acquired from said Wm. S. Calhoun all his right, title, and interest in and to the estate which forms the subject of this litigation.

In support of the application for injunction, various grounds are set forth which it is unnecessary to recapitulate at length. Those which are of immediate importance may be stated, in substance, as follows, to wit:

1. That the power of attorney under which Wm. S. Calhoun assumed to act was not executed in conformity to the laws of this State; is informal and insufficient; and did not authorize said Wm. S. Calhoun to execute said notes and mortgage, or, in any manner, to bind said Mrs. Calhoun or her property.

2. That said notes and mortgage were executed pursuant to a fraudulent conspiracy between Wm. S. Calhoun and James N. Nevin, the original holder of said notes, the object of which was to defraud the said Mrs. Calhoun, who received no consideration therefor.

For answer, defendants deny generally the allegations of the petition, and aver that the injunction was obtained for delay, and is but a repetition of previous attempts to obstruct the collection of their claim. They pray for its dissolution with damages.

As a preliminary to the consideration of the case thus presented there are certain matters, not disputed, which may be stated as facts. These are:

That the notes and mortgage upon which defendants are proceeding were not executed by Mrs. Calhoun in person.

That said notes and mortgage were executed by Wm. S. Calhoun, claiming to act as the agent of Mrs. Calhoun, under and by virtue of the power of attorney mentioned.

That said power of attorney was executed, as it purports to have been, by Mr. and Mrs. Calhoun, and that Mrs. Calhoun did not obtain the sanction of any Louisiana Judge in signing said act.

The pleadings, and the facts thus stated, present questions of law which may, and, in fact, must be determined without reference to issues which might arise upon a further investigation of the record. The first of these questions is as to the capacity of Mrs. Calhoun, counsel for

plaintiff claiming that the act of procuration under which the notes and mortgage held by defendant were executed, was not made in conformity to law, and did not confer the power claimed to have been exercised under it, for the reason that Mrs. Calhoun was legally incapacitated from either exercising or delegating such power.

It is manifest that Mrs. Calhoun could have delegated no greater power than she herself possessed. If, therefore, at the date of the procuration, she was without power to execute instruments having the effect claimed for the notes and mortgage executed in her name by William S. Calhoun, she clearly could not have delegated such authority to him.

The question then is, had she the power to execute such instruments.

To say that the provisions of law governing the rights and obligations of married women were enacted with reference to the husband is to utter a truism. The intention of such laws is doubtless, in part, to recognize the marital authority of the husband, and, in part, to protect the wife against the abuse of that authority. It can not be supposed that they were intended to deprive her of the use and enjoyment of her own property, and it may be said that they were not intended to prevent her using such property for the benefit of third persons, other than the husband.

Certain it is, however, that with reference to the power to contract, according to the textual provisions of our Code, the incapacity of married women is the rule, their capacity the exception.

C. C. 1782 provides that "All persons have the power to contract except those whose incapacity is specially declared by law. These are persons of insane mind, those who are interdicted, minors, and married women."

The general disqualification of married women could hardly be made more distinct or emphatic than by this language and classification, and it follows, as a necessary consequence, that whatever powers they may possess in this State, in regard to the formation of contracts, must proceed from special enacting statutes, susceptible of being construed with that just quoted. That there are such statutes can not be doubted; in fact, by the provisions of the Code itself, married women are specially authorized to do many things; but, in almost every instance the power thus conferred on them is guarded by provisions prescribing specifically the form and manner in which those things are to be done, and as if to close every possible avenue for misconstruction upon this point, C. C. 133 provides that "Every general authority, even though stipulated for in the marriage contract, is void, except so far as it respects the administration of the property of the wife."

For the purposes of the present case it suffices to say that prior to

1855 there was no special provision of the Code (of 1825) authorizing married women to borrow money or contract debts, and they were only held liable upon such contracts upon its being shown affirmatively that the consideration inured to their separate benefit. In the case of "Hellwig vs. West," 2 A. p. 1, it was said that they might be made liable for frauds committed by them, although, as the case was ultimately decided upon rehearing (2 A. p. 3) the opinion upon that point was unnecessary.

In fact, up to the time of the decision of the case of "Zuntz vs. Cornen," 10 A. 433, there is probably not one instance in which a married woman had been held liable for a debt upon her contract alone; the basis of the judgments in such cases being affirmative evidence that the consideration of the contract inured to the benefit of the married women who were sought to be made liable.

In the case referred to (Zuntz vs. Cornen) it was held that an authentic act of mortgage executed by a married woman, with the authorization of her husband, was sufficient to justify the issuance of an order of seizure and sale, and that such an order could not be arrested by an unsworn statement in a rule, that the notes to secure which the mortgage had been given were without consideration, the court considering that she should have proceeded by injunction.

Even in that case, however, it was distinctly stated that (to quote the language of Judge Spofford, concurring with Judge Ogden):

"Where an issue is properly made up between the parties, the burden of proving the affirmative, that the debt of the wife (particularly where it has been contracted conjointly with the husband) inured to her separate benefit, has been thrown upon the creditor."

This decision was rendered in 1855, and since the act passed during that year authorizing married women to contract debts, etc., is not referred to, it is more than probable that it had not been called to the attention of the court whilst the matter was under consideration. However that may be, the decision only goes to the extent of requiring an issue to be made properly (and the proceeding by injunction is indicated as the proper method of raising the issue), to throw the burden of proof upon the party seeking to hold a married woman liable upon an authentic act of mortgage.

By act number 200 of 1855, however, a method was provided by which married women were authorized to borrow money, contract debts, and mortgage their property, by contracts made under certain conditions, which contracts so made were constituted full proof as against such married women, and were made as binding in every respect as though made by *femmes soles*. In other words, the effect of that act, as since interpreted, was to relieve parties contracting with married women in accordance with its provisions from the necessity of offering any fur-

ther proof than the contract itself. See "Rice vs. Alexander," 15 A. p. 54; "Hardin vs. Wolf & Cerf," 29 A. 334.

The particular conditions prescribed for the contracts contemplated by the act referred to (and which is substantially embodied in arts. 126, 127, 128, of the Civil Code) are, that the wife shall obtain the authorization of the husband, and the sanction of the judge of the district or parish in which she may reside; such judge being required to examine her separate and apart from her husband, and in case he is satisfied that the money about to be borrowed, or the debt contracted, "is solely for her separate advantage, or for the advantage of her separate or dotal property," then he shall furnish her with a certificate to the effect that he has made such examination; which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage or other act which may be required for the security of the debt contracted, and shall be annexed to such act, and said act, executed in the manner thus prescribed, shall furnish full proof, etc.

Since the passage of this statute it may well be questioned whether the doctrine laid down in the case of "Zuntz vs. Cornen" can be sustained. One particular method is provided by law by which married women may create authentic proof against themselves, and, as to all other methods, they labor under the general disabilities already referred to. An act executed in any other way than that specified will not furnish full proof against them, and will not be as binding as though executed by a *femme sole;* it must, therefore, be supplemented by testimony *aliunde.*

This view of the matter seems to have been taken by the present court in the case of "Conrad vs. LeBlanc," 29 A. 125, when it was held:

"The courts have been uniform in not holding the wife liable without proof that the consideration inured to her separate benefit, no matter what the form of the contract, or who the holder, in the absence of the statutory authorization of the judge, originating with the act of 1855."

This language is directly applicable to the case at bar, since it is not claimed that Mrs. Calhoun obtained this "statutory authorization;" and the legal inference is that she had, therefore, no authority to execute instruments which would have the same effect as though they had been executed with this "statutory authorization;" and, being without this power herself, she could not have delegated it to Wm. S. Calhoun.

It is claimed, however, that the power of attorney under which Wm. S. Calhoun acted, although impotent for the purposes stated at the date of its execution, acquired the necessary vitality by reason of the death of Meredith Calhoun, which event, as we have seen, took place before

the execution of the notes and mortgage upon which defendant's proceeding is based.

The argument upon this point is that the death of the husband produced a change in the condition of the wife, who thereby became a *femme sole*, and that this circumstance *ipso facto* vested Wm. S. Calhoun with the power which the act of procuration held by him originally purported to convey.

This position is untenable.

It is true that the death of the husband did not divest the wife of any power which she possessed before his death, and that she thereby acquired the power of a *femme sole*. It does not appear from any thing in the record, however, that she exercised the powers thus acquired. The only powers which she appears to have exercised before the execution of the notes and mortgage upon which the defendants are proceeding, were those of a married woman subject to the limitations which have been considered. In the exercise of those powers she might safely have delegated authority to contract in her name, since the law protected her by limiting her liability upon contracts made by virtue of such authority to such as could be shown *aliunde* to have inured to her benefit. It by no means follows that she would have delegated such authority without this protection, or that such delegation is to be implied without action upon her part by the fortuitous removal of the cause which incapacitated her at the time the act of procuration was signed.

The object and intent of the law requiring an examination by and sanction of the judge was to counteract the influence of the husband. In the execution of the act of procuration in question, however, the wife had no such protection; she must, therefore, be supposed to have signed said act under her husband's influence, and acted, therefore, only to the extent of her capacity under such circumstances. She took no subsequent action prior to the execution of the notes and mortgage by Wm. S. Calhoun, and it is difficult to perceive how or where he acquired any more authority than was originally vested in him.

Beyond this, it may well be doubted whether the mere recital in the act of mortgage of the death of Meredith Calhoun afforded such proof of that fact as to justify any judicial action with reference to it. The power of attorney spoke for itself, and showed that it was executed by a married woman conjointly with her husband. The power claimed by the agent was, therefore, to be construed with reference to that fact, and not with reference to his own statement unauthorized by the power of attorney, that the husband had since died, and that he, the agent, had thereby acquired additional authority.

The most, then, that can be claimed for the notes and mortgage

held by defendants is that they have the effect accorded to such instruments by the decision in the case of "Zuntz vs. Cornen," already quoted, and, under that decision, when the issue is made, as it has been made in this case, the burden is upon the party claiming, to show by evidence *dehors* the contract, that the consideration inured to the benefit of the wife.

It will be remembered, however, that this is a proceeding, on the part of the defendants, *via executiva*. That they might have changed the form of their proceeding by their answer to the petition for injunction can not be doubted, but they have not done so. This court has, therefore, either to maintain the proceeding *via executiva*, or to perpetuate the injunction.

If the proceeding *via executiva* is maintained, in view of the issue made by the petition and affidavit for injunction, it must be maintained upon evidence *dehors* the note and mortgage upon which the order of seizure originally issued. It is not pretended that this evidence is in the form of an act importing confession of judgment, or of a judgment rendered by some tribunal other than that from which the order issued. It could not, therefore, be made the basis of a judgment in conformity to the prayer of defendant's petition, or of the answer to the injunction suit. 1 R. 407; 10 A. 275, 433.

The law authorizing executory proceedings, like other statutes providing extraordinary legal remedies, must be strictly construed, and can not be extended to cover this case. See C. P. 732, *et seq.*

1 Hen. Dig., Executory Process, I, number 1, and cases there cited.

Nor is this Court authorized, of its own motion, to change the form of the proceeding and render judgment *via ordinaria*, since no such judgment is prayed for.

In the case of "Chambliss vs. Atchison," 2 A. 488, it was held that:

"Proceedings *via executiva* can not be changed into an action *via ordinaria* without the assent of the seizing creditor." And in the case of "Tildon vs. Dees," 1 R. 407, the court said:

"We might, perhaps, have proceeded to consider the case on its merits under the prayer of the defendant for a judgment *via ordinaria* so far as the minor Ann Martha Dees is concerned, for Charlotte Dees claims nothing in her own right, but the record, from the contradictory statements we find in it relative to the number of heirs left by the deceased, does not enable us to determine the portion of the claim to which the minor would be entitled as one of the heirs."

The claim set up by defendant's counsel, that Mrs. Calhoun ratified the act of Wm. S. Calhoun in issuing the note and mortgage in question, upon her return from Europe in 1870, must be governed by the same principle. It is not pretended that this ratification was in authentic

form, and it is useless to consider whether the parol evidence, introduced subject to the bill of exception taken by counsel for plaintiff in injunction, would authorize a judgment *via ordinaria*. No such judgment is asked for, and no such evidence can sustain a proceeding *via executiva*. 1 R. 407.

There is one other point to be considered. Counsel for defendants urge that plaintiff should have appealed from the order of seizure and sale, and, in support of this position, argue that said order was a definitive judgment which could only be altered or changed in one of four methods named in the Code, to wit:

New trial—appeal—action of nullity—and rescission.

An examination of the articles of the Code of Practice, under and by virtue of which alone the order of seizure and sale can issue, will readily disclose that this position is not well founded. Those articles provide other methods for changing and altering this order than those referred to, which relate to definitive judgments proper.

Article 738 provides that the order of seizure and sale may be enjoined. Articles 740, 741 provide for a summary trial of the injunction, and article 742 provides that:

"If on being required the defendant proves that the action in which the seizure has been obtained is extinct or prescribed, or that the cause of it is void, or that the debt on which it is founded is paid, remitted, or compensated, the judge shall revoke the order of seizure and condemn the plaintiff to pay costs."

It need hardly be remarked that the judge possesses no such power over ordinary definitive judgments; and it is evident that the rules provided for the revision of such judgments do not apply to orders of seizure and sale. In fact, the proceeding by injunction seems to be the particular and special remedy provided in this class of cases. It is true that an order of seizure and sale has been held to be a judgment in so far that an appeal may be taken from it, as from any order which may work an injury; and, doubtless, if the sole question raised is the insufficiency of the evidence, an appeal would answer the purpose, since the record would, in that case, contain every thing required for a decision by the appellate court; but, if the opposition is founded upon matters requiring the introduction of testimony beyond the acts upon which the order issued, a mere appeal from the original order would be an utterly vain thing as to these matters, since such an appeal could not bring them up for revision; and a party desiring to bring before this court the question of the sufficiency of the evidence on which the order issued, and other questions besides, would be obliged to resort to an appeal for the one and an injunction for the other, thus involving that multiplicity which the law abhors.

The question, however, of the effect of the order of seizure and sale as contradistinguished from a judgment was fully considered in the case of Harrod vs. Voohees, Administrator, 16 La., p. 254, in which Judge Morphy, as the organ of the court, used the following language:

"This court has frequently held, it is true, that when a judge issues an order of seizure and sale he renders such a decree as can be appealed from. If executory process is prayed for on an act importing confession of judgment, the judge must examine and decide whether the instrument unites all the requisites of the law necessary to authorize this summary proceeding. So far it is a judgment, and an appeal must lie from it, as from all other orders of court that might work an irreparable injury. A judge might erroneously make such an order on evidence not warranting the issuing of it. Such, for instance, has been the case in the very decree relied on. It was granted on a deed of mortgage executed before a justice of the peace; an officer wholly unauthorized to pass such acts, except in certain cases, none of which are proved to have existed in the premises. But such a decree is not a judgment in the true and legal sense of the term, and possesses none of its features. It issues without citation to the adverse party; it decides on no issue made up between the parties, nor does it adjudicate to the party obtaining it any right in addition to those secured by his notarial contract. If such an order was a real judgment, it would be out of the power of the judge granting it to set it aside; after rendering this decree he would be divested of all jurisdiction, and it could be reversed only by means of an appeal or a separate action of nullity; whereas, it is every day's practice for the judge issuing such orders to set them aside, on a rule to show cause or an opposition; and in most cases the proceedings are turned into an ordinary suit in which a final judgment is afterward rendered. Such a decree then can be viewed only as giving the aid of the officers of justice to execute an obligation which, by law, produces the effect of a judgment in relation to the particular property mortgaged," etc.

The case of "Zuntz vs. Cornen," (10 A. 433) was not dissimilar to the case at bar. In that case the defendant filed an unsworn opposition to the executory proceeding, setting forth that she was a married woman and that it did not appear that the notes and mortgage inured to her benefit. It was held that she should have proceeded by injunction.

In the case at bar the plaintiff has not only raised the question of the want of authority in Wm. S. Calhoun but has also raised the question of want of consideration as to Mrs. Calhoun. The first of these questions might have been inquired into on appeal, the second could not, whilst in the proceeding by injunction both questions could be examined, but that defendants have not thought proper to turn the pro-

ceeding into an ordinary suit. As to those matters which have been examined, however, the case is properly before the court.

In concluding, it is proper that some notice should be taken of the condition of things resulting from the fact that in June, 1871, Wm. S. Calhoun became owner of an undivided half interest in the property upon which he had attempted to impose the mortgage in the name of his mother, and that it is claimed that in 1873 he conveyed that interest to his sister, the plaintiff in this suit.

The questions of the effect, as to said Wm. S. Calhoun, of his unauthorized execution of the notes and mortgage involved in this case, and of the effect, as to said mortgage, of his subsequent acquisition of the property in question, and of the alleged transfer of said property to his sister, are not now properly before the court. Whatever rights the defendants may have in the premises, whether against Wm. S. Calhoun or the said property, or both, are however expressly reserved to them and are not to be considered as affected by this judgment.

With this reservation, and for the reasons stated, the judgment of the lower court must be affirmed at the costs of the appellants.

MARR, J. I concur in the foregoing decree.

CONCURRING OPINION.

EGAN, J. I think the power of attorney of Mrs. Calhoun, executed while she was a married woman, is to be measured and interpreted by her then capacity to make it, and all acts done under it are to be considered as being done by the mandatory of a married woman. It acquired no new and elastic properties or scope by reason of the death of Meredith Calhoun, the husband, and by all authority is to be viewed with greater scrutiny because executed conjointly with him. No acts or facts are shown which go to show any re-issuance or affirmance of the power by Mrs. Calhoun after her husband's death.

If the interpretation of this power argued for by the defense is correct, there would be no safety or protection for married women or their property in Louisiana, notwithstanding the provisions for that purpose of the various statutes enacted for their protection, and the long line of decisions interpreting and applying them. Far better would it be for their existence to be theoretically merged and their capacity to contract suspended altogether during the marriage, as it is under other systems of law. It has been too long and too well settled by this court, from the earliest day down to the present bench, to be now questioned, that with regard to obligations sought to be enforced against married women, the question is not so much as to the consideration as to the capacity to

enter into the contract even when entered into personally. Hence, it follows that even the holder of a negotiable note of a married woman, for value before maturity, is yet liable to have pleaded against him every defense arising from her incapacity. See Conrad vs. LeBlanc, Sheriff, 29 A. 123, and cases there cited. In the same case it was further held that even where the authorization of the judge has been obtained to enable her to contract and execute a mortgage for a certain sum and purpose, and it is executed for another sum, and either in whole or in part for a different purpose, that *whoever* seeks to enforce the mortgage can only do so by proving *aliunde*, as in other cases, that the debt secured by the mortgage inured to her separate benefit. *A fortiori*, then, is the whole matter open to inquiry for her as for any ordinary litigant, in a proceeding like the present, based purely upon the mortgage, under the general principles recognized by this court, that whatever may be the negotiability of the instrument or evidence of the debt secured by the mortgage, the latter is itself non-negotiable.

All these principles apply with still greater force to the present case, in which there is no pretense even of authorization by the judge, and where the evidence *aliunde* not only does not support, but directly contradicts the existence of the consideration named in the act of mortgage, and that the consideration of the notes and mortgage inured in the smallest degree to the benefit of Mrs. Calhoun, or her property, or that either notes or mortgage were executed for any of the objects or purposes contemplated in the power; Nevin himself, the mortgagee, who testified freely and fully in the case, does not pretend so. Indeed, if one of his statements, made to prove the defendant's case, is to be believed, an important part of their consideration was a debt incurred for moneys remitted to France during the war, and the existence of the community, and which, therefore, comes directly within the statutory prohibition of the wife binding herself for a debt of the husband, or of the community. But whether this be true, or whether, as elsewhere attempted to be shown by himself and other witnesses, the consideration was money advanced to enable W. S. Calhoun to embark his mother, without her knowledge or consent, as a partner in the commercial firm of Shackleford & Co., a purpose which, it is admitted, was wholly beyond the scope even of the language of the power of attorney under which he pretended to act, and which was appended to the mortgage as evidence of his authority to execute it, it is quite manifest that neither notes nor mortgage were executed for the purpose named in the act (i. e.), for supplies and moneys for the use of Mrs. Calhoun's plantation during the current year. Nevin himself swears that he had at the time in his hands $5000 of Mrs. Calhoun's money, that not over $3000 was needed or used during the year for her places, which were almost

wholly rented out, and even this sum was largely more than repaid by the crops received and sold during the year; while, if the evidence of his accounts found in the record is to be believed aside from other testimony, he had in his hands, at the very time of the execution of the notes and mortgage, many thousands of dollars belonging to Mrs. Calhoun, the product of the crops of other years, in addition to the $5000 admitted by him, as before stated. His own evidence, and that of his accounts alone, is, I think, sufficient to establish the existence of the most flagrant fraud, and a conspiracy to defraud Mrs. Calhoun, through the act of her son, known at the time to Nevin to be wholly unauthorized, to bind his mother for the purposes for which he himself states the notes and mortgage were executed. This knowledge is shown, not only by the terms of the power itself, but by the repeated attempts and anxiety of Nevin to have a new one executed, and by other facts and evidence in the record. The time at which the bank acquired whatever interest it may have in these notes has been left by it in a very unnecessary state of uncertainty, when it was so easy to have shown their acquisition, and that interest before maturity, had that been the fact. The fact that no reference to its books has been made, and that none of its officers or agents have been offered to testify in regard to those important facts, or any others in the cause, but that the bank has chosen to rest its case and the evidence even of the existence of any indebtedness to it by Nevin, mainly to him who is so directly implicated in the fraud and conspiracy charged, is, to say the least, unusual, and displays a remarkable want of interest in the result of the litigation. Besides, one who takes a note executed by delegated authority, even before maturity, is affected with notice, or at least put upon inquiry as to the extent of the authority; and, again, Nevin himself testifies that the notes were pledged to the bank on the very day of the maturity of one of them; as to which, at least, it can not be pretended that the bank acquired before maturity, and which it must have known was not expected to be paid at maturity, as otherwise the former holder would have held and collected it, and used the money, instead of pledging it to secure a loan. We have left also out of view altogether the well-known commercial usage, of which the bank could not have been ignorant, on the part of factors, to take country paper of this class as a security, not for moneys or supplies already advanced, but to be advanced, and which, if not advanced, or if repaid through the pledge of the crop, uniformly made at the time of execution of the instruments, the consideration would either have no existence, or be at an end. How far, if at all, this well-known usage would take this particular class of paper out of the ordinary operation of the laws relating to commercial paper, we do not consider it necessary to determine in this case;

and it is evident that, whenever acquired, that interest does not cover the whole amount of the notes, but only about $6000, besides interest. The remainder, then, when collected, would belong to Nevin, the original fraudulent mortgagee, under whatever aspect the case is viewed. Again, aside from the considerations already mentioned, were these even the notes and mortgage of a person under no legal incapacity, the bank was sufficiently put upon inquiry by the identification of the notes with the mortgage, and by the terms of that act itself, without the examination of which, as the security for their payment, it is not to be supposed that, contrary to usage and the dictates of ordinary prudence, it would have taken the notes. At all events, as before stated, the present proceeding is based purely upon the mortgage *via executiva*, and that, at least, is open to contest. I think the plaintiff's case has been fully made out upon the merits. As to whether she could in an ordinary action claim the exemption from the operation of the mortgage of that portion of the land acquired from her co-heir, William S. Calhoun, subsequent to his mother's death, or whether the estoppel which would operate against him would operate equally against the present plaintiff, we are not now called upon to decide. The case of Zuntz vs. Cornen, 10 A. 433, is not in accordance with the current of decisions of this court, but even in that case the court held, as did the present court in the Conrad case, that when the act itself bears intrinsic evidence that the maker, a married woman, exceeded her powers, executory process should not issue, and that where it does not, injunction, and not appeal, as argued in the present case, is the appropriate remedy. This must be so, or a denial of justice be operated.

The plaintiff has brought herself within the provisions enumerated for injunction against executory process in article 739 of the Code of Practice, and even if she were confined to them, must still succeed under the evidence adduced in support of her injunction. The enumeration of causes for injunction in that article refers, however, only to the injunctions without bond, provided for in the preceding article, 438, and by no means restrict or narrow the general provisions of the law authorizing injunctions for any legal cause under that head in the Code of Practice. There are many other facts, not enumerated, supporting the views here taken, but I have been induced to embark in this discussion of the case in its present shape, owing to the differences of opinion among the members of the court, and the consequent wide range which the discussion has assumed, and because my silence might otherwise be interpreted into acquiescence in views of the case I do not entertain in common with some of my brethren. I can not now recall any case which has come under my observation presenting a record of more flagrant fraud and attempted wrong through the forms of law than that now before us.

I am, however, content under the circumstances to acquiesce in the decree pronounced by the district judge, who has been associated with us for the trial of the case, setting aside and avoiding the executory process, and remitting the bank to a proceeding *via ordinaria*.

I therefore concur in the decree.

DISSENTING OPINIONS.

DEBLANC, J. On the 27th of December, 1866, Meredith Calhoun, and his wife—Mary S. Taylor—appointed as their agent in this State, their son William Smith. The authority delegated to that agent was nearly unlimited. He was empowered to *lease*, *mortgage* and *sell* the property of both, and of each of said parties—"to take charge of and conduct all business affairs of every name and nature, pertaining to them in America, *whether the same related to real or personal estate*, or of any other kind whatsoever—to make, execute, acknowledge and deliver any contracts, agreements or covenants—to collect and receive any money, debt, rent or account due or to become due."

In 1869, Meredith Calhoun died: the evidence of the agency created by himself and his wife, unrevoked by her, continued—after his death—to stand on the recorder's book, a notice to the world. There it remained until the death of Mrs. Calhoun. If—from the demise of the husband—the powers so delegated and the recorded evidence of those powers had lost their effect, the fact that they thus remained, apparently at least, unchanged and unrecalled, was certainly calculated to ensnare the most vigilant, to deceive the most cautious.

In 1870, acting under that unrevoked and published authority, Mrs. Calhoun's agent borrowed for her, from James N. Nevin, the sum of $15,000. To represent that sum he subscribed and delivered, as agent, three notes of each an equal amount—two of which, the first and last maturing were transferred to the Mechanics & Traders Bank, the middle one to D. W. Moore, of Mississippi.

To secure that loan, William Smith Calhoun, as agent, mortgaged in favor of Nevin, or any future holder of the notes by him subscribed and delivered, four plantations situated in Louisiana and belonging to his mother. She was then a widow and absent from our State.

It is urged—by plaintiff—that the death of Meredith Calhoun operated a change in the condition of said deceased's wife, and that—at the very moment of his death—the mandate from both of the spouses to the son expired. This is a mistake: Mrs. Calhoun was neither interdicted nor insane, and the change—not in her condition as a principal—but in exclusively her marital state, did not destroy or impair—but, on

the contrary—enlarged and increased her capacity. As a widow, it was in her power to revoke the agency. This she has not done.

We can well understand that a change in the mental condition of the principal, that insanity and interdiction, that the marriage of a woman, who passes from single life under the authority of a husband, are causes which should and do revoke antecedent mandates—: for, one can not delegate to others the exercise of a power which is denied to him—but we are at a loss to understand why, at the dissolution of the marriage, when the widow resumes her full capacity and the unrestricted administration of all she owns, the mandate given by her during coverture, should afterwards expire against her wish and will.

In our legislation, the capacity to contract, the limitations to that capacity, and the absolute and removable incapacities are specially mentioned and clearly defined. The authorization of the husband or of the judge is indispensable to validate the contracts of the wife—but, once perfected, those contracts survive the husband and the marriage. It would have been as useless as irrational to have declared revoked by the death of the husband, an act perfect as to the wife and which—if then revoked—the widow could renew, resuscitate and again revoke.

Mrs. Calhoun was informed of the execution by her son of said notes and mortgage; she was thus informed before and after her return from France to Louisiana, and—far from contesting—she approved and ratified expressly and tacitly, the acts of her agent—expressly, by her application for a delay fixed by herself and within which she was to sell some property to satisfy the now contested claim—tacitly, by her unbroken silence in and out of court, as to the pretended invalidity of said claim. 10 M. 526. 7 L. 17. 4 R. 134. 29 A. 212. R. C. C. 1786.

In June 1871, Mrs. Calhoun died: by inheritance and by purchase of her brother's share in the succession of their mother, plaintiff became the sole representative of the latter, and—as such—opposes and resists the demand of the Bank, on the ground already disposed of, and on the additional ground that the contract declared upon was entered into between her brother and Nevin, in pursuance of a conspiracy to defraud her mother.

As against Nevin, if he were attempting to enforce that contract, plaintiff might urge the fraud charged against him and their mother's agent. As against the Bank, which took the notes in good faith, for a valuable consideration and before maturity, that defence is untenable. Its officers only had to ascertain—from the tenor of the power of attorney and the act of mortgage—whether *it appeared* that the agent had acted within the scope of his authority. It so appears, and Mrs. Calhoun was legally bound. By the unconditional acceptance of her mother's succession, plaintiff has assumed her obligations.

In his argument, plaintiff's counsel contends "that a mortgage can not be transferred to a third party, so as to give him greater rights than the mortgagee possessed." In regard to the transfer of credits, this is not correct: third parties acquiring before maturity, often acquire more than their vendors are entitled to. The transfer—under those circumstances—vests the right of claiming—not always that which is really due, but that which *appears* to be due, by the instrument which attests the existence of the transferred credit.

The note is the principal, the mortgage an accessory—and, whether mentioned or not in the transfer of the principal, the accessory passes with it to the transferree. The Code so provides. The holder of a claim represented by a note and secured by a mortgage could not sell separately, to one the note, to the other the mortgage: they are the inseparable parts of but one contract, and—though the mortgage may be abandoned or lost—it can not be enforced separately from the claim, and by any other than the holder of the claim.

The validity and defects of the principal constitute the validity or defects of the accessory. The debt may outlive the mortgage, but the cause which destroys the debt, invariably destroys the mortgage. The equities which the obligor is precluded from opposing to the claim, can not be opposed to the mortgage.

"En principe—said Paul Pont—le privilége ne se sépare pas de la créance; il n'a pas une existence qui lui soit propre, et il ne peut-être cédé distinctement et indépendamment de la créance. Mais si par l'effet d'une cession et d'une subrogation regulière, la créance elle même passe d'une personne à une autre, le privilége passe également et est acquis de plein droit au cessionnaire ou au subrogé.

Revue critique de Legislation et de Jurisprudence, février 1856 p. 108.

In his discussion on the same subject, Marcadé had already expressed the same views:

"Il est tout simple que la vente d'une créance comprenne—plein droit, *et sans qu'il soit besoin que le contrat s'en expliquer*, les accessoires de cette créance. * * * Le cautionnement, l'hypothèque ou le privilége qui garantissent une créance en sont évidemment des accessoires, presqu'ils ne sont rien autre chose que des moyens d'en mieux assurer l'exécution, et que—le créance tombant—ces divers droits tomberent et n'avaient plus de raison d'être. Il n'y a pas de cautionnement, d'hypothèque ou de priviléges possibles, là où il n'y a pas une créance dont ces droits seront une dépendance."

Explication de C. N. par Marcadé, article 1692.

Rev. C. C. 2645.

To sue on the notes, to enforce the mortgage given by Mrs. Cal-

houn's agent, there was no necessity of any specific transfer: in their form, the notes are payable to bearer, and the mortgage was granted in favor of *any holder* of said notes. The Bank has the required title, and no additional transfer could have added to that title. It derives its right of action, not only from the law, but from the very terms of the contract, the convention of the parties.

In the procuration from Mrs. Calhoun to her son, the most important powers were granted to the agent. He had the right to borrow, mortgage and draw: he borrowed, mortgaged and drew. Under no clause of that indefinite mandate, could Nevin have disputed, or the Bank doubted the agent's authority to create the debt, to receive the proceeds of the loan, and to dispose—as he thought proper—of every property, every right, every cent belonging to his mother.

As to the Bank, it was useless to prove a ratification by Mrs. Calhoun of the acts of her agent. She had resumed the administration of her paraphernal property, and—by an unlimited power of attorney—had specially authorized him to incur the expenses indispensable to the cultivation of her plantation. The agent declared to the notary and witnesses that the notes were furnished for exclusively that object. As to third parties, that declaration had as much force as if made by Mrs. Calhoun herself, and she was bound by the act of her agent, before and without the ratification.

Can a married woman—duly authorized by her husband—stand by the side of a commission merchant, ask him to lend her funds and make advances which she represents as necessary to cultivate, improve or save her separate property, direct him to pay those funds to a designated mandatary, and—when the merchant claims the amount thus advanced, tell him: it is true that I did borrow your money, that I borrowed it for a lawful purpose, but that money has been misapplied by my chosen agent, and—as you failed to guess that it would not enure to my benefit—you alone must suffer for the abuse of a trust created by me. I did not deceive you, my agent did; when he received and took your money, he was acting for me, under a power delegated by me, and within the scope of that power—but, in the disposition of the funds, he has exceeded or disregarded his authority? If so, a contract legal and perfect at its origin, legal and perfect as to both the creditor and the debtor, and with which the creditor has strictly complied, may be—by the fraud of the debtor's agent, converted into, and annulled as a prohibited contract.

The incapacity, or rather the capacity of the wife to contract, is limited and conditioned: she can not bind herself for the benefit of her husband, his estate or the community—that is the limitation. She can not bind herself without the authorization of her husband or of the

judge—these are the conditions. When authorized by either, she can alienate, grant, mortgage, acquire, by gratuitous or encumbered title, and bind herself for or towards any one, except it be for the benefit of her husband, his estate or the community. R. C. C. 122, 126, 127, 1790, 2397, 2398.

The 1775th and 1779th articles of the Code of 1825, re-enacted and retained in the revised Code, leave—it seems—no doubt on that subject. The first provides that *all persons* may contract, except those whose incapacity is specially declared by law, and these are persons of insane mind, those who are interdicted, minors and married women: the other article provides that—as to the wife, her incapacity is removed by the authorization of her husband or of the judge.

R. C. C. 1782, 1786.

In and before 1855, the credit of the married women of the State had been so affected by their invariable disregard of their civil obligations, by their successful resistance to the enforcement of those obligations, that, in that year, to resurrect their destroyed credit, the legislature had to pass a special act, intended to remove the uncertainty, the risks of a contract with them, intended also to dispel the legitimate suspicion which then existed against such contracts. That act was adopted—not to restrict the already restricted capacity of married women, not to add to the limitations imposed on their capacity, but to provide a definite, an effectual mode of binding them, to increase their facilities, or—to speak more properly—to decrease the then almost insurmountable difficulties under which they were to manage their separate interest, and—more particularly—to calm the just apprehensions of those who were disposed to become their creditors.

The law, as it was before the adoption of the act of 1855, stands unrepealed, unimpaired, with this difference: when married women bind themselves according to the provisions of said act, they are placed on the same footing as a *femme seule*, and their contracts—unless attacked for fraud on the creditor's part, and in a contest with the creditor by whom the fraud has been committed—furnish full proof against them and their heirs. These are the very words of the Code, and when—in such a case—fraud is alleged by a married woman, it is incumbent upon her to prove that it was perpetrated by, or to the knowledge of the party claiming the enforcement of a prohibited contract. As to contracts entered into by married women, without the formalities prescribed by the act of 1855, they are governed by the legislation which preceded the adoption of said act, and those who deal with them with but the authorization of their husbands, must do so under circumstances excluding even the presumption that the wife is about to bind herself for what—in law—is considered as her husband's advantage or that of the

community, and circumstances which—on the contrary—are such as to induce a rational and honest belief that she is acting exclusively in her own interest, for her own and separate benefit. When the creditor has, in good faith and in strict accordance with law, parted with his money, it would—it seems—be a strange injustice to hold that he is liable for a deceit practiced upon him by both the husband and the wife, and for the future and unlawful disposition of money, over which—as soon as it is paid or handed to the wife or her agent—he can neither retain, nor exercise any control. It is otherwise—however—when instead of borrowing money for merely alleged necessities, for future use and future purposes, such as the raising of an unsown crop for the wife and on her own separate property, the wife—without the sanction of the judge, seeks to borrow money to pay a debt already contracted, a liability already incurred, for—as it is the character of the debt which—then—can alone give validity to a married woman's obligation, the party from whom she so seeks to borrow must—at his peril—ascertain that the debt was contracted, the liability incurred for her own, her exclusive benefit.

Be all this as it may: such an error—as rendering a judgment on insufficient evidence—does not authorize a resort to the process of injunction, but can and should be corrected by appeal, by a new trial, by an action of nullity or rescission. The judge who issued the writ of seizure and sale on the ground that the evidence to do so was sufficient, can not enjoin and restrain the execution of that writ on the ground that the very evidence which he so found and pronounced sufficient, was insufficient to authorize the issuance of the writ. 25th A. 539.

In this case, plaintiff has reversed the rule, and—in direct opposition to a positive law—has not only not resorted to any remedy pointed out by that law, but has resorted to a remedy repugnant to it, reprobated by our jurisprudence.

For these reasons, I respectfully dissent from the decree rendered by the majority of the court.

SPENCER, J. I can not concur in the opinion or decree of the court in this case.

Mary S. Calhoun owned as her paraphernal property four plantations in Grant parish. She and her husband, Meredith Calhoun, being then in France, executed before the American Consul at Paris, on 27th December, 1866, a power of attorney to their son, William S. Calhoun, in terms as follows:

" *They do jointly and severally* nominate, constitute, and appoint their son, Mr. William Smith Calhoun, of Louisiana, United States of America, to be *their* true and lawful attorney in fact, giving and by these

presents granting unto said attorney full power and authority for *them* and in their *names*, place, and stead to take charge of and conduct all business affairs of every name and nature pertaining to *them* in America, whether the same relate to property, real estate or personal, or be of any other nature or kind whatsoever. To sell, assign, and transfer any or all real estate, lands, tenements, and hereditaments *to them or either of them belonging*, or any interest therein or right thereto; also giving to said attorney full power and authority to *mortgage* or lease any such property as to him may seem best. To make, execute, acknowledge, and deliver any contracts, agreements, or covenants, and to sign, seal, and deliver any and all conveyances, deeds, leases, *mortgages*, or other instruments of writing necessary for the execution of the power herein granted. To collect and receive any sums of money, debts, rents, dues, or accounts now due or to become due, to appear for *them* before any courts, tribunals, or places necessary for the collection of any such sums of money, to receive the same and full and sufficient acquittance therefor to give; and generally to do and perform all things requisite in as full and complete a manner as if herein specially provided for."

In 1869 Meredith Calhoun died in France.

On 12th May, 1870, (the mother being then a *femme sole)* William S., the son, executed three notes as her agent under said power, each for $5000, payable to his own order as agent, and indorsed in blank, maturing on November 1, December 1, 1870, and January 1, 1871. On the fourteenth May, 1870, he, as agent of his mother, executed an authentic act of mortgage, to secure these notes, in favor of one Niven, a merchant of New Orleans, in favor of *any other holder of said notes.* In the act of mortgage it is recited that the consideration of the notes was money and supplies, furnished and *to be furnished* by Nevin, for the cultivation of his mother's plantations, of which she had the administration. Nevin pledged the first and last of the above described notes to the defendant bank. There is some dispute as to whether the bank obtained the two notes before the maturity (November 1) of the first one. I think the evidence is conclusive that the bank held both the notes on or before the fourth November (the maturity of the first one), and, therefore, *did not acquire it after its maturity*, and, therefore, it is not subject to equities in the bank's hands.

In January, 1871, the bank sued out executory process on these two notes; but the entire record was burned with the courthouse in April, 1873, except the two notes.

In June, 1871, after returning from France, Mary S. Calhoun died, leaving the plaintiff, Ada, and her son, William S., as her sole heirs, who accepted her estate unconditionally. In 1873, Ada Calhoun purchased the interest of William S. in the mother's succession. In April, 1875, the

bank commenced *de novo* its executory proceeding, and Ada Calhoun brought this injunction suit. The grounds of injunction are numerous. The main points are:

1. That the evidence on which the judgment of seizure and sale was rendered is not authentic.

2. That Mrs. Calhoun was without capacity to give the power of attorney to her son.

3. That she was without capacity to alienate or mortgage her real estate without the authorization of the judge.

4. That the power of attorney did not confer on William S. any other authority than that of administration, and was revoked by the death of the husband.

5. That the notes were without consideration, and that William S. Calhoun and Nevin colluded together to defraud Mrs. Calhoun. That the money procured by said notes was not used for her benefit, but put by William S. into the firm of Shackleford & Co., at Colfax, and that the bank acquired them after maturity, and that the notes and mortgage were void.

There are a few vital points which I propose to consider, and which, in my opinion, are decisive of all these questions.

1. The insufficiency, or non-authenticity of the evidence upon which the decree in this case was rendered can not be set up as ground of injunction. The only remedy was by appeal. I take it to be well settled that a party can not resort to injunction where he has relief by appeal. See 13 A. 111; C. P. 605—607; 14 A. 656; 6 R. 58; C. P. 556; 12 M. 691.

But I do not admit that, in point of fact, the evidence was insufficient to warrant the flat of the judge. The only suggestion of insufficiency is that the mortgage by way of recital states that the indebtedness is for money and supplies "*furnished and to be furnished*," and that, therefore, there must be authentic proof showing that the supplies "to be furnished," had been actually furnished. The answer to this objection is that the mortgage was given to *secure the notes*, and was in favor *not of Nevin only*, but "*of any other or future holder*" of these notes. If the consideration of the notes, in the hands of a third holder, could not be inquired into—if the state of accounts between Nevin and Calhoun could not affect the right of such holder, why should it affect his rights as holder of the mortgage, which, upon its face, is given as security *to him* as a *future holder* of the notes? The mortgage in this case is one direct to the bank as "*a holder* of the notes," and, in that respect, does not differ in its legal aspects from one granted to it specially, after it became the *bona fide* holder of the notes. If the maker of a note is precluded from showing its invalidity—if the law presumes a consid-

eration and will not admit proof to the contrary, for the purpose of defeating the note, will it admit *such proof* for the purpose of defeating a mortgage given *in favor of the holder* of that note? If there be in law or fact a good consideration, actual or presumed, for the note, then I contend there is, *ex necessitate rei*, a good consideration for the mortgage. That if the consideration can not be inquired into to defeat the note, it can not be to defeat the mortgage. If the mortgage, in this case, had been simply in favor of Nevin, personally, and *not in favor of future holders* of the notes, the case would have presented a different aspect, and have fallen within the scope of some of our decisions to the effect that a mortgage securing a negotiable note is not itself a negotiable instrument. In my opinion, these decisions are in direct conflict with the spirit and letter of the Civil Code. A mortgage is not an independent contract. It is a mere accessory of a principal. It is not separable from it, and goes with it as an incident. 3251—3252. "The sale or transfer of a debt includes every thing which is an accessory to the same; as suretyship, privileges, and mortgages." C. C. 2615. A person can not transfer a mortgage note and retain the ownership of the mortgage, no more than he can remove the substance without moving the shadow. In my opinion, a mortgage being a mere incident, a simple accessory of a debt, partakes necessarily of its nature, and is negotiable or not, just as the debt to which it adheres is so or not. See 27 A. 561; Story on Bills, sec. 191. I, therefore, think that where the consideration of the note can not be inquired into to defeat the note itself, it can not be to defeat the mortgage securing that note. In other words, if there is, by conclusive presumption of *law*, a good consideration for the note, a mortgage given to secure it can not be defeated by proof that there was, *in fact*, not a good consideration for it. The bank being a third holder, in good faith, of these notes, the question as to whether the money "to be furnished," was or not actually furnished, is an immaterial one, since it could not be raised, as against the bank, to defeat either the notes or mortgage. If immaterial, it was not necessary that it be proved before taking the order of seizure. I think, therefore, that there was authentic and sufficient evidence to support the judgment of seizure, even if this question could be raised by injunction.

2. The next question is as to the capacity of Mrs. Calhoun to grant to her son the power of attorney in question. To me it is manifest that there is prevailing a great misapprehension as to the nature and extent of the incapacities of married women under the laws of Louisiana.

There is but one *general incapacity* under which she labors, and that is her inability to contract without the authorization of her husband, or, in his default, of the judge.

When she is joined and authorized by her husband she has precisely *the same* legal capacity as *any other woman*, with *one single exception*, to wit: that she can not bind herself or her property for the debts of the community, or of the husband. When so authorized, therefore, her incapacity is purely relative, and limited to this one class of contracts. When so authorized, she can donate, sell, encumber, or mortgage her real estate. C. C. 122. She can contract debts for her own benefit, or become security for the debts of her children, her father, mother, brother, sister, or even of strangers. In fine, she can make any contract she pleases, except for the benefit, or as security of, her husband and the community. See Hellwig vs. West, 2 A. 1; 10 A. 433; Farrell vs. Yoe, 2. A. 903; 5 A. 569. It is now settled that she does not need the authorization of the judge to grant mortgages. The only effect of such authorization is to estop her from asserting that the debt was for the benefit of the husband.

She can at any time resume the administration of her paraphernal property, not only without consent, but in defiance of the wishes of her husband. See C. C.

It is, therefore, perfectly manifest that at the time this power of attorney was executed Mrs. Calhoun had capacity, with the authorization of her husband, to sell, lease, and mortgage her real estate in Louisiana, and to contract debts for her own benefit, or for the benefit of anybody else than her husband. If she had this power herself, where is the law which forbids her conferring it, with the authorization of the husband, upon her agent and son? No such law exists in the statutes of Louisiana. Her husband joined and authorized her in the execution of this power of attorney.

She owned the property, and having the right to administer it herself, and to sell it, or mortgage it (provided it was not for her husband's debts), she could do these same things by an agent. See 2 A. 890. Of course, her agent had no greater power than she had, but we have seen she had those powers, subject to said restriction. She even had the power to become a "public merchant," and, therefore, with her husband's authority, could have become a partner of Shackleford & Co.

3. Does the power of attorney, as quoted above, confer on William S. Calhoun authority to sell and mortgage her real estate, to contract debts, and secure the same? Its language means as much, or else it means nothing. It distinctly recites that they "*jointly and severally*" appoint him agent, with power "to sell, assign, and transfer any or all real estate, etc., *to them* or *either of them belonging*," and "*to mortgage*" the same, etc. It is idle to argue in the face of these terms, as do the counsel, that "this procuration is, therefore, simply one by the husband and

gave the agent, so far as the wife's property is concerned, no other power than that the husband himself had, that of administration."

4. Did the death of her husband, in 1869, revoke this procuration so far as she was concerned? The Code, article 2996 (old number), tells us that a procuration expires "by the change of condition of the principal," but nowhere tells us what constitutes such change of condition.

We must, therefore, have recourse to reason and authority to ascertain. The change of condition intended evidently refers to cases where the capacity of the party undergoes a diminution. If a person *ceases* to possess capacity to do a particular thing *himself*, of course he can not do it by another, as his agent; and any previously conferred power to such agent, would, of necessity, be revoked, for the creature can not be greater than the creator. But why an increase or addition to the capacity of the principal should so operate, we are at a loss to see. In Reynolds vs. Rowley, 2 A. 893, this court held that a power of attorney, executed by a single woman, who on marrying retained the administration and control of her property, was not revoked by the marriage. The court say:

"According to Judge Story, the reason that, as a general rule, marriage revokes powers of attorney previously given by the wife, is that the power of constituting an agent is founded on the right of the principal to do the business himself; and, when the right ceases, the right of constituting an agent must cease, also. Story on Agency, 501. *In this case the law gave Mrs. Rowley the right to administer after marriage, without the assistance of her husband, and, therefore, the rule does not apply.*" Certainly, if becoming a married woman does not revoke, necessarily, previously given procurations, becoming a *femme sole* never can.

5. Having thus concluded that Mrs. Calhoun had the capacity to give the procuration to her son to contract debts (other than for the husband's benefit) and to grant mortgages to secure them; and that she did in fact grant him those powers; and, finally, that the powers so granted were not revoked by the death of the husband or otherwise, we find that in May, 1870, *after she had become a femme sole*, her said agent procured from Nevin large sums of money, and executed the notes sued upon, securing them by mortgage. It is shown that she was advised of the execution of this mortgage after returning from France and made no objection thereto.

The plaintiff lays much stress upon the fact that the mortgage recites this money was to be used for planting purposes, when in point of fact the agent diverted the greater part to the mercantile ventures of Shackleford & Co. What difference does that make to the holder of

these notes? The power of attorney gave the agent almost plenary powers, and it was no part of the duty of persons lending the money or taking said notes to follow up Wm. S. Calhoun to know what he did with the money. It was enough for them to know he had the power to borrow it. It was none of their business if he abused his trust. Mrs. Calhoun is the proper person to bear the loss if her agent was unfaithful.

6. There is no disputing the fact that under cover of this power of attorney giving absolute and almost unlimited disposal of her estate to her son, she put it in his power and enabled him to procure *every dollar* of the money represented by these notes. Good conscience and equity as well as law forbid that she or her heirs should now be heard to say they were given without consideration. It is a proper place and occasion for applying the familiar legal maxim that he who by his conduct and representations has put it in the power of another to do a wrong, must bear the loss consequent thereon.

We therefore refrain from entering into the lengthy discussions of counsel on this question of consideration, and content ourselves by saying that there *is no allegation or proof that any part of the notes sued upon was a debt of the husband;* that Mrs. Calhoun was a *femme sole* acting by a duly authorized agent in giving them, and when advised made no objection thereto; that she and her heirs, and above all others, the said Wm. S. Calhoun and *those claiming under him*, are estopped and precluded from pleading said Wm. S. Calhoun's misconduct as a defense to said notes. I confess my utter inability to understand or appreciate the process of reasoning which can exempt Wm. S. Calhoun's half of these four plantations from responding to this debt. If his mother's estate is not bound, because he was not authorized to bind it, he is personally bound. If he granted a mortgage on property not his own to secure his individual debt, then, by art. C. C. 3304, "this mortgage shall be valid if the debtor should ever after acquire the ownership of the property, by whatever right." By the death of his mother in 1871 he did afterward acquire one half of this property, and the mortgage attached to it and could not be defeated by a subsequent sale in 1873 to his sister, the plaintiff. I have carefully examined the record in this case, and must say I do not find that evidence of flagrant fraud my brothers speak of. I think the fraud, if any, is rather on the side of plaintiff and those under whom she claims.

I think the case is clearly with the defendants, and that the injunction should be dissolved, with damages.

MANNING, C. J., recused.

No. 6703.

CRESCENT CITY LIVE STOCK AND SLAUGHTER-HOUSE COMPANY VS. JOHN LARRIEUX.

Where a corporation entitled to certain exclusive privileges enjoins a defendant from further violating those privileges, alleging that defendant had already damaged them, by violating said privilege, to the extent of $200, and making affidavit that the amount in dispute, and the right claimed by them was over $500 exclusive of interest and cost, this court will have jurisdiction of an appeal taken in such a case.

A corporation which is entitled by its charter to sue for fines and penalties for violations of its privileges, is likewise entitled to sue out writs of injunction to prevent and restrain from the violations of those privileges.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

Robert Mott for plaintiffs and appellants.

E. K. Washington for defendant and appellee.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by SPENCER, J.

EGAN, J. This suit is by the plaintiff corporation against the defendant, a private market man, to recover two hundred dollars "damages," and to enjoin further interference with, or violation of, the alleged exclusive franchises of plaintiff.

There is no allegation of value beyond the damages prayed for, and the amount alleged and prayed for being fixed in the petition at two hundred dollars, this court is without jurisdiction, *ratione materiæ*, to entertain the appeal. There is no affidavit or other proof of value beyond in the record, and it is very questionable whether any affidavit could affect the value fixed by the allegations and prayer of the petition.

It is therefore ordered that this appeal be and it is hereby dismissed at the cost of appellant.

ON REHEARING.

SPENCER, J. Plaintiff sets forth its existence as a corporation, and avers that it is, by its charter (made part of the petition) invested with the exclusive privilege of having all animals destined for human food in the parishes of Orleans, Jefferson, and St. Bernard landed at its wharves, yarded on its premises, and slaughtered in its houses. That it has provided the wharves, yards, houses, etc., necessary, and as required by its charter. That it has, since December 21, 1876, in conformity to a

decree of this court, reopened its slaughter-houses, yards, etc., on the west side of the Mississippi river, and given due notice thereof. That the defendant, a butcher, has, in violation of the exclusive privileges of said company, and of the sanitary regulations of the city of New Orleans, since December, 1876, been engaged in slaughtering beeves for food, within said limits, at a place other than plaintiff's slaughter houses. "That said violations of petitioner's said charter have made defendant liable to them *in damages in an amount in* excess of two hundred dollars. That these violations, if allowed to continue, will irreparably injure plaintiff, and, in order to prevent such results, an injunction is necessary to restrain defendant from further violations of petitioner's said rights," etc. "Whereupon petitioner prays that said John Larrieux * * * be condemned to pay petitioner the sum of $200, with interest, etc.; * * * that an injunction issue enjoining and restraining the said Larrieux from landing, slaughtering, etc., beeves, cattle, etc., at any other houses, yards, etc., than those of petitioner," etc.

On hearing this application on a rule *nisi*, the court refused the injunction, and plaintiff appeals.

There are two questions presented: 1. Has the court jurisdiction? 2. If so, is plaintiff, on the face of his petition, entitled to an injunction?

1. Plaintiff, on filing his petition for appeal, supplemented it by affidavit "that the amount in dispute and the right claimed by said company in this suit is over $500, exclusive of interest, costs," etc.

The substance of its allegation is, first, that defendant has already, by past acts, damaged it in the sum of $200; and, second, that if permitted to continue, it will irreparably injure plaintiff in the enjoyment of its exclusive rights, privileges, and emoluments, under its charter. It is made to appear, by affidavit, that these rights and privileges thus alleged to have been invaded, and which will continue to be so invaded, are of a value exceeding $500, etc. We think that under the allegations of the petition, the terms of the charter, and the affidavit, the matter in dispute is shown to be within the jurisdiction of this court.

2. Taking plaintiff's allegations as true, has it disclosed a *prima facie* right to an injunction? We have held that if the plaintiff, in due form, discloses a right to the writ in his pleadings, it must be granted as a matter of right, preliminarily, and that, upon the trial of a rule *nisi* in such case the court can not go into the merits, or consider other matter than the face of the pleadings.

It seems not to be disputed that if plaintiff were a natural person, instead of a corporation, it would be entitled under its allegations to the writ of injunction. But it is said "a corporation can act only in the mode prescribed by its charter." That "a corporation has only such

powers as are specifically granted, or such as are necessary in carrying the former into effect, and these powers can only be exercised for the purpose contemplated by its charter." Brightly's Digest, vol. 1, p. 182. That inasmuch as the charter of plaintiff gives it the right to sue for "fines and penalties," for violations of its privileges, therefore it can not protect itself by injunction against these violations.

We can not subscribe to these views. The law declares that: "Corporations legally established are substituted for persons. Hence, it follows that they may possess an estate, * * * are capable of receiving legacies and donations, * * may make valid contracts, obligate others and obligate themselves toward others, exercise the rights which belong to them, manage their own affairs, appear in courts of justice," etc. C. C. 433.

If the law gives corporations the power to exercise the rights belonging to them—to appear in courts of justice for the enforcement and protection of such rights—it must certainly intend to grant the means usual, necessary, and proper for such enforcement and protection. The doctrine of our law is, and, so far as we know, without an exception, that a party whose rights are invaded may invoke the aid of the courts to prevent any act which, if done, would entitle him to damages. See 5 N. S. 501; 7 A. 498; 7 R. 442; 2 A. 773; 14 A. 283.

There is no reason in law or equity for denying to a corporation the same remedies for the violation and invasion of their rights that are accorded to others. Article 296 C. P. says: "Injunction is a mandate obtained from a court, *by a plaintiff*, prohibiting one from doing an act which, he contends, may be injurious to him, or impair a right which he claims." That is just exactly what this plaintiff seeks to obtain. There is nothing in our law from which it can be inferred that this right is denied to corporations. It would seem to us that the fact of the law giving direct actions to recover penalties for violation of plaintiff's privileges can not be taken as evidence of the legislative will to deny it the right of preventing such violations, but rather an additional means of protection.

It is therefore ordered and decreed that the decree heretofore rendered by this court, dismissing the appeal in this case, be set aside; and it is now ordered and decreed that the judgment appealed from be reversed, and that the preliminary injunction prayed for by plaintiff be granted, upon its furnishing bond and security in the amount to be fixed by the court *a qua;* and it is further ordered that this case be remanded to be proceeded with according to law. Appellee paying costs of appeal.

No. 6837.

SUCCESSION OF JOHN CLARK. PAMELIA CLARK ET AL. APPELLANTS. MRS. REILLY ET AL. APPELLEES.

Where three separate questions, tending to one conclusion, arise in one and the same case, as for example in the settlement of a succession, and having been consolidated by consent of parties are passed on in three separate decrees, rendered simultaneously, these decrees may all be brought before this court in one single appeal.

In such a case one appeal bond is sufficient; and as appellants were not condemned by the lower court to pay any sum of money, or deliver any property, the bond need only be for an amount to cover costs.

Persons not parties to a suit have a right to appeal from the judgment rendered in it, if they intervene, and allege that they have been aggrieved by the judgment. And if it shall appear to this court that they have an interest in the suit, their appeal will be maintained.

No such officer as "provisional administrator," is now known to our law. If however such an officer should be appointed by the court, pending a contest, he has only the functions of a keeper, and may be set aside at the discretion of the court.

Where some of the heirs of a succession are beneficiary, and their debts, and the creditors of the succession, or the heirs of age demand an administration it should be ordered.

Where there are debts of a succession, and other circumstances authorizing the demand for its administration, a partition of its property among the heirs will not be ordered until it has been duly administered.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

T. Gilmore & Sons and *J. L. Tissot* for administratrix and appellant.

McGloin & Nixon for opponents and appellees.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. John Clark died on the thirteenth of February, 1877, intestate, leaving a considerable estate. Mary, wife of Reilly, and Alice, wife of Woelper, children of his first marriage: Pamelia, Elizabeth, and William Edwards, children of the second marriage; and Mrs. Catherine Routh, widow of the third marriage, survived him.

On the fifteenth February, Pamelia Clark, who attained her majority in June of the preceding year, Mrs. Widow Clark, and Robert Meadowcroft, maternal uncle of the children of the second marriage, two of whom were minors, applied for administration of the succession.

Mrs. Reilly and Mrs. Woelper opposed this, on the grounds that Widow Clark and Meadowcroft were not entitled in preference to them; that Pamelia was young, and without sufficient experience; and that Mrs. Reilly, having equality of right with her, should be preferred on account of her age.

The opposition was maintained, and judgment was rendered, on the twenty-eighth March, appointing Mrs. Reilly administratrix. A motion was made for a new trial, pending which, on the eleventh April, Meadowcroft qualified as tutor of his nephew and niece; and on the twelfth April Pamelia Clark filed a petition in which she alleged that the community which had existed between her father and mother had been dissolved by the death of the latter: that she, Elizabeth, and William Edwards were the sole heirs of their mother: that the community had remained in indivision under the management and control of her father, and that she desired to have a partition of their estates. She made Mary Reilly and her husband, Alice Woelper and her husband, Meadowcroft, in his capacity as tutor of the minors, and Mrs. Widow Clark, parties; and prayed for a partition of said successions.

The motion for a new trial was overruled, and the judgment appointing Mrs. Reilly administratrix was signed on the twenty-third April. She failed to qualify; and, on the fourth May, Pamelia Clark, on motion, showing that Mrs. Reilly had neither qualified nor caused an inventory to be begun, obtained an order appointing her administratrix.

On the seventh May, Mrs. Reilly and Mrs. Woelper took a rule on Pamelia Clark to show cause why the order appointing her administratrix should not be revoked, on the grounds that it was *ex parte*, and not warranted by law; and that a demand for partition having been made by Pamelia Clark, which could not be denied, and there being few debts, no administration was necessary; and they moved that no letters of administration be granted her until the final determination of this rule; and on the same day Mrs. Reilly and Mrs. Woelper answered the petition for a partition, and prayed for a partition of the succession of their father among his heirs.

On the nineteenth May, Meadowcroft answered for his pupils that he could make no objection to a partition of the property held in indivision, as set forth in the petition of Pamelia Clark.

On the twenty-fourth May the court rendered judgment rescinding the order appointing Pamelia Clark administratrix. The next day she applied to be appointed administratrix of the succession of her mother; and on the fifteenth June she prayed to be confirmed as administratrix of that succession, and provisional administratrix of the succession of her father. The court granted the order as prayed for, on her giving bond in the sum of twenty thousand dollars. She gave the bond; qualified in each of the capacities; and separate letters were issued to her as administratrix of the succession of her mother, and as provisional administratrix of the succession of her father.

Mrs. Widow Clark answered the petition for partition by plea of prematurity; and that partition can not be effected until all the debts

are paid; and she prayed for the appointment of an administrator to settle the succession of her deceased husband.

Mrs. Reilly and Mrs. Woelper opposed the application of Pamelia Clark to be appointed administratrix of the succession of their father on the grounds that administration was not necessary, because of the pending demand for partition. In the event that administration should be deemed necessary, they alleged and claimed that Mrs. Woelper, the eldest of the heirs, was entitled to be appointed by preference.

The litigation had thus been reduced to the issues presented as follows:

1: On the rule to vacate the appointment of Pamelia Clark provisional administratrix.

2: On the opposition of Mrs. Reilly and Mrs. Woelper to the application of Pamelia Clark to be appointed administratrix.

3: On the petition for a partition of the successions of Clark and his second wife, as to the right to proceed to a partition among the heirs before the debts of the succession are paid.

The minutes show that "by consent of counsel the above issues were consolidated, and the case proceeded to trial."

Three separate judgments were rendered on the same day, September 24, and signed on the same day, October 12:

1: Vacating the order appointing Pamelia Clark provisional administratrix:

2: Maintaining the opposition to the application of Pamelia Clark to be appointed administratrix on the ground that administration was not necessary:

3: Ordering a partition by licitation, and referring the parties to a notary to regulate the details.

Pamelia Clark, Meadowcroft, in his capacity as tutor of the minor heirs, Widow Clark, Mrs. Grace Batson, and Meadowcroft individually, the three last mentioned claiming as creditors, united in a motion for a suspensive appeal from these three judgments, alleging that they were aggrieved; and the appeal was granted on their giving bond in the sum of $500.

The appellees move to dismiss on the grounds:

1: That as there were three separate judgments, upon and in three separate matters and proceedings, each decree and judgment should have been appealed from separately.

2: That there should have been three separate bonds "to secure the rights of appellants from three separate and distinct causes of action."

3: That appellants have not made a proper and sufficient showing to authorize or justify an appeal.

FIRST. All the questions passed upon in these three judgments arose in one case, the succession of John Clark; and they all tend to one result, the settlement of the succession of John Clark, whether by an administration, or by partition among the heirs, which puts an end to the succession. Pending an application for administration there could be no partition among the heirs; and after a decree ordering a partition there could be no occasion for the appointment of an administrator, there would be nothing to administer.

There were not several cases which were consolidated; there were several questions which arose in one case, that is, in the succession of Clark; and these questions were all consolidated, by consent.

We can not conceive of any prejudice to the rights of the appellees by a single appeal in the succession of Clark, from these three judgments rendered simultaneously. The intimate connection of these questions would indicate the propriety of consolidating them, and of bringing them all before the court of original jurisdiction and before this court in one single proceeding. It seems to us the single trial of all these questions in the district court, and the single appeal including them all, consist perfectly with the interest and convenience of all the parties; and we know of no authority, no law or principle which forbids this mode of proceeding.

SECOND. The appellants were not condemned to pay any sum of money, nor to deliver to the appellees any thing. No matter what might be the amount of the bond, or the number of bonds given by appellants, no decree could be rendered against them on the appeal, except for costs; and the costs are as fully secured by one bond with sufficient security for a sufficient amount as by any number of bonds.

THIRD. The appellants have brought themselves within the requirement of the Code of Practice. The parties to a suit have the right to appeal, of course; and third persons, not parties, have this right, also, when they allege that they have been aggrieved. Article 571.

Mrs. Clark, Meadowcroft, and Mrs. Batson all claimed to be creditors of the succession, and the record shows that they are creditors. There was a contest between the heirs on the application of one of them to be appointed administratrix; and that contest promised to be protracted. The applicant was appointed provisional administratrix. The condition of the succession was such as to require the exercise of conservatory powers, to prevent loss and injury. The creditors were directly and pecuniarily interested in the maintaining of the order appointing a provisional administrator to take care of the property pending the contest for the appointment of an administrator; and in the appointment of an administrator to whom they might look for payment.

The creditors were equally interested in opposing a partition, before the debts were paid. While the succession is under administration the creditors look to the administrator alone; when the property has passed out of the hands of the administrator, and has been partitioned among the heirs, it is by no means convenient to the creditors to pursue each one of them for his virile share, particularly where they may have their domiciles in different parishes, or, some of them, beyond the limits of the State.

Counsel for appellees suggest that there may be difficulty in adjusting the costs in the event that one or more of the judgments appealed from should be affirmed, and one or more of them reversed. It is not new, nor is it very difficult, for judicial tribunals to apportion costs on equitable principles; but no argument based on inconvenience would justify the dismissal of an appeal.

Without intending to express any opinion as to the correctness of any one of the judgments appealed from, we think all the appellants have shown such an interest in the questions passed upon as entitles them to appeal.

The motion to dismiss is overruled with costs.

ON THE MERITS.

The opinion of the court was delivered by

SPENCER, J. John Clark died intestate in February, 1877, leaving, first, Mrs. Reilly and Mrs. Woelper, children of his first marriage; second, Pamelia Clark, of age, and William and Elizabeth, minors, children of his second marriage; third, Mrs. Catherine Clark, his third wife and widow surviving him.

His estate was inventoried at $77,820 28, of which $7550 92 was cash in bank, and $8580 the appraised value of premium bonds.

There is evidence in the record tending to show that the debts of the estate amount to $10,047 64; but a large portion of these seem of doubtful legality. It seems to be established, if not admitted, that there are debts to the amount of near $5000.

After Clark's death, the widow and one Meadowcroft, tutor of the minors, and Pamelia, applied jointly for administration. Mrs. Reilly opposed on various grounds, and claimed the appointment herself. Her opposition was sustained, and she appointed by decree signed April 23, 1877. On April 12, 1877, Pamelia Clark filed a suit for partition, making all parties in interest defendants. Default was taken on this petition, and experts appointed, who reported for a partition by licitation. The tutor of the minors answered, joining in the prayer for partition. The widow pleaded that it was premature until the estate had been administered.

On May 7, 1877, Mrs. Reilly and Mrs. Woelper answered, and joined in the prayer for partition. Mrs. Reilly seems to have abandoned her right to administer, and did not qualify under her appointment.

On May 4, 1877, Pamelia Clark, by *ex parte* motion, and on alleging that more than ten days had elapsed since Mrs. Reilly's appointment, etc., caused herself to be appointed administratrix. Mrs. Reilly and Mrs. Woelper took rule to vacate this order, because Miss Clark had sued for partition, and because the debts were small, and an administration unnecessary, and uselessly expensive. The court rescinded the order appointing Miss Clark, who seems not to have appealed.

On May 25, 1877, Pamelia again made application for letters of administration; was opposed by Mrs. Reilly and Mrs. Woelper, on the ground that the estate was large, the debts small, and administration unnecessary; that the heirs demanding partition have accepted unconditionally the succession; that the above named order rescinding her previous appointment was *res adjudicata* on the question of administration, *vel non*. That, if there was necessity for administration, Mrs. Reilly should be appointed. The court sustained this opposition, and dismissed the application. From this order one branch of the appeal before us is taken.

In the proceeding for partition there was judgment decreeing it, and from that decree appeal is taken by Pamelia, Mrs. Clark, and the tutor.

Pending her application for administration, Pamelia Clark obtained an *ex parte* order, without notice, appointing her provisional administratrix, on a bond of $20,000. Mrs. Reilly and Mrs. Woelper, on motion, caused this order of appointment to be set aside, and from that decree appeal is taken, also.

1. We think the court properly revoked the appointment of Pamelia Clark as "*provisional administratrix.*" It is an office not *now* known to our law; and whilst it may be, and doubtless is true, that, in the discretion of the judge, some such appointment, for the preservation of the property of an estate, might be made, pending a contest before him, he certainly would have the right of revocation at his discretion, also. But under such an appointment the appointee would be rather a guardian or keeper than an administrator—who can not be appointed, in any form, without giving bond as required by law. When the office of "provisional administrator" was known to our law, he could only be appointed on giving bond as any other administrator. Besides, the duration of the appointment of such a guardian would necessarily be short, for the law requires speedy and summary trial of such questions as contests for administration, and does not allow the decree to be suspended by appeal.

2. The rule is that where some of the heirs are beneficiary, and there are debts, and the creditors or heirs of age demand an administration, it should be ordered. See Soye vs. Price (not yet reported); 4 L. 202; 4 R. 414; 14 A. 641; C. C. 1030, 1042; C. P. 974, 982; 2 A. 465; 3 A. 502; 29 A. 348.

As stated, there is proof in this record, and we do not understand that it is denied, that there are several thousand dollars of debts against this estate. There is in the record a petition, signed by numerous persons claiming to be creditors, demanding an administration. True, this petition was filed after the trial of the issues herein above stated, but whilst a motion for a new trial was pending, and before judgment signed. That petition is verified by oath that the parties thereto are creditors, and was, we presume, filed as basis for appeal. Some of these creditors are appellants from the judgments rendered in this case refusing an administration and ordering a partition. However much we may feel disposed to approve the decree of the judge below, we do not feel at liberty, under the facts of this case, to disregard the plain and positive texts of the Code, and the uniform adjudications of the courts. As there are creditors of the estate demanding an administration, and as there are among the heirs some minors, who can not be other than beneficiary, we think a partition, if opposed, can not be made until the estate is administered and the debts paid. The proposition of appellee's counsel, that the minors by consenting to the decree of partition had unconditionally accepted, is not tenable. Neither the minor himself, nor any one for him, can accept in that way. No act of his, or of his tutor, can render him liable as heir pure and simple.

The evidence in this record does not enable us to decide to which of the heirs the administration should be confided. We think, as the judge *a quo* did not pass upon that question, we should remand the case as to that.

It is therefore ordered and decreed that the judgment decreeing the partition be reversed and set aside. That the judgment refusing the appointment of an administrator be also reversed, and that this case be, as to that, remanded, with instructions to the judge *a quo* to proceed to the appointment of an administrator, according to law. That the judgment revoking the appointment of Pamelia Clark as provisional administratrix be affirmed. That two thirds of the costs of appeal be borne by appellees, and one third by appellants; those of the court below to be borne by the succession.

No. 6737.

AURORE NEEL VS. PÉLAGIE HIBARD.

One who holds possession of real estate as an agent, can not acquire the property of such estate by prescription.

An action to annul a judgment can only be brought by one who has a real and actual interest impaired by such judgment.

It is not necessary that the bastard child, born in this State of a slave mother, should have been legally "acknowledged" by the mother, in order to enable the emancipated mother to inherit from said child.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

W. E. Murphy for plaintiff and appellee.

Ed. Bermudez for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. In 1842, on the 7th of December defendant—then a slave—brought forth a child who—as herself—was a slave. With her consent and the permission of her mistress, that child was—on the 19th of February 1844—baptized under the name of Philippe, and as being the illegitimate son of Fillette Lafontaine, a free person. He was then baptized, for the reason—as said by his mother on the trial of this cause—that, otherwise, he would not have been free.

He grew near his mother and lived with her until he was about sixteen years of age. She sent him to school, and being remarkably intelligent, as shown by his letters, he progressed rapidly in his studies, attracted the attention of one Alexander Marionneau, who became intensely attached to him, and determined—after consulting with and obtaining the assent of his mother and of his mistress—to remove him from this State, where he was exposed to pass from the possession of a friendly owner under the control of less tolerant masters. When about to return to France, Marionneau, whose intention was—not merely to secure the freedom of Philippe—but to conceal the irregularity of his birth, the misfortune of his condition, concluded that his name and status should be changed. It was then that he and one Campanel—deceiving a priest and the Recorder of births—caused two false entries to be made, in and by which the pretended son of Fillette Lafontaine was represented as the legitimate issue of the marriage of Banks Dunbar with Anna Philippe.

This done, Marionneau—who had some property in this City—appointed as his agent and to take charge of it, one Louis Neel, the husband of plaintiff; and—in 1858—with legalized certificates of the false entries already referred to—left for France, accompanied by William Dunbar, the son of Pélagie.

That Marionneau, Campanel and defendant were guilty of a fraud,

we do not deny; but that fraud was perpetrated with the aid and sanction of those who alone could have complained of it, and it is too late to denounce it.

Marionneau died in France, on the 13th of April 1861, and—by his last will—the inconsiderable property which he owned here passed to William Dunbar, who retained Louis Neel as his agent. He was—by that agent and by plaintiff herself—recognized as the son of Pélagie and the owner of the property which had belonged to Marionneau. Shortly after the death of the latter, Dunbar was penniless, and—as he had ever done—he worked incessantly to get a livelihood. Overtaken by sickness, he wrote the most imploring letters to obtain the revenues which—he thought—and which, in all probability, his agent had derived from the lease of his property in New Orleans; but he wrote in vain. Prostrated by an accidental consumption, he entered an hospital in Paris, and there he died on the 12th of March 1867, possessed of naught but his clothes and ten cents.

More than eight years after—on the 17th of April 1875—Pélagie Hibard was, by a decree of the second district Court, recognized as the sole heir of William Dunbar, and ordered to be put in possession of his estate. Two days after the rendition of that decree, Joseph Flores called on plaintiff, with a copy of said judgment, and demanded, in Pélagie's name, possession of the property which had been left in charge of Louis Neel—at first by Alexander Marionneau, and—at his death—by William Dunbar.

Nearly thirteen months after that demand, the widow of Louis Neel filed an action in the second district Court, in which she alleges that the decree which recognizes Pélagie as the sole heir of William Dunbar was improvidently rendered, without any evidence to sustain it and through the misrepresentations of Pélagie: that she is aggrieved by said decree, has an interest in attacking it and prays that it be rescinded and annulled.

How is she aggrieved? Pélagie is disturbing her in what she terms "the legal and peaceable possession of a lot of ground and improvements thereon." That lot and those improvements are the same which—from 1858 to 1861—Louis Neel held in no other capacity than as agent of Marionneau, thereafter as the agent of William Dunbar, and his widow's pretension is as extravagant as unjust.

Those who possess as she does, can not acquire a legal possession, because it can not be presumed that they had the intention of possessing for themselves, and even if they did entertain that dishonest intention, their possession continues to be that of the person for whom they originally took it.

R. C. C. 943, 3441, 3446, 3489, 3490, 3493.

An action can be brought by only those who have a real and actual interest which they pursue, and plaintiff has completely failed to show how she was or can be aggrieved by the effects or the execution of the judgment which she seeks to annul.

C. P. 15.

Mrs. Neel's counsel contends that—not only Pélagie has not acknowledged William Dunbar as her son, but—on the contrary—has denied that fact from his birth. To justify that reproach, he refers to the misrepresentations resorted to, for the purpose of securing the freedom of her child and concealing his origin. Her participation in that fraud did—in no way—deprive her of any right to which she may be entitled as the mother of the deceased.

To sustain her action in nullity, plaintiff relies on articles 203, 922 and 929 of the Revised Code, which provide—the first, "that the acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child—the others, that the estate of a natural child deceased without posterity belongs to the father and mother who have acknowledged him, and—in default of acknowledged relations—to the State.

William Dunbar died in 1867. The Code of 1825 was then in force, and not a single provision of that Code, concerning the acknowledgment of illegitimate children and their successions, can be justly invoked against those of our slaves who were emancipated after the war. At the birth of her son, Pélagie was a slave and she would not have been allowed to make such an acknowledgment. When slavery was abolished, her absolute incapacity fell, and—as all free persons, even minors, lunatics, persons of insane mind and the like, she became invested with the right of inheriting.

Code of 1825, article 945.

The deceased's mother was not married and he was a bastard. Is that any concern of plaintiff? That mother's concubinage, the illegitimacy of her son, were the almost inevitable results of their condition, and as that condition was not of their choice, but one imposed by the laws of the State, the maternity of the slave—though hatched in a not prohibited concubinage, can not be invoked as a crime against the emancipated mother, and can assuredly not authorize the widow of her son's agent to despoil the concubine, and to keep as her own the property of the bastard.

We do not hesitate to hold that a female slave, whose child was born before the general emancipation which followed the war, who has acknowledged that child in the only manner in which she could have

done so, by nursing him, by treating him as such, and who—by him—has always been recognized as his mother, is certainly entitled to his succession to the exclusion of at least the State; unless, perhaps, the succession thus claimed would have been opened after the revision of the Code of 1825.

Were plaintiff to succeed in her attempt, what would she gain? The harsh and barren satisfaction to dispossess a mother, and for whose benefit? Not her own, but that of the State. Thus, the very authority on which the party relies, clearly demonstrates that she has—not only no real or actual interest, but not even a prospective or eventual interest in the matter, unless it be to retain—and forever—in disregard of law and justice—the property entrusted to their care, and which she and her husband have enjoyed, without the form of a title or shadow of a right, for more than ten years.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed, and plaintiff's demand rejected at her costs in both courts.

No. 6897.

MARY STUFFLER VS. ELIZA J. PUCKETT.

A parish judge has no power to authorize a married woman to contract a debt for more than $500.

Where the wife has not been judicially authorized to give a mortgage on her separate property, a note and mortgage executed by her are not legal proof of her obligation, and evidence *aliunde* showing that it was her separate debt, must be produced, in order to bind her.

Unless the wife accepts the community expressly, or tacitly, she stands in relation to its debts as she does toward the debts of third persons.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Herron, Bird & Beale for plaintiff and appellee.

Saml. P. Greeves for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The plaintiff, owning as her paraphernal property a lot of ground in Baton Rouge, borrowed from the defendant $2000, on April 24, 1872, and executed solidarily with her husband a promissory note therefor, to the order of Eliza J. Puckett, payable in one year. In the act it is declared that the improvements upon said lot were made after marriage, and belong to the community; and that, therefore, the husband joins in the act. The act also declares that the wife had been authorized by the parish judge; and there is annexed to it a petition of

Mrs. Stuffler, addressed to the parish judge, asking his authorization, and a very informal certificate of that functionary to the effect that "after examination of the petitioner, being satisfied that it is necessary and proper that the said sum of two thousand dollars should be procured for the purpose therein set forth," he orders that she be authorized to grant the mortgage. In her petition for authorization she sets forth that she owns the lot, but that the improvements thereon belong to the community; that the lot is encumbered with a mortgage past due, and there are other claims, not specified, which she desires to pay.

James Stuffler died in 1873, and soon after plaintiff qualified as administratrix of his estate.

Defendant sued out executory process on this mortgage in 1877, making Mrs. Stuffler individually, and as administratrix, defendant. Thereupon, Mrs. Stuffler enjoined the sale, alleging in substance that the debt was contracted during marriage and was a debt of the community, for which neither she nor her property was liable; that the interest of the community in said property was a mere money claim against her for the improvements put on it, and could only be ascertained and enforced in a settlement between herself and the community; that the pretended authorization of the parish judge was without effect for want of legal form, and because the parish judge was without jurisdiction to grant it. She further alleges that the sale was not advertised for the time required by law.

Under article 127 C. C. the application for authorization is to be made to the district or parish judge, "according to the amount involved." This refers, of course, to the constitutional amounts determining the jurisdiction of said judges. By express provision the Civil Code governs where its enactments are at variance with those of the revised statutes of 1870; sections 3982 and 3983 of the statutes must therefore be controlled by article 127 C. C. Besides, the article of the Code is more in harmony with the constitutional limitations upon the jurisdiction of said courts. It is not necessary to decide whether, upon oath of the absence of the district judge, a petition for authorization addressed to him can be granted by the parish judge, since there is no such question raised by the facts or pleadings in this case. We think the authorization in this case was invalid, and without effect, and that the case stands, therefore, upon the effects of the acts of a married woman not acting under judicial sanction.

It is unnecessary to cite authority to show that, in such case, the simple denial of the wife put the onus of proof upon the creditor; that her note and mortgage are not legal proof of her obligation, and that evidence *aliunde* must be produced to bind her.

In this case it is shown that there was, as stated by her, a pre-exist-

ing mortgage granted by her to one Payne, in 1870; but that mortgage was in all respects similar to the one in controversy, except that its amount was only $1000, and there was no pretense of judicial authority for giving it. It is rendered probable that this pre-existing mortgage was taken up with money obtained from Mrs. Puckett on the second mortgage, but there is not only no proof that this debt to Payne was a separate debt of the wife, but, on the contrary, a presumption of law that it was a debt of the community. In fine, the defendant wholly failed to prove the plaintiff's separate liability. There is no analogy between this case and that of "Jordan vs. Anderson," 29 A. 749. That was a case where the wife entered into a contract with a builder to construct, with his own labor and material, a house on her paraphernal property. We held that she and her property were liable to him. Here, the wife borrows a round sum of money, and gives her note and mortgage. The very act of mortgage shows that the improvements upon her property were already there, and put there by the community.

An attempt was made to show that the wife had ratified this act of mortgage by paying interest on it after the husband's death. She was administratrix of her husband's estate, and nothing shows in what capacity she made the payments. It might well be doubted whether any thing short of a written promise to pay would render her liable, if *this was in fact* a community debt, since the law *prohibits* her, during marriage, from binding herself for such debts. It strikes such obligations with absolute nullity. "Toute ratification est donc impossible pour une obligation proprement nulle; sans doute, on peut créer une obligation nouvelle et efficace pour la substituer a celle qui n'avait qu'une existence apparente, mais on ne peut pas plus valider celle-ci, car le néant ne peut pas plus être confirmé qu'il ne peut être detruit; *quod nullum est confirmari nequit.*" Marcadé, vol. 5, p. 344.

Unless a wife accepts expressly or tacitly the community, she stands in relation to its debts very much in the position which she would to the debts of any other third person. A promise to pay the debt of a third person must be express, and in writing, signed by the party to be charged. C. C. 2278, number 3.

The judge *a quo* perpetuated the injunction, but gave, in effect, a judgment of nonsuit as to defendant's claim. The appellee has not asked that the judgment be amended, and appellant has no just reason for complaint, as the judgment is, perhaps, more favorable to her than it should have been.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs.

No. 6772.

THE STATE VS. S. W. CURTIS.

When the motion for a new trial, on the ground of newly discovered evidence, does not disclose the evidence, or the source from which it is derived, the motion is defective, and should be overruled.

An information charging defendant with breaking and entering a store at night, with intent to steal, which fails to charge that defendant *feloniously* entered, and fails to charge that he did break, and enter with *burglarious*, or *felonious intent* to steal, etc., is fatally defective.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, for plaintiff.

P. P. Carroll and *J. N. Healy* for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The defendant was charged as follows:

The State of Louisiana, First Judicial District, Parish of Orleans, ss. Superior Criminal Court for the Parish of Orleans:

John J. Finney, District Attorney, of the First Judicial District of the State of Louisiana, who, in the name and by the authority of the said State, prosecutes in this behalf, in proper person comes into the Superior Criminal Court for the parish of Orleans, in the parish of Orleans, and gives the said court here to understand and be informed that one S. W. Curtis, late of the parish of Orleans, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-six, with force and arms, in the parish of Orleans, aforesaid, and within the jurisdiction of the Superior Criminal Court for the parish of Orleans, did in the night time, and with intent to steal, break and enter the store of M. Andrieu & Co., contrary to the form of the statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same.

JOHN J. FINNEY,
District Attorney of the First Judicial District.

Upon this information he was tried and convicted, and after an ineffectual motion for new trial, was sentenced to ten years hard labor in the State Penitentiary. Our attention has been called to the action of the court in annulling the motion for new trial, of which it is only necessary to say that we can not consider the question as to the sufficiency or insufficiency of the evidence to convict, were it before us, as it is not; and that the precise nature of the newly discovered evidence, or the source from which to be derived, is not disclosed in the motion, which is, therefore, defective, and need not be considered. A motion in arrest of judgment was filed in the court *a qua*, the grounds of which are assigned as error in this court. They are: "That the information does not

charge that said defendant, on the twenty-seventh day of September, 1876, did *feloniously* enter," etc. "Nor that the said defendant, on the same day and date, did then and there, *with felonious intent* to steal, break and enter the store aforesaid." "Nor that the said defendant, *with burglarious intent*, did then and there break and enter the said store." It will be seen from the information already read that it is liable to the objections taken in point of fact. We have, therefore, only to consider whether it is therefore defective in point of law. If the information were at common law it would be clearly bad, and so, also, if the statute referred to a common-law offense. See State vs. Thomas, 29 A. 601, and authorities there cited. It has been very properly held in this State, under the statute against breaking and entering with intent to commit a crime, that the indictment would be bad if it only charged the intent to commit a *misdemeanor*. The general rule unquestionably is that, where the offense was not one at common law, it is in general good to charge substantially in the language of the statute. That under which this information was filed reads as follows: "Whoever, *with intent* to kill, rob, *steal*, commit a rape, or *any other crime*, shall in the night time break and enter into any shop, *store*, courthouse, church, barn, rice or sugar house, cotton house, plantation, or any vessel, *or having with such felonious intent* entered, shall in the night time break any such house, building, or vessel, and every person present aiding, assisting, or consenting to such *burglary*, or accessory thereto before the fact, by counseling, hiring, or procuring *such burglary to be committed*, on conviction shall suffer imprisonment at hard labor, not exceeding ten years." R. S 1870, section 852. The use of the words "*with such felonious intent*," and the words "*such burglary*," in the statute can not be without meaning, and we think necessarily refer to and characterize both clauses of the statute, and indicate the legislative intent that though the breaking and entering charged be not of a dwelling-house, it was and is intended to be classed and considered and charged as "*burglary*," under our law. The statute of 1855, which has been reproduced in substance, and almost in language, has been often held as not intended to make a radical change in the system of criminal pleadings, but to simplify it, and correct some supposed deficiencies, and not to dispense with the substantial averments of a bill of indictment at common law, of which the absence of the word "*feloniously*," or "*burglariously*," or with "burglarious intent," would be fatal to an indictment; so we think the absence of those essential averments in an information for what is termed and considered by our law "*burglary*," is equally bad; while the statute under which this information was filed would seem to enlarge the definition of burglary at common law so as to embrace another class of cases, neither that nor any other statute has changed "the mode of prosecution," the

substantial requisites to a good indictment or information for that crime, however defined, which are, therefore, the same as at common law; and we think, under the terms of the statute in question, that if the term "*burglary*" had been altogether omitted from it, the use of the word "*feloniously*" in the information under it is essential. See, again, State vs. Thomas, 29 A. Wharton's Am. Crim. Law, sections 1607, 1612, and 1613; see, also, same, section 272; 8 R. 590; 10 A. 195; same, 698; and State vs. Stiles, 5 A. 324.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside, and the information quashed, as not good in law, and that the defendant remain in custody subject to the orders of the Superior Criminal Court of the parish of Orleans for further prosecution, according to law.

No. 7073.

STATE EX REL. BOARD OF SUPERVISORS, ETC., VS. BOARD OF LIQUIDATORS.

The Board of Liquidators appointed to carry into effect the provisions of the Funding Act of 1874, can not refuse to fund any legal warrants, or bonds of the State, when required to do so by the owners, or the legal custodians of such bonds.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

J. S. Brent and *E. H. Farrar* for plaintiffs and appellees.

H. N. Ogden, Attorney General, for the defendants.

The opinion of the court was delivered by

MARR, J. The Relators obtained a peremptory mandamus, ordering the State Treasurer and the Secretary of State, joint depositaries of certain bonds known as the Seminary Bonds, to present them to the Board of Liquidation, to be exchanged for Consolidated Bonds, under the Funding Act of January 24, 1874.

In obedience to this order the Depositaries presented the bonds for funding, and the Board of Liquidation refused to fund them. Thereupon the Relators proceeded by mandamus against the Board, to compel the funding. The Board made no written answer; and the mandamus having been made peremptory, the Board appealed.

There is no question about the legality of these bonds. They were issued under act No. 182, of 1857, in liquidation of the indebtedness of the State to the Seminary fund; and the interest was paid on them semi-annually, until 1873. We understand the refusal of the Board to be on the ground that these Bonds represent a trust fund; and that it would be bad faith on the part of the State to diminish them by forty per cent.

The funding act authorizes the funding of all valid outstanding bonds of the State, and valid warrants, etc., drawn previous to the passage of the Act; and if the owners, beneficiaries of the bonds, or those having the legal custody and control of them, choose to avail themselves of the privileges of the Act, the Board of Liquidation has no right or authority to discriminate between one valid bond and another, as to the merit of the original consideration. Such distinctions might influence the future action of the State.

We can not, in this proceeding, review the judgment requiring the Depositaries to present these Bonds for funding; nor can we deny to the Relators the privileges to which they are entitled under the funding Act.

The judgment appealed from is, therefore, affirmed with costs.

No. 7029.

STATE VS. ISRAEL MORRISON.

No indictment is valid which does not contain an indorsement of the special crime charged, followed by the words "a true bill," and signed by the foreman of the grand jury in his official capacity, in the presence of the grand jury.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Yoist*, J.

H. N. Ogden, Attorney General, for plaintiff.

Hewes & Parlange for defendant.

The opinion of the court was delivered by

MARR, J. Appellant, the accused, was tried and convicted on a charge of murder; and, after ineffectual motions, first for new trial, and then in arrest of judgment, he was sentenced to death.

The paper called an indictment states that the accused did * * * kill and murder one Robert Noland; and the indorsement on this paper is: "No. 266, State vs. Israel Morrison, 'Murder.' Oscar Joffrion, Foreman; L. H. Ducoté, District Attorney."

The minutes show that Joffrion was appointed Foreman; that the Grand Jurors were sworn; and that, after having received the charge of the Judge, they retired to enter upon the discharge of their duties; but there is no entry to show that they ever again made their appearance in court.

It was admitted on the trial of the motion in arrest that the only indorsement on the indictment is that copied above; "and that the words 'a true bill' or words equivalent thereto do not appear in any part of the indictment."

It would be a waste of time to consider any of the other objections

raised by the motion in arrest and the bills of exception. For all that appears, this indictment may have been the work of the District Attorney and the Foreman alone, without ever having been submitted to or acted upon by the Grand Jury. The finding of the Grand Jury is expressed in one way alone; and that is by the indorsement of the crime, for instance, "Murder," followed by the words "a true bill," signed by the Foreman, in his official capacity, in the presence of the Grand Jury, in attestation of their official action; and no other evidence can be received to show that they have acted upon the charge and found the bill, than that afforded by the indorsement of the crime, and the finding, "a true bill," verified by the signature of the Foreman.

When a bill has thus been found, it is the business and the duty of the Grand Jury to go into court and through their Foreman, in open court, to present the bill, which is done, usually, by handing it to the Judge. It is the business of the Clerk, when the bill is delivered to him by the Judge, to state in his minutes the coming of the Grand Jury into court, and presenting the bill in open court, and to record the finding as it is indorsed on the bill, with the signature of the Foreman.

Israel Morrison has not been legally charged with the crime of murder; and the verdict and sentence are mere nullities.

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside; that the judgment and sentence of the court be annulled, avoided, and reversed; and that Israel Morrison be detained in custody, to await the further action of the District Attorney and the Grand Jury of the parish of Pointe Coupée, and until discharged in due course of law.

No. 7021.

MARCELLITE MARTINEZ ET AL. VS. SUCCESSION OF ADOLPHE VIVES.

Service of citation, and a certified copy of the petition in a suit, before the proper court to revive a judgment, made on the administrator of the judgment debtor within ten years of the date of the judgment, will interrupt prescription, even though the number of days within which the defendant was called on to answer was not specifically set forth in the citation.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *McVea*, J.

E. B. Talbot for plaintiff and appellant.

Barrow & Pope for defendant and appellee.

The opinion of the court was delivered by

EGAN, J. This suit is to revive a judgment rendered by the district court of Iberville on the eleventh of May, 1866. It was filed on the

ninth of May, 1876, and citation and copy of petition served personally upon the administrator of the deceased judgment debtor on the next day, the tenth of May, 1876, within less than ten years from the date of the original judgment.

On motion of the defendant's counsel a default taken upon this service was set aside on the ground that the citation did not, as required by the Code of Practice, specify the number of days within which the defendant was called on to appear and comply with the demand or file his answer. Thereupon a new citation was issued and regularly served, though meanwhile more than ten years had elapsed from the rendition of the judgment sought to be revived.

The defendant pleaded the prescription of ten years and other matters of defense not necessary to be considered, as this appeal is from a judgment dismissing the suit on the exception of prescription only.

We have been invited by counsel on both sides to consider the effect of the act of 1858 "to require written proof in certain cases" in connection with that of 1853 providing for the first time a prescription for judgments. Both are now embodied in the late revision of the Civil Code. We do not, however, consider it necessary to embark in that field of inquiry in the present case, to which we do not consider the former act as having any application. The sole question here is whether or not the citation issued on the ninth of May, 1876, and served together with a copy of the petition setting forth the nature and character of the demand upon the administrator personally on the tenth of the same month, interrupted prescription. There is no pretense that the representative of the succession was not fully informed by that service of the nature of the demand and cause of action; none that the copy of petition served was not a true copy, or that it was not properly certified as such, but only that the number of days within which he was called upon to answer was not specifically set forth in the citation.

It must be remembered that this citation was issued in the present suit, and that there is here no question of the effect of citation in another and different suit or proceeding to interrupt the prescription pleaded.

Neither can it be now contended in the face of the frequent adjudications of this court to the contrary that citation issued and served within ten years from the date of the original judgment does not stop prescription even though the judgment of revival be not rendered till after the lapse of ten years. This is but the recognition and application to suits for the revival of judgments of the principle of legal interruption of prescription operated by citing the defendant before a court of justice, whether it be a court of competent jurisdiction or not, recognized in articles 3516 (formerly 3482) and 3518 (formerly 3484) of the Civil Code. Indeed, that mode of interruption is specially provided by the

very terms of the law which provides for the prescription of judgments. See R. C. C. article 3547.

The only inquiry remaining then is whether the service of the copy of the petition in this case upon the administrator personally, not constructively, together with a citation defective only in not stating the number of days within which he was called on to answer operated such legal interruption of prescription in the present case. The copy of petition served informed the administrator fully of the nature of the suit; even the citation itself gave not only the title of the cause and of the court but also the names of the parties and nature of the action, and was properly addressed to the defendant in his capacity of administrator of the succession of Adolphe Vives, the deceased judgment debtor. Indeed, it was in all respects regular except as to the time for answering the demand, and the service seems to have been so far effective that the defendant appeared by counsel in time to prevent the ripening into final judgment of the default taken upon that service.

The reasons given by the district judge for setting aside the default are solely the defect as to time for answering in the original citation.

In the case of Pratt vs. Peets, curator, 3 La. 281, where prescription was pleaded against a revocatory action after the dismissal of an intervention by the same plaintiff in another suit in which he set up the same fraud relied upon in that case, Judge Matthews, as the organ of the court, said: "A mistake in the tribunal it seems will not destroy the effect of a suit in the interruption of prescription; and by analogy it ought not when the error occurs in the manner of prosecuting such suit in consequence of which it is dismissed." And the court overruled the plea of prescription.

In White vs. McQuillan, 12 L. 533, prescription was pleaded against promissory notes and it was urged that a previous imperfect service of citation did not interrupt prescription. There the service as in this case was personal, and the defect was that the copy of petition was not certified by the clerk under seal of his office. Judge Bullard, as the organ of the court said; "We are of opinion that the service of the citation together with a copy of the petition, although it may not appear that the copy was duly certified by the clerk, is a sufficient judicial demand to interrupt prescription." In Flower et al. vs. O'Connor, prescription was pleaded against a promissory note payable and belonging to a commercial firm dissolved by death of one of the partners. Suit had been previously brought before prescription had run upon the same note by the surviving partner as such, but without authority to represent the heirs or representatives of the deceased partner, and was for that reason dismissed as of nonsuit. It was claimed that prescription was thereby interrupted, and the court said: "It is a well-settled doctrine in our

jurisprudence that one of the modes of interrupting prescription is by citing the possessor or debtor before a court of justice; that it matters not whether the suit is brought before a court of competent jurisdiction or not; that prescription is interrupted by suit, although the plaintiff therein be nonsuited; that a mistake ought not to destroy the effect of such suit when the error occurs in the manner of prosecuting it in consequence of which it may be dismissed;" and cites a number of authorities in support of the views expressed. The court then proceeds to review the whole question, and, after an apt quotation from Pothier, says: "It is clear from this doctrine of Pothier that in order to determine the effect and extent of a legal interruption we must inquire more particularly into the object and cause of the action than into the right of the plaintiff, the manner in which it is prosecuted, and the competency of the court in which it is instituted, and endeavor to ascertain how far the knowledge of the titles on which it is founded has been brought home to the defendant by the judicial demand; and we do not hesitate to conclude that if it be established that the defendant has been judicially notified of the titles which are the foundation of the demand for the whole property or of the debt so as to acquire a sufficient knowledge of the rights which are sought to be enforced against him by suit, there results from said suit a legal interruption in favor of those to whom such rights may belong; and such the court says seems also to be the true spirit of our own law, citing C. C. 3484, now 3518, to the effect that "a legal interruption takes place when the possessor has been cited to appear before a court of justice on account either of the ownership or of the possession; and the prescription is interrupted by such demand whether the suit has been brought before a court of competent jurisdiction or not."

In the case of Driggs vs. Morgan, 10 R. 120, there were two citations, one of which, issued and served before prescription had run, was excepted to as insufficient, whereupon the plaintiff, as in this case, caused a new citation to issue, and the defendant pleaded prescription to the action which was to recover damages *ex delicto*. The court below overruled the plea and the Supreme Court affirmed the ruling, and in so doing said the defendant could not have been mistaken as to the court before which he was called on to answer; that the citation was headed and issued from the district court of the Fourth Judicial District for the parish of Pointe Coupée, where the suit was stated to be pending, and was signed by the clerk with the attestation of the name of the judge of that court. The exception was that the citation required the defendant to file his answer "in the office of the clerk of the court of the parish aforesaid at the court-house, at Pointe Coupée."

This suit was prior to the constitution of 1845, and parish courts

were still in existence; there was therefore more substantial ground of error or objection than in the present case, although it is proper to add that the court thought the original citation good.

In Barrow vs. Shields, 13 An. 58, Judge Buchanan, as the organ of the court, said: "It is immaterial for the purpose of interruption of prescription whether the debtor be cited before a court of competent jurisdiction or not. Neither does any error in the form of the action nor the rejection of the creditor's demand by the final judgment thereupon have the effect of avoiding the interruption of prescription resulting from citation; for these clauses of the 2247th article of the Code Napoleon which declare that the interruption of prescription is considered as "*non avenue*" if the suit be informal or if the demand be rejected, have not been copied into our Code. The only portion of that article adopted by our legislature is the clause "Si le demandeur se désiste de sa demande," citing C. C. 3485, now 3519. In the same case Judge Merrick says, citation *eo nomine* is not essential to interrupt prescription; that a subpœna in chancery is equivalent to citation, citing 15 La. 485; so, also, where citation is waived, C. P. 177; that a reconventional demand has like effect, citing Morgan vs. Briggs, before quoted. 10 R. 119. Judge Spofford in the same case, p. 70, says: "It would seem that the interruption takes place whenever the debtor is brought into court, no matter how irregularly or improperly, to answer on account of the debt in a suit to which the creditor is a party," and further "under a similar textual provision it has been held in France that the appearance of a warrantor in a cause, cited only at the instance of the defendant, if he sets up a defense to the plaintiff's demand, will interrupt the prescription pleadable by the warrantor against the plaintiff," and cites Dalloz, 32, 1, 164. In Morton vs. Valentine, 15 A. 150, the plaintiff recovered a judgment in Mississippi, where there was a statute providing that judgments shall not be revived by *scire facias*, nor shall any action of debt be instituted thereon after the expiration of seven years from the date of that judgment. The defendant removed to Louisiana and was sued upon the judgment which was revived by *scire facias* in Mississippi, after it had become barred by the statute. He pleaded the prescription of seven years under the Mississippi statute, and his plea was overruled. We only allude to this with the other cases to show the tendency of our jurisprudence. But we now come to other decisions more directly apposite to the case at bar. In Smith vs. Taylor, 10 R. 133, Bullard, judge, as organ of the court, held that where the petition was deposited in the clerk's office by the plaintiff's attorney before the time necessary to prescribe the action had elapsed, but in consequence of the absence of the clerk and deputy clerk from the parish it could not be filed nor citation issued until the time had elapsed, the action will

not be prescribed. "The court said the plaintiff had until the last day of the year to commence proceedings, and was not obliged to procure process before. If at that time there was an impossibility to procure the necessary process the prescription was suspended." Citing 7 N. S. 471, 3 La. 221. In N. O. Canal and Banking Company vs. Tanner, 26 An. 273, our immediate predecessors held that prescription was interrupted by a citation issued by a person *de facto* in possession of the clerk's office in 1873, although he was so under authority of a government they did not recognize.

In Leon vs. Bouillet, 21 An. 651, it was held that citation served upon one whose native language is French when the petition is written only in English will interrupt prescription, and yet the law was at that time, 1865, even more positive on this subject, and the reasons for requiring service in the native tongue of the defendant much stronger than those which require the number of days for answer to be stated in the citation. No one will question that exception to the service made in the case just quoted should have been sustained *in limine*, and new service ordered, and such was the ruling of the court, but it also said that though the words "must be" were used in the article of the Code of Practice, 172, it was no more than was done in relation to all the other forms of a petition, such as names, surnames, etc. But the Code does not pronounce the absolute nullity of a petition defective in these particulars. It held the nullity only a relative one, and that while the defendant had a right to require service in his native tongue it did not follow that the suit must be dismissed, and cited 7 La. 413, Thomas vs. Baillio, where the precise point was ruled in the same way. In the last-named case the court cited as analogous the case of Lowery vs. Kline, 6 La. 380, where the exception was that the petition did not set forth the residence of the plaintiff. In the 21 An. case the court held that the exception was one required to be made *in limine litis*, and say: "We must conclude therefore that the defendants had been cited to appear before a court of justice, and that prescription was thus interrupted," citing the cases of White vs. McQuillan and Flower vs. O'Connor already reviewed in this opinion, and also 4 La. 418, and 4 R. 258, of which we will only remark that they sustain the ruling in question. If, however, we were to consider alone the authority of Smith vs. Taylor, 10 R., where the petition was merely deposited in the clerk's office the day before prescription was complete, and the later case of Canal Bank vs. Tanner, 26 An., is it not manifest that the plaintiffs have brought themselves within the rule in both cases, and that they had done more than was done in 4 R. and 21 An. cases, by procuring the service upon the defendant of a citation and copy of petition from which he could not fail to understand the nature and object of the demand? The plaintiffs

were not responsible or in fault for the omission of the clerk, whose duty it was to state the number of days in the citation. So far from abandoning, or discontinuing, or not making their demand, they were pressing it by all means in their power; and we think that the administrator, the representative of the succession, "had been cited to appear before a court of justice" to answer the demand, and that the objection to the citation was of such character that it should have been made before the default, which the court erred in setting aside. That, however, is unimportant, as we are only now concerned with the first service and citation as affecting the question of prescription, which we think was interrupted by it.

It is therefore ordered, adjudged, and decreed that the judgment of the court below sustaining the defendant's plea of prescription be and it is avoided and reversed; and it is now ordered and adjudged that the plea of prescription be and it is overruled, and the case remanded to be proceeded with according to law, the defendant and appellee paying costs of appeal.

No. 6809.

WM. REED MILLS vs. J. Q. A. FELLOWS.

A resident of the Sixth Municipal District of the city of New Orleans sued in one of the district courts for the parish of Orleans, and served with citation prior to the seventh of November, 1876, remains, as to that suit, subject to the jurisdiction of said court.

After a case has been fixed for trial the court is without authority to order it to be tried by jury.

Under our practice nothing prevents the cumulation of demands for the double purpose of proving the existence of a partnership, when the defendant has denied it, and for its liquidation, when proved.

To entitle a party to the continuance of a case, on the ground of absent witnesses, it is necessary not merely to allege but to prove, that he had been diligent, that he was surprised, that he could not prove the facts by other available witnesses, and that they were not absent by his consent or procurement.

When the court orders the defendant to produce in court certain books, which plaintiff swears will prove certain facts, and defendant files, in response to the order, an evasive answer, and fails to produce the books, on the day fixed in the order [no matter whether the case came up for trial that day or not] the court will be authorized to order that the *specific* facts (but only the specific facts) sworn to by the plaintiff, be taken as confessed by the defendant.

When one partner sues the other for a liquidation and balance due on partnership account, the defendant can not set up in reconvention, damages to the business of the partnership caused by the bad habits of the plaintiff.

In the absence of express agreement a charge by one member of an ordinary partnership against the other, for keeping *the books of the firm* is inadmissible.

Mills vs. Fellows.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Gus. A. Breaux for plaintiff and appellee.

J. N. Hagins for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This suit is for settlement of an alleged law partnership between plaintiff and defendant, carried on under the firm name of Fellows & Mills.

The suit is brought in Fifth District Court of Orleans.

I. Defendant excepted to the jurisdiction for the reason that he is, and has been for many years, a resident of the Sixth Municipal District of New Orleans; and that, by act number forty-five of 1876, said municipal district from and after November 7, 1876, became part of the Second Judicial District of the State. See Lafayette Insurance Company vs. Remmers, 29 A. p. 419, and State vs. Williams, *idem*, p. 779.

This suit was instituted in Fifth District Court of Orleans, May 24. 1876, at which time there can be no doubt that court had jurisdiction. See same cases.

The exception to jurisdiction was filed June 8, 1876, and overruled June 28, 1876. On July 1, 1876, the defendant, reserving the benefit of his said exception, filed an answer to the merits.

In the cases above cited we held that the act, number forty-five of 1876, was inoperative until the date of election of judges, on November 7, 1876, and that the Sixth Municipal District was up to that date within the jurisdiction of the courts of Orleans, but afterward under that of the Second Judicial District Court.

In the act forty-five above referred to, no provision is made for transferring any pending causes from the courts of Orleans to the Second Judicial District Court. But the defendant insists that on the seventh November, 1876, the Fifth District Court was by said act divested of jurisdiction over him, since he was a resident of the Sixth Municipal District; and that, therefore, the case should have been transferred or dismissed. The answer to this proposition is that there was no provision of law authorizing the transfer; that the record of the suit belonged to the Fifth District Court, and could not be taken from the custody of its officers, without such authority. The suit, as we have seen, was rightly brought in the Fifth District Court, where it had been put at issue before the act in question took effect. It would be carrying a technicality very far to dismiss the suit under the circumstances of this case. We have seen it could not be transferred; and, as the court had rightful jurisdiction at its inception, we hold that that jurisdiction continues to final judgment, in the absence of express law to the contrary.

II. After this cause was fixed for trial, and, not being reached, was

under the rules continued by preference to another day for trial, defendant filed a prayer for jury, which was allowed. Plaintiff moved to vacate this order allowing the jury, and the court so ordered, considering that it had been improvidently granted, after the case was fixed for trial. The court did not err. C. P. 494.

III. Plaintiff, having filed a supplemental petition reiterating in substance his previous allegations of the existence of the partnership, and charging that defendant was making way with partnership assets, obtained a sequestration.

Defendant excepted, "that until the issue of partnership or no partnership, which is raised in his answer, shall be finally heard and determined, there can be no examination into the accounts and affairs of the alleged partnership." This exception was properly overruled. Under our practice nothing prevents the cumulation of demands for the double purpose of establishing the existence of a partnership, if denied, and for its liquidation when established.

IV. Whilst the case was being tried, the defendant made affidavit for a continuance, on account of the unexpected absence of three witnesses, J. H. Oglesby, J. S. Whitaker, and E. W. Burbank; setting forth what he expected to prove by them; alleging diligence, and, also, ignorance of their departure from the city.

The court refused the continuance, on the grounds that the affidavit was insufficient, and that two of the witnesses, Oglesby and Burbank, had never been served with subpœnas. That three of them stated defendant had told them they would not be needed, etc. We think that the court properly refused to continue. The case had been on trial for some days. Under such circumstances the defendant should have brought himself within the strictest rules. He should have not only alleged but shown diligence and surprise; that he could not prove the facts by other available witnesses; that they were not absent by his consent or procurement, etc.

V. Plaintiff obtained an order requiring the defendant to produce in court, on the day fixed for trial, the docket-book and the account-books of the business of Fellows & Mills, swearing that he expected to establish by them "the existence of the partnership, and the entire allegations of the petition."

The defendant filed a sworn answer to this rule to produce, in which he refers to and adopts the allegations of his original and supplemental answers in the case; reiterating that he denies that there is an unsettled partnership between him and plaintiff; that the books are his private property, etc.

The court, considering this answer as manifestly evasive, on motion of the plaintiff, ordered that the facts stated in the affidavit of plaintiff

be taken as confessed by the defendant. Of this the defendant complains:

First, because he contends that his answer was sufficient, and denied the existence of the books called for. We do not agree with him. We have gone carefully over his answer and supplemental answer, which he adopts. They are not sufficiently direct and responsive.

Second, because the order *pro confesso* was prematurely taken. This ground rests upon the fact that the Code of Practice, article 473, provides that the books shall be "produced on the day fixed for trial." That, although this order was taken on the day fixed for trial, the case was not, in fact, tried on that day, because not reached, and, therefore, continued, with preference, to another day.

We think the order was not prematurely taken, being taken on the day fixed for trial. Besides, it comes with bad grace from the defendant to complain of prematurity when he had positively refused to produce the books, even under the coercion of imprisonment for contempt.

Third, because plaintiff's allegation of facts to be proved by the books was too vague to be entered up as proving any thing. If plaintiff alleged no facts with sufficient certainty to serve as proof, then the order could do defendant no harm. But we think there was one fact alleged with sufficient certainty, at least, to wit: that said books would prove the existence of the alleged partnership. We agree with defendant that the other averment that they would prove "the entire allegations of the petition," is too general. By article 140, C. P., the party in such case must "declare in writing, and on oath, what are the facts he intends to establish by such books," etc. In analogous cases, such as are provided for in articles 466, 561 of C. P., the courts uniformly hold that the affidavit must be specific as to the facts. This swearing by reference to voluminous records, and, as it were, by wholesale, is inadmissible; and this objection is quite as forcible against defendant's answer to the rule, as to plaintiff's affidavit for it.

We hold, therefore, that the fact of the existence of the partnership was confessed by the defendant.

Having thus reviewed the preliminary questions raised by defendant, necessarily with brevity, for he has argued at great length in support of them, and their number precludes more extended discussion without transcending reasonable limits, we come to the merits of the controversy.

The defendant in his answer charges that the plaintiff, by debauchery and dissipation injured the business and reputation of the firm, and claims $30,000 damages therefor. The judge *a quo* properly disallowed proof of such a charge. It was foreign to the purposes and objects of the suit. The judge well says that such conduct by plaintiff would have

been excellent reason why defendant should have dissolved the partnership sooner; but, by his own showing, he not only did not do so, but continued it without remonstrance, hardly, for years, with full knowledge of all the facts. Indeed, he never seems to have thought of dissolution until long after his partner had reclaimed himself from his alleged bad habits. We prefer, for the good name of both parties that the veil of oblivion be drawn over such disclosures—especially as the plaintiff is the brother of the defendant's wife, and himself now the head of a family.

It would be impracticable within the limits of this opinion to review all the facts relating to each item in contest in this case. The partnership did a large business for more than ten years, and the items disputed are numerous, and many of them hotly contested. We have examined with care all the evidence in the cause, and have endeavored to weigh it dispassionately. The judge *a quo* gave plaintiff judgment against defendant for $8000 65, with lien on the assets of the partnership. We have not been able to agree entirely with him in regard to several items in the account. We will state briefly our conclusions:

The balance due plaintiff per statement "A," is not disputed, and is		$3,047 46
It appears that defendant collected from January 1 to July 27, 1875, date of dissolution	$7,082 42	
The court below allowed deductions from this sum, as follows: Amounts from Reynolds, Dubuclet, Southern Express, Swazey & Strauss, aggregating $1000. To this we think should be added expenses of trip to Monroe, on business, $60, making	1,060 00	
Leaving for division	$6,022 42	
One half of this to credit of plaintiff is		3,011 21
To this add half fees from Edwards and Clark vs. Puig, $85		42 50
The amount of the Gaines judgment in favor Fellows & Mills was	29,552 00	
From this should be deducted 71 cents on the $100 ordered by the circuit judge	209 82	
Also, amount paid W. E. Todd	1,206 52	
Also, allowance to defendant on account of expenses Emmott seizure	2,000 00	
And its share of interest	395 91	
Also, two and one half per cent included in the judgment vs. Gaines, for account of defendant as her bondsman in certain cases, and interest $2186 27, $5998 52. Net balance of Gaines's judgment	23,553 48	
Of which one half to credit of plaintiff is		11,776 74
Making plaintiff's total credit		$17,877 91

The court below credited plaintiff with one half of the fees in certain suits known as the Morgan tax suits. The evidence satisfies us that these suits were begun and settled after the dissolution of Fellows & Mills, and are distinct and different from certain similar suits in which plaintiff was concerned as counsel. We, therefore, leave this matter entirely out of the account.

We find, as above, plaintiff's credit to be		$17,877 91
From this must be deducted the following debits, to wit:		
His orders on account Gaines judgment	$10,308 00	
Amount due for board	500 00	
Amount for furniture	175 00	
Amount for office expenses	199 03	
Amount for office rent to October 1, 1875	127 50	
Amount for office rent to December 31, 1875	127 50	
Half amounts collected, as per December 10	269 56	
Half amount fee of Burbank	50 00	
Half amount fee of Burbank	50 00	
Half amount fee in Semmes case	100 00	
Half amount fee received by plaintiff from sheriff in Morgan tax case	153 00	
Half amount expenses to Washington in Morgan tax case	100 00	
Half amount fee from Ivens	15 00	
Half amount from Swan	105 00	
Half amount balance due by Burbank	238 29	
Half amount balance due by Beebe	111 87	
Total debits	$12,629 76	$12,629 76
Which, deducted from credits, leaves as balance due plaintiff		$ 5248 15

The other amounts claimed by defendant as chargeable to plaintiff are, we think, unsupported. We think the claim of defendant against plaintiff for $3000 for keeping the books of the concern is wholly inadmissible in the absence of an express agreement. The partnership is by law, and in the absence of agreement, presumed to be equal. C. C.

We have charged the Gaines judgment in favor of defendant with the amount allowed therein for becoming surety on her bonds. This liability of defendant was personal to himself, and the compensation therefor was not an asset of the partnership.

The defendant complains that the judgment allows interest against him on its amount from judicial demand; whereas, the Gaines judgment or order was not collected till May, 1877, and constitutes a large cash item in the account. We have credited plaintiff with $11,776 74 on account of this Gaines debt, and debited him with $10,308. The differ-

ence, $1468 74, alone enters into the balance we declare due plaintiff. This amount of the judgment we render will, therefore, bear interest only from May 15, 1877; the balance of the judgment will bear it from judicial demand.

The credit claimed by defendant for half of uncollectible advances and balances, as chargeable to profit and loss account, is inadmissible, since defendant has not been charged, in plaintiff's favor, with such worthless assets, and can not, therefore, claim credit for them.

The judgment appealed from must, as to its amount, and as to the interest, be amended, and, in other respects, be affirmed.

It is therefore ordered, adjudged, and decreed that the judgment in plaintiff's favor be amended, so that the amount thereof be reduced from $8000 65 to $5248 15; whereof $1468 74 shall bear interest at five per cent from May 15, 1877, and the balance at same rate from judicial demand, to wit: May 29, 1876. That in other respects the judgment appealed from be affirmed; plaintiff and appellee to pay costs of this appeal.

The rehearing asked in this case by defendant is granted.

ON REHEARING.

The balance of the Gaines fund, on which we allow plaintiff interest, is, it seems, in custody of the United States Circuit Court, and is not under control of defendant. The allowance of interest against defendant on the sum of $1468 74, the balance of the Gaines fund, from May 15, 1877, is, therefore, we think, an error.

It also seems that we did not give defendant credit for $125, salary from park commissioners for August, 1875, which was included in the $7082 42, and which was to be deducted therefrom by consent of parties. It also appears that the item $211 25 from tax resisters, was received by way of re-imbursing to defendant expenses incurred by him, and not as fees.

These two sums amount to $336 25; which being deducted from the $6022 42 fixed as "amount for division," leaves $5686 17; making plaintiff's "one half" thereof $2843 09, instead of $3011 21; making plaintiff's total credits (instead of $17,877 91) $17,709 79; deduct total debits of plaintiff, $12,629 76; leaving balance due plaintiff, $5080 03.

It is therefore ordered, adjudged, and decreed that our former decree herein be amended, so as to reduce the amount thereof from $5248 15 to $5080 03; and that the sum of $1468 74 thereof bear no interest, instead of bearing interest from May 15, 1877; that in other respects our said decree remain undisturbed.

No. 7032.

THE STATE VS. ELBERT FAULK.

Where a party is tried for perjury, for having sworn in a civil suit that he witnessed the sale of certain property, he has the right to introduce in evidence the judgment of the court in said suit decreeing that said sale had been made, and the reasons for said judgment given by the court.

He has also the right to show by witnesses that said sale took place on a different day from the one he had sworn to, even though the effect of such evidence is to contradict and discredit another witness in the case without having laid the basis for such contradiction.

In criminal cases it is not necessary that there should be any foreman of the jury. Nor is it necessary that the verdict of a jury should be written, or signed. It is sufficient that a member of the jury utters the verdict orally. Nor is it necessary that the verdict should express the name of the prisoner, or the specific crime for which he is condemned.

APPEAL from the Eleventh Judicial District Court, parish of Union. *Graham*, J.

Allen Barksdale, district attorney, for plaintiff and appellee.

L. B. Watkins for defendant.

The opinion of the court was delivered by

MANNING, C. J. One Henderson went to Texas in 1874 working a mule in his waggon. His creditor, Post, pursued him, and in a settlement between them, Post got the mule and brought it back. Henderson's father thereupon brought suit against Post for the mule, alleging that he had only loaned the mule to his son. On the trial in the parish court, Faulk, the prisoner, swore that he had seen the elder Henderson sell his son a mule in the former's lot. Henderson had judgment in the parish court, and Post appealed. On the trial in the district court, the prisoner was not a witness. Post had judgment there. But in the interim between the two trials of the civil cause, the prisoner was indicted for perjury, and from the verdict of conviction, and sentence to five years' confinement in the penitentiary, he prosecutes this appeal.

A new trial was moved for the reason that "the verdict of the jury is contrary to the law and the evidence, and in conflict with justice, humanity, and common sense."

The issue was, did the prisoner swear falsely when saying that he saw Henderson sell the mule to his son. The judgment of the District court, decreeing title in Post under the younger Henderson's sale to him was offered in evidence by the prisoner, and rejected by the Court because it was "between third parties, and was not *res judicata* as to the State, and not relevant to the issue in this cause."

It is difficult to perceive what the principle, founded on the thing adjudged, has to do with this proceeding, or in what way it affects it. The prisoner was indicted for false swearing in a certain civil suit. He

offered the judgment in that suit to prove a fact, viz that the court had solemnly adjudged that a sale had been made by certain persons of a certain animal. It was for swearing that he saw that sale made, that he was indicted. It may be that a sale had been made, and the prisoner did not see it, but that is outside of the question of the right of the prisoner to prove the judgment of the Court upon the identical issue to which he swore, and in accordance with the tenor of his oath. The evidence was not only relevant, but of the greatest consequence to the prisoner. The record of the court at which the perjury is charged to have been committed is not only admissible, but is so necessary a part of the testimony that it will not be excluded for a misrecital in a mere matter of date. Thus, if the day of holding the court at which the perjury is alleged to have been committed is misrecited in the indictment, the record of that Court of a different day was not excluded, the day having been laid in the indictment with a *videlicet.* State v. Clark, 2 Tyler 282.

There was also offered in evidence, and refused, the written reasons of the judge for the judgment in that case. That paper is as much a part of the suit as any other, and we know of no good reason why it should have been excluded.

The prisoner offered one Goyne as a witness to prove that the elder Henderson did sell the mule to his son at Farrar's gin-house the day before the prisoner swore the mule was sold, but on objection by the State, the court excluded the testimony on the ground that it was "an attempt to contradict the witness Henderson by shewing that he had made different declarations as to the sale from those sworn to by him without laying the proper basis for such contradiction."

The evidence was admissible for the purpose for which the bill recites it was offered, i. e. to prove that Henderson did sell the mule to his son, and thus to assist in establishing a fact, for swearing to which as a fact, the prisoner was charged with perjury. It did not matter if it did discredit another witness. The act to be proved by Goyne was the act which the prisoner swore he saw done.

Error is assigned in that the verdict is bad because not signed by any member of the jury, and is imperfect because reading simply—we the jury find the accused guilty—without mentioning his name, or of what crime.

There is no error in this. No foreman is appointed by the court to the petit jury in a criminal trial, nor need a jury designate one by name. The jury speaks through one of its members in delivering the verdict *ore tenus*, and it does not matter whether he be called, or whether the jury call him, a foreman or not. There is no need that the verdict should be written, and hence none that it be signed. In some parts of

this State, the verdicts in criminal cases are written, more perhaps because jurors have seen it done in civil causes, and supposed it proper or necessary to be done in criminal trials, but the practice in the country from which we derive our criminal procedure, and the practice in our sister States, is that the verdicts in criminal causes are always delivered *ore tenus*, and are recorded by the clerk, and then read to the jury as recorded, who are then asked if that is their verdict, and if the answer is yea, the finding, rendering, and recording is complete.

It is not necessary to notice other errors assigned. Sufficient has been said to entitle the prisoner to a new trial. Therefore

It is ordered and decreed that the verdict of the jury is set aside, and the judgment rendered thereon is avoided and reversed, and it is further ordered that the cause is remanded for a new trial of the prisoner to be proceeded with according to law.

Nos. 6948 and 6949.

STATE EX REL. CORA A. SLOCOMB VS. W. F. ROGILLIO ET AL. AND CORA A. SLOCOMB VS. JNO. J. BARROW, SHERIFF, ET AL.

In a mandamus proceeding by a mortgage creditor to compel the recorder of mortgages to record his mortgage, so as to operate as a lien on his debtor's property from a certain date, evidence is admissible to show the existence of other mortgage and judgment creditors of his debtor claiming rival liens on said property.

The mortgage and vendor's privilege reserved by a vendor of real estate, to secure the credit installments due by the vendee on the purchase price, becomes operative and takes rank, as to third persons, not from the moment the act of sale and mortgage is deposited with the recorder of mortgages for registry, but only from the moment it is actually inscribed in the *Book of Mortgages*, kept for that purpose, in the parish where the property is situated.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist*, J.

Saml. J. Powell for plaintiff and appellant.

W. W. Leake for defendant and appellee.

The opinion of the court was delivered by

EGAN, J. On the fourteenth of February, 1877, the relator in the first and plaintiff in the second action sold to James P. Bowman the Hazelwood plantation, in the parish of West Feliciana, for $6500, payable in three annual installments, and retained in the same act a mortgage to secure the price. She caused a certified copy of the act of sale and mortgage, which had been passed before a notary in New Orleans, to be sent to the recorder of the parish where the land lay for registry. It was received by him on the seventh of March, 1877, and indorsed "filed

for record on the seventh of March, A. D. 1877, and truly recorded same date in notarial record book R, pages 434 and 435, and in mortgage book H., pages 149 and 150, July 5, 1877." Subsequent to the registry of the act in the book of conveyances, but prior to its registry in the book of mortgages, the land was seized under *fieri facias* at the instance of creditors of the vendee, Bowman. Whereupon the vendor, Mrs. Slocomb, sued out a mandamus to compel the recorder to register her mortgage as of the date of the filing of the paper in the recorder's office, to wit, March 7, 1877, and to give it rank accordingly. She also sued out an injunction to stay the sale until the question of her rank and rights could be adjudicated, and prays that her mortgage may be decreed to have been "virtually and legally transcribed in the mortgage records of the parish where the land lay from the date of filing of the act in the recorder's office, seventh of March, 1877, and that it take effect on the property sold from date; that her mortgage be deemed superior to the rights of the seizing creditor and the proceeds distributed accordingly; and that the recorder be required to make out for the purposes of the sheriff's sale a certificate giving her mortgage the rank so claimed for it."

The view we take of the matter in controversy makes it immaterial in this inquiry whether, as stated by the recorder, he was instructed by plaintiff's attorney to record the act in the book of conveyances specially without any instructions as to registry in the mortgage-book, or whether, as stated by the counsel, the instructions were general and simply to record the act, presuming that the recorder knew his duty and would record it both in the book of conveyances and of mortgages. For the same reason, it is unnecessary to consider a bill of exceptions taken to the reception of parol evidence of the contents of the lost letter of instructions accompanying the act. So far as relates to the mandamus case, we may as well now remark also that the exception to the reception of evidence of the existence of other judgment and mortgage creditors was not well taken. In a proceeding which would so materially affect their rights and rank if successful, they were necessary parties, and the evidence was properly admitted to show that in this proceeding the recorder could not be compelled to disregard the registered rights of others not parties to the proceeding, or to give on the books of his office now a priority to the relator's mortgage over them. See 6 R. 299; 8 R. 97; Young & Wann vs. Hays, Recorder, 14 An. 654. The real and only question at issue here is whether or not the filing of the act of mortgage in the recorder's office has the same effect as the transcribing or recording of the act in the book of mortgages. We have been referred to the case of Payne vs. Pavey, 29 An. 116, decided by us at the last term in New Orleans, as conclusive of the question. That case only

determined the effect of the filing of a *conveyance* of lands in the office of registry, and it was correctly held under the positive and unequivocal provisions of the Civil Code that the conveyance took effect as to third persons from the date of filing in the proper office, although not actually recorded or transcribed in the books until long afterward, and we expressly declined in that case to express any opinion as to whether the same rule prevailed in regard to mortgages. It may be, and indeed is, argued that there is no good reason for a distinction, and that the same rules should apply to both. In the Pavey case we said what we have now occasion to repeat, that "the laws of registry are arbitrary," and that in many cases this court has considered itself bound to refuse relief, because "*ita lex scripta est.*" However arbitrary the distinction may seem, and in fact is, the provisions of the law in regard to the time from which sales and mortgages shall take effect against third persons are essentially different. As we held in the Pavey case, conveyances take effect against third persons by the positive and express terms of the law from the time they are deposited and filed for registry in the proper office. In regard to mortgages which are *stricti juris* on the other hand, the Civil Code, art. 3329, provides in express terms that "among creditors the mortgage whether conventional, legal, or judicial, has force *only from* the time of recording it in the manner hereafter directed;" article 3342, that these mortgages are only allowed to prejudice third persons when they have been publicly *inscribed* on records kept for that purpose, and *in the manner hereafter* directed;" article 3345, that "all mortgages, whether conventional, legal, or judicial, are required to be recorded in the manner hereafter provided;" and article 3348, that "any person entitled to a mortgage or privilege on the property of another person must cause the evidence of such mortgage or privilege to be recorded *in the mortgage book* of the parish where the property is situated." We here find not that mortgages like conveyances take effect from the time they are deposited or filed in the proper office, but only from "the time they are" actually "*inscribed*" "on records kept for that purpose," and that the recording must be in the mortgage-book of the parish where the property is situated;" and so it has often been held that the registry of a mortgage in the *book* of conveyances though in the proper office is insufficient and without effect as to third persons, the only exception being where it appears that only one book of record is kept, in which both sales and mortgages are registered indifferently. See 5 An. 154; 16 An. 435; 24 An. 78, and authorities cited.

In the 16th An. case, Carpenter vs. Allen, Judge Merrick said: "A mortgage is a real right, a *jus in re*, which in general, so far as third persons are concerned, can only be created by an observance of the forms of law." In Taylor vs. Hotchkiss, 2 An. 917, it was held that a legal

registry alone gives effect to the mortgage as to third persons, as to whom it is valid not as executed between the parties, but as recorded. For any error in the registry the mortgagee must suffer, saving his recourse against the recorder. See, also, Walden vs. Grant, 8 N. S. 570. Again, it has been held that the remedy of the creditor who loses his rights for want of a proper inscription is against the officer in damages. His fault or fraud can not be visited upon the public. 4 R. 5; 2 An. 606, 800; 5 An. 632. In White vs. the Union Bank, 6 An. 162, and LeFlore vs. Carson, 7 An. 65, it was expressly held that it is not enough for one holding an act giving a privilege to deposit it with the proper officer to be recorded; he must see that it is done, or he will lose his privilege. In the 6th An. case, of White vs. Union Bank, Judge Slidell, as organ of the court, said: "We have been invited by appellant's counsel to reconsider the opinions given in Ells vs. Sims and Perot vs. Chambers, 2 An. 253 and 801 (cases of imperfect or irregular registry held bad), and this mainly upon the ground of the strong equity of a vendor to show the price of the thing sold has not been paid. We have duly considered the arguments of counsel, and have not been able to reconcile a departure from those decisions with the express requisitions of the Code, nor to distinguish the facts of this cause from those of the cases referred to. It is the privilege of the vendor which Merrill claims; and we could not have decided the cases referred to in favor of such a claimant without expunging from the Code the article 3238, which declares that the vendor of an immovable or slave only preserves his privilege on the object when he has caused his act of sale to be duly recorded at the office for recording mortgages in the manner thereinafter directed." The same provision is contained in art. 3271 of the R. C. C. of 1870 as to the vendor's privilege upon immovable property. *whatever* may *be the amount* due him on the sale. And by articles 3273 and 3274 "privileges are only valid against third persons from the date of the recording of the act or evidence of indebtedness as provided by law" and "no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property is situated." In the Union Bank case, just quoted, Judge Slidell further says: "It is contended that a party holding a deed of mortgage or act from which a privilege results, has done all that the law requires of him to preserve his rights when he has deposited the act for record in the proper office and with the proper officer. But this proposition is inconsistent with the article 3238, which requires the creditor to cause his privilege to be duly recorded. Supposing a prior and a subsequent mortgagee to be both innocent parties upon one of whom the negligence of the public officer must fall, it is more equitable that they should be borne by the former than the latter; because by diligence he could have assured himself that the mortgage

was inscribed; whereas, the second mortgagee has in general nothing to rely upon but the officer's certificate of freedom from incumbrance." In the 7th An. case of LeFlore vs. Carson, p. 67, the court through the same organ, Judge Slidell, re-affirms the doctrine in White vs. Union Bank, 6 An., from which we have so freely quoted. In view of the authorities cited and of the textual provisions of the Civil Code we are of opinion that Mrs. Slocomb's privilege and mortgage was not preserved as against the seizing creditor or others of prior registry, and that she can neither successfully assert its superiority over them nor compel the recorder to give to her mortgage any other place or date upon the books of his office than it now holds. It may not be amiss to remark, also, that even according to the statement of her own attorney he gave no specific instructions to record the mortgage in the proper book or to record the instrument as a mortgage, and it is shown by the evidence that neither he nor any one else ever paid or offered to pay the fees for such registry until the time when the mortgage was actually inscribed. We think this a proper case to apply the rule laid down by Judge Slidell in the cases cited, and with him we may say that if the plaintiff is unpaid the resolutory condition remains to her. The provision of articles 2264 and 2266 C. C. under the general head of registry of conventional obligations can not control the specific provisions under that head in regard to the registry of mortgages and privileges which we have quoted.

It is therefore ordered, adjudged, and decreed that the judgments appealed from which denied the mandamus and dissolved the injunction be and they are affirmed with costs of appeal.

CONCURRING OPINION.

MANNING, C. J. It is the duty of the Recorder of each parish to write on the back of each Act he receives, the time it was so received, and to record all acts without delay in the order in which they are received. These acts shall have effect against third persons only from the date of their being deposited in the recorder's office. Rev. Stats. sec. 3081.

There is no distinction made here between different kinds of acts, and if this provision stood alone, all acts would take effect from the date of their deposit in the Recorder's office, and the filing written upon them by that officer would fix that date. But art. 3238 of the Civil Code (new no. 3271) requires the actual recording of the vendor's privilege on land to enable him to preserve it, and a new article in the last Revisal, numbered 3348, which however is only a reiteration of the Act of 1869 (sec. 8 p. 116), compels persons who are entitled to a mortgage on the

property of another person to cause the evidence of such mortgage to be recorded. A mortgage must therefore be not only filed in the recorder's office, but must be recorded in the proper book, in order to have effect against third persons.

I do not think however that it is necessary for a party or her attorney to give specific instructions to a Recorder to record an Act in a particular book. The Recorder is presumed to know his business and duty, and though the presumption is sometimes a violent one, it must be held to legally exist. It is his duty to record the Act in both the conveyance and mortgage books, if the act contains both a conveyance and a mortgage, and to do it without instructions. Neither do I think that a person is obliged to offer or actually tender the fees to the recorder when he delivers the act to him, in order to entitle the party to have the act recorded. The recorder can demand the payment, and the instant payment of the fees, and if he does demand them, and the party refuses or neglects to pay them, he will have only his own negligence to blame for the non-recording of his act. But if the act is delivered to the recorder, and he files it, and says nothing about the fees, he has induced the party to believe that he waives his right to the instant payment of them, and he can not afterwards excuse himself for his omission to record the act on the ground that his fees were not tendered. Nor do I believe that such defence would avail in an action on the recorder's bond for damages sustained for not doing his duty in recording the act.

It may be fortunate that the relator has a remedy by the resolutory action. I concur in the decree.

MARR, J. I concur in this opinion.

No. 6998.

WALTER C. COMPTON vs. WM. L. SANDFORD.

Parties are estopped from denying admissions or declarations deliberately made by them in judicial proceedings.

Judgments which are not absolutely null and void, can not be attacked in any collateral manner.

The issue of title to certain property, passed on by a final judgment, can not be raised again in a subsequent suit between the same parties.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Blackman*, J.

R. J. Bowman and *M. Ryan* for plaintiff and appellee.

James G. White for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 3d of October 1866, George W. Compton bor-

rowed from William L. Sandford, eighteen hundred and eighty-seven dollars. To evidence that loan, Compton executed a note payable in January 1867, and secured its payment by mortgage on a plantation situated in the parish of Rapides. That note was not paid at its maturity, and—in January 1874—seven years after it had matured, Sandford obtained judgment for its amount, with a recognition of the mortgage securing its payment.

On the judgment thus obtained, execution issued, the hypothecated land was seized and the seizure enjoined by two separate and distinct actions, one filed in the names of the heirs of Mary E. Compton, on the ground that—with the exception of one hundred and fifty acres of said land, alleged by them to be the property of Angus Compton, the balance of the same belonged to them by inheritance from their mother—and the other filed in the name of Angus Compton, on the ground that he owned the one hundred and fifty acres acknowledged by his co-heirs to be his property, by purchase from Mrs. Hamilton and Frank and John S. Henderson.

The first mentioned of said injunctions was decided in favor of the heirs of Mary E. Compton, who—by the decree of the court—were declared the owners of the hypothecated land, less—of course—the one hundred and fifty acres alleged by themselves to be the property of Angus Compton; and the latter's injunction—as to that portion of said land—dissolved by a judgment rendered on the fifth of June 1875. From this judgment no appeal was taken; from the other, Sandford appealed, but without success: the judgment rendered against him and in favor of the heirs of Mary E. Compton was affirmed by this Court.

An alias execution was then issued on the judgment of Sandford against George W. Compton, and—under that second execution—the one hundred and fifty acres of land disclaimed by the heirs of Mrs. Compton, and the intended sale of which her son Angus had vainly attempted to prevent, was again seized to satisfy the aforesaid judgment.

This last execution and the sale of the land seized under it were enjoined by Walter C. Compton, the plaintiff in this suit, who avers that the portion of land thus levied upon belongs—by inheritance—to him and the other children of Mary E. Compton, and is still held in indivision between them: that, as one of the children of said deceased—and not otherwise—Angus is entitled to a share in said land: that, until a partition fixing the locality of his own share therein, he can not be deprived of his ownership over the entire tract inherited by them from their mother, and that the acknowledgment by his co-heirs and his under tutor in the injunction suit, "that Angus is the owner of a fraction of that entire tract," is not binding upon him, for the reason that said acknowledgment was made whilst he was under age, and—so far

as he is concerned—by Angus himself, who was then his under-tutor, and claiming for himself the whole of the fraction alluded to.

The answer to plaintiff's demand denies that, either at her death or at any other time, Mrs. Mary E. Compton owned the land in question or any separate property.

If—under the pleadings—we could consider the evidence adduced of Mrs. Compton's title to the property mortgaged by her husband and seized to satisfy that mortgage, what does that evidence show? that, in 1843, Mrs. George W. Compton obtained judgment against her husband for a sum which, as testified to by one of the witnesses, did not exceed two hundred and fifty dollars, and—by another—four or five hundred dollars. Under two executions issued, one on her judgment—the other, on a judgment in favor of the heirs of Samuel Compton, the whole of the property of George W. Compton was seized, offered for sale and purchased by his wife for twenty thousand two hundred and ninety-one dollars, and that was, according to one of the witnesses, more than eighty times the amount of her judgment, and—according to another about forty or fifty times said amount.

During the month of May 1864, the courthouse of the parish of Rapides, and the records and papers therein contained were destroyed by fire, and—in 1868—an act was passed by the Legislature to amend a previous act which provided for the supplying of said records and papers, among which were the judgment of and the sheriff's sale to Mrs. George W. Compton.

The 3d section of said act is in these words: "That the party defendants in all applications for that purpose shall have the usual legal delay as in other suits, but when the said party answers he shall admit the petition or deny it partially or wholly, and said denial shall be under oath: whereupon the judge shall proceed to the trial without the intervention of a jury, and upon hearing the evidence shall decide and render judgment, establishing or not, the destroyed deed, bond, mortgage, judgment or other writing as the evidence proves to have existed."

The 4th Section provides: "that if the plaintiff or applicant makes oath to the allegations of his petition, it shall be *prima facie* evidence of the existence of such deed, bond, mortgage, judgment or other writing &c."

On the 14th of May 1869, Mrs. Compton filed an application in the district Court for the parish of Rapides, to have re-instated the sale of the 7th of October 1843, from the sheriff to her. Her husband accepted service of the wife's unsworn application, waived time—meaning, at least we so presume, the delay allowed by law for answering, and—on the 17th of May 1869—a decree was signed re-instating the applicant's title, though no default had been taken against, no answer made by the defendant.

The property referred to in said decree was adjudicated to Mrs. Compton for more than twenty thousand dollars, the fortieth part of which, at most, could have been applied to the execution issued on her judgment, the evidence of which was destroyed by the fire of 1864 and has not been re-established. What became of the balance of the price? The most of the property thus acquired by her composed the separate estate of her husband, and it may be that said balance was the consideration of the alleged reconveyance of the land in dispute from the wife to the husband. If so, the transfer was authorized by our Code.

Rev. C. C. art. 2446, number 1.

Not only did George W. Compton mortgage this land to Sandford, but he also mortgaged it to W. C. James, the tutor of the minors Henderson, and when—in payment of the latter's claim, the said Compton conveyed them the one hundred and fifty acres which plaintiff alleges that he and his co-heirs inherited from their mother, Mrs. Compton intervened in the act of sale and renounced in favor of said minors to any right which she then had or may have had on the property so transferred to them.

It is true that her renunciation to any rights which she might have exercised *on* that tract of land, could and did not divest her of any title to the land itself: but, is not that renunciation at least a presumption that—legally or otherwise—there may have been a reconveyance from Mrs. Compton to her husband? Whether there was or not, it is now useless to inquire, and why? The rights and the extent of the rights of plaintiff and his co-heirs, as regards the tract of land now seized, are fixed by two judgments and the judicial admissions made in the pleadings on which those judgments are based. The fact that Angus Compton was the owner of said tract, is not merely acknowledged, but fully established by a notarial act—and neither the judgment which recognizes the title of the heirs of Mrs. Compton, to the whole of the land claimed by them, and—as an irresistible inference—the title of Angus to that part of said land which was, not only not claimed by said heirs, but expressly excepted from their demand as belonging to said Angus—nor the judgment dissolving the latter's injunction have been attacked in nullity by plaintiff, and the first mentioned of those two judgments has been affirmed by the Supreme Court.

If, by his pleadings, plaintiff had re-opened the litigation closed by those decrees, and had supported his mother's alleged title, by none other but the evidence which we have before us, we might well have hesitated to acknowledge the validity of that title; but that litigation was and remains closed, and—coupled with the evidence adduced on the trial—plaintiff's pleadings do not justify his injunction.

As to defendant's admission that "subsequent to the sale made by

the sheriff and his deed to Mrs. Compton, a reconveyance was made by her to G. W. Compton many years before the youngest of the plaintiffs was born," it can not be legally divided, and for the reason already stated, that Mrs. Compton was judicially separated in property from her husband, and may have transferred that land to him in payment of the balance due by her of the price of the adjudication to her of property inherited by and belonging to her husband; nor can that admission be justly disconnected from the assertion found on the same page that said land was not the property of Mrs. Compton at the time of her death. Besides, these declarations were made and passed upon in a controversy finally determined by a decree of the district Court, signed on the 5th of June 1875 and affirmed by this Court. In this case, the validity of the wife's judgment is denied, and her pretended title assailed as fraudulent and absolutely null. As to a part of the land, that title is protected by the aforesaid decree, which, however, does not cover the tract of one hundred and fifty acres; and—as to that tract—the injunction sued out by Angus to release its seizure and prevent its sale, was dissolved on the very day on which that of Mrs. Compton's heirs was perpetuated—on the 5th of June 1875, and—from the decree dissolving Angus' injunction no appeal was taken.

The plea of *res judicata* filed and urged by defendant must prevail, and this conclusion dispenses us from discussing the other questions raised in the briefs and bills of exceptions. That conclusion leaves no doubt that plaintiff has abused the equitable writ of injunction.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is amended, plaintiff's injunction entirely dissolved, and he, Angus T. Compton, and J. S. Compton—his sureties on the injunction bond, condemned *in solido* to pay to William L. Sandford, as damages, ten per cent upon the amount of the judgment, the execution of which was enjoined, with costs in both Courts, and—as thus amended—the decree of the Court *a qua* is affirmed.

The Chief Justice, having been of counsel in this case, recused himself and took no part in this decision.

No. 6915.

THE STATE VS. ALBERT WILLIAMS.

A verdict of conviction will not be set aside on the ground that the State's Attorney refused to call and examine three witnesses present at the trial of the case, and alleged to be cognizant of all the facts of the case, when there is no averment, in the bill of exceptions that the accused was prejudiced thereby, and when there is nothing to show that he did not have a fair and impartial trial.

The crime of murder can not be prescribed. Time therefore is not of the essence of that offense, and therefore the time stated in the indictment is, in general, not material.

As affecting the question of prescription, as to prescriptible offenses, evidence is admissible to show that the accused was a fugitive from justice, from the time the act charged was committed.

A general allegation, in an exception, that the charge of the lower judge "*is not law*," is too vague.

APPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie*, J.

H. N. Ogden, Attorney General, for the State.

Folse for defendant.

The opinion of the court was delivered by

EGAN, J. The accused was charged with murder and found guilty without capital punishment. The case comes before us on three bills of exception, the first of which is to the refusal of the court at the request of the prisoner's counsel to compel the district attorney to call and examine on behalf of the State three witnesses, stated to be then present in court, and to be fully cognizant of all the facts submitted for investigation. The judge *a quo* refused to so order, as he states, because it seemed in violation of what had always been understood to be the law of this State, and this was the only case of the kind which had ever come to his knowledge. He states further that two of the witnesses named were relatives of the accused; the third was not. It appears from the bill that at the time it was proposed to call the witnesses in question, the State had already examined four or five witnesses on behalf of the prosecution, and the district attorney had announced that the testimony of the State was closed. The counsel for the accused relies upon the authority of the case of Hurd vs. the People, 25 Michigan, 405, in which it was held "that the prosecutor in a criminal case is not at liberty like a plaintiff in a civil case to select out a part of an entire transaction which makes against the defendant and then to put the defendant to proof of the other part *so long as it appears at all probable from the evidence* that there may be any other part of the transaction undisclosed; especially if it appears to the court that the evidence of the other portion is attainable," and refers to the case of Maher vs. the People, 10 Michigan, 225–26, to the effect that it is the well-established rule of the English courts that all witnesses present at the transaction should be called by the prosecution before the prisoner is put upon his defense if such witnesses be present, citing 8 C. & P. 559, Orchard's case same; note Roscoe's Criminal Evidence, 164. The court however says: "Whether the rule should be enforced in all cases when those not called are near relatives of the prisoner or some other special cause for not calling them exists we need not here determine. Doubtless where the

number present has been very great, the production of part of them might be dispensed with after so many had been sworn as to lead to the inference that the rest would be merely cumulative and where there is no ground to suspect an interest to conceal a part of the transaction."

It appears from the head note, and so we interpret these *dicta*, that the court held it to be the duty of the prosecution to put in evidence "the whole of the *res gestæ*."

It is as true in Louisiana as elsewhere, as the court remarked in the 25th Michigan case, that "the prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simple justice; and he has no right to sacrifice this to any pride of professional success." This we have announced substantially in more than one decision since we have been upon the bench, and were a case before us in which it appeared that any unfair advantage of the accused had been taken in the progress of the trial in any important particular likely to influence the result, we should not hesitate to set aside the conviction. In the present case, however, there is no such statement in the bill of exceptions; nothing but the bare refusal to call and examine on behalf of the State the witnesses named. Neither the evidence given by those witnesses already examined nor that proposed to be given by the others is before us. We are therefore unable to determine for ourselves whether this case comes within the rule announced in the 25th Michigan case or not. The bill discloses no circumstance of suspicion, even, that a fair and impartial trial was not afforded the accused. The State had already examined four or five witnesses as to the facts of the case, and had rested the case for the prosecution. It is not suggested that the case thus made was imperfect, or that evidence given disclosed or rendered probable the existence of other or fuller evidence, or even that the witnesses proposed to be called were present at the homicide. If they were, *non constat* but that their evidence would have been merely cumulative of that given by the four or five witnesses already examined. Some discretion must under the rule invoked be allowed both to the district attorney and the court *a qua* in a matter of this kind, and there is nothing to show that in this instance it was not properly exercised. The jury were the judges of the sufficiency of the evidence of guilt of the accused, and found him guilty. The rule in question has never prevailed in the courts of this State, nor are we prepared to admit the proposition that it is the settled rule of the English courts. We think otherwise, except with the modifications stated, and that as a rule the prosecuting officer of the State, who should be always mindful that, as said by us in another case, the State wishes no unfair advantage taken of any one accused in her courts, still has discretion to select his witnesses and manage the prose-

cution according to his best judgment under the eye and proper direction of the court, whose duty it is also to see that a fair and impartial trial is accorded to the accused. It is to be presumed that this was done in the case at bar, and this ground of exception is overruled.

The second exception is to the reception of evidence that the accused was a fugitive from justice from the time the act charged was actually committed: first, because as affecting prescription, that was a question solely for the court and not for the jury; second, because no evidence of fleeing from justice prior to the date stated in the bill of indictment was receivable, and that the evidence received was of a fleeing from justice after the actual commission of the act charged, but more than one year before the time stated in the indictment. Of this it may be remarked, 1. That time is not of the essence of the offense here charged, and therefore the time stated in the indictment is in general not material. 2. That as affecting the question of prescription the evidence was properly received, as *otherwise* the accused might have asked the court to instruct the jury, and such would have been the duty of the latter, to acquit the accused in case they should find from the evidence that he had been guilty of manslaughter only, and that more than twelve months had elapsed since the commission of the act. 3. That the jury did find the accused guilty of the imprescriptible crime of murder, although they qualified their verdict by adding under the statute "without capital punishment." The fact of fleeing from justice has always been considered a circumstance of suspicion of guilt receivable in evidence in a criminal case, and in the present case the court *a qua* instructed the jury to disregard all evidence of fleeing from justice before the time charged in the bill. This ground can not be maintained.

The third and last exception is, that the written charge of the judge *a quo* to the jury "is not law." We have not been favored with a brief by the counsel for the accused, nor are we informed in what respect the charge is not law, and we do not perceive it. As a whole the charge seems to us, if any thing, rather more favorable to the accused than perhaps strict law would warrant, and is in the main but the enunciation of well-established principles. The exception is too vague and general, and should have pointed out the particulars in which the law was violated by the charge of the judge, which occupies a dozen pages of the transcript. This ground is not well taken.

The judgment appealed from is affirmed.

No. 6715.

THE STATE VS. HENRY SMITH.

The General Criminal Statute enacted by the Legislature of this State May 4, 1805, did not adopt, as a portion of our law, all the crimes and misdemeanors known to the Common Law at that date. It merely adopted the Common-Law definitions of those offenses declared to be crimes by that act, and incorporated as a part of our system, the Common-Law mode of prosecution as to forms of indictment, method of trial, rules of evidence, and all other Common-Law proceedings in criminal cases.

The crime of incest, although denounced, is not defined by any statute of Louisiana, and hence, there can be no conviction for incest under the laws of this State.

APPEAL from the Second Judicial District Court, parish of Orleans. *Pardee*, J.

H. N. Ogden, Attorney General, and *A. G. Brice*, District Attorney, for the State.

Saml. S. Carlisle for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was convicted under an indictment for incest, and was sentenced to imprisonment at hard labor for life.

The counsel for the prisoner asked the court to charge the jury, that the crime of incest, not being defined by the criminal statutes of Louisiana, must be defined and construed according to the common law of England as it existed at and previous to the enactment of the Act of 1805, and that as incest was not a crime at common law, or defined thereunder in 1805 and previously, no conviction could be had under the statutes of this State.

The court refused the charge, and the prisoner reserved a bill, and appealed.

It is noteworthy that this is the first prosecution for incest ever brought before this court, and so far as we are advised, the first one ever instituted in this State.

The act of May 4, 1805, provides "that all the crimes, offences, and misdemeanors herein before named, shall be taken, intended, and construed according to and in conformity with the common law of England; and that the forms of indictment, (divested however of unnecessary prolixity) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences, and misdemeanors, charging what ought to be charged, shall be, except as is by this act otherwise provided for, according to the said common law." sec. 33.

Observe that the statute specifically directs how all the crimes, offences, and misdemeanors *herein before named* shall be taken, intended, and construed, and how the prosecution of *the said crimes*, etc. shall be

conducted. Among the many offences named in the preceding sections, for the commission of each of which a punishment is prescribed, that of incest is not to be found.

It has been held "that the legislature, in adopting the common-law rules of proceeding (procedure?), method of trial, &c adopted the system as it existed in 1805, modified, explained, and perfected by statutory enactments (of England) so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions." State v. M'Coy, 8 Rob. 545. But this decision, the soundness of which the profession have uniformly recognised, was digested by the then reporter with a different phraseoloy, having a more enlarged application than the text warrants, and Mr. Hennen has transcribed the Reporter's version instead of that of the opinion, and so has perpetuated the error. For it will be seen that the opinion speaks only of the common-law *rules of procedure, method of trial,* &c modified by England's statutory enactments before 1805, as the system that was adopted by our act of that year, while the digest of the Reporter is, that the legislature in passing that act "must be understood as having adopted *that system of law* as it existed in 1805, modified" &c.

It was not decided by this court in that case that every act which was an offence at common law in 1805 was thereby made an offence here, nor is that a proper legal construction or reasonable intendment of the Act. On the contrary, with the manifest purpose of shutting out such construction, the Act of 1805 devotes thirty-two sections to providing how all the crimes should be punished which the legislature chose to visit with punishment, and as these crimes had specific designations in the common law, such as murder, rape, arson, etc. with well defined meanings, the act declares that those crimes, which had been already named in it, should be construed in conformity with the common law of England, that is to say, that the definitions of those crimes which were accepted or established by the common law, should be held as defining them here, and the mode of prosecution as to forms of indictment, method of trial, rules of evidence, and all other proceedings, shall be as at common law. But the Act does not adopt the whole criminal law of England as it existed in 1805. It is only the definitions of those offences that are named in it, and the mode of procedure for criminal prosecutions, that were adopted by that Act. And it may be added that the omission from the re-enacted statute of the words 'herein before named,' (Rev. Stats. 1870 sec. 976), and the use of terms which embrace all crimes, does not affect the argument, as we shall see when we come to inquire whether this crime was one at common law, or by statute of England.

The 48th. section confirms this view of the intent of the legislature,

where it is enacted—"that as soon as may be, after the passing of this act, the governor shall cause to be drawn up and printed and promulgated in the English and French languages, an exposition and explanation of each and every of the crimes and misdemeanors herein before mentioned, which are not herein precisely defined, and of the rules of evidence, the mode of trial, the forms of writs and indictments, and all other proceedings as they are directed to be had in the 33d section of this act." It was a definition only of each and every of the crimes and misdemeanors mentioned in that Act that was required, plainly demonstrating that henceforward no others were denounced by the law—that no other acts than those which constituted the crimes, known to the English common law by the names used in the statute of 1805, should be visited henceforth with punishment.

This interpretation is put beyond the possibility of cavil by the fact that in 1817, an act was passed supplementary to that of 1805, creating new offences, the first mentioned among them being the abominable crime of incest.

The definition of the crimes, directed to be made by the act of 1805, was not made. The thought then in the mind of the legislature may have been the germ of Mr. Livingston's Code, and it is not the least of the many singular features of this subject, that although that Code was compiled many years after 1817, no mention is made in it of this crime.

The Attorney General contends that incest was known as a crime to the common law of England long before 1805, and had often been punished—that while it is true, the Ecclesiastical Courts alone had jurisdiction of the offence, the common-law courts exercised the power of controlling and regulating the jurisdiction of the Ecclesiastical Courts in determining within what degrees of affinity and consanguinity the crime could be committed. 3 Blk. Com. 87. His argument therefore is that it was made a crime here by the Act of 1805.

But we have already seen that the Act of 1805 did not adopt all the crimes and misdemeanors known to the common law at that date, but did set forth specifically the particular crimes and misdemeanors which henceforth should be deemed offences against the State, and incest was not one of the number.

It is not mentioned in the statutes until 1817, and then and ever since it appears with the brief denunciation—whoever shall commit the crime of incest shall, on conviction thereof, suffer imprisonment at hard labor for life. Rev. Stats. 1870. sec. 789.

But what is incest? It has not, like murder, a fixed and definite meaning everywhere. An act that is incest in one country is not criminal at all in another country. Nay more, an act that is incest in one of our sister States is not so in all. No man may marry his brother's

widow, or his wife's daughter in Virginia, (Code, p. 470) nor within the Levitical degrees of consanguinity or affinity in Georgia. (Stat. Law p. 742), nor his son's widow or uncle's widow in Mississippi (Code, p. 494), but none of these marriages would be incestuous in our State, except as to some of the Levitical degrees.

The 'Digest of the Civil Laws in force in the territory of Orleans,' published by authority in 1808, has this prohibition;—Marriage between persons related to each other in the direct ascending or descending line is prohibited. This prohibition is not confined to legitimate children, but extends also to children born out of marriage. Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or of the half blood, whether legitimate or illegitimate, and also between the uncle and the niece, the aunt and the nephew. Title IV c. II arts. 9, 10. These prohibitions re-appear in our Civil Code (arts, 96, 97 new nos. 94, 95), and there is added the declaration that all other impediments on account of relationship or affinity are abolished. art. 98 new no. 96. So also our Code defines incestuous bastards to be those who are born of two persons who are relations within the degrees prohibited by law, (art. 202 new no. 183) and inflicts upon them disabilities, (arts. 217, 222, 914, 1475 new nos. 198, 204 with altered phraseology, 920. 1488.)

But here, is interposed the objection that these articles of the Civil Code relate only to the civil disabilities imposed upon the *issue* of marriages within the prohibited degrees. They do not impose criminal penalties upon the persons who thus marry. That Code of necessity, and from its nature and object, does not treat of crimes or their punishment.

It is therefore true that while our criminal statute attaches a punishment to the commission of incest, nowhere in our law is that crime defined. Shall it be said that the Act of 1805 does not define the crime of murder, and that no one will pretend that murder, for lack of such definition, is not a crime by our law? The Act of 1805 does attach a penalty to the crime of murder, and does not to the crime of incest, and then provides that all the crimes *named in the Act* shall be taken and construed according to the common law of England. Is a crime not named in the Act to be construed according to that law? Criminal statutes must be construed strictly in favor of a party charged with their violation.

But we will consider the matter *arguendo* in the light most favorable to the State. Incest was not made a crime by the Act of 1805, but it was by the Act of 1817. Since then the Act of 1805 provided, that all the crimes named in it should be construed by the common law of England, it may be assumed that whenever any act is thereafter made a crime by our law, it intends that such crime shall also be construed

according to that law, so that when incest was made criminal in 1817, we have but to revert to the common law definition to ascertain what it is.

Incest was neither defined nor punished by the common law of England at or before 1805. It was punished by statute in that country, and death was the penalty, and its definition was supplied by the canon law. Says Blackstone—"in the year 1650 when the ruling power found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilfull adultery were made capital crimes, but also the repeated act of keeping a brothel or committing fornication were, upon a second conviction, made felony without benefit of clergy. But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual courts, according to the rules of the canon law." 4 Com. 65. England has again made incest a statutory offence since 1805.

If then we are to take and construe this crime as it was taken and construed by the common law of England in 1805, because our statute of that year directed that certain enumerated crimes should be thus construed, albeit incest is not one of them, we are met by the want of any common law definition of it, although the canon law contained one, and if we shall take the canon law definition, because it was adopted by the common law, then an act which was punishable as incestuous by the law of England in 1805 was not punishable here.

The State at this point contends that the legislature passed the act punishing incest with reference to the well established and received definitions of that word in books of authority. That would be a dangerous rule to apply to the construction of criminal statutes. Our statute is unlike any other. It lacks that precision which should always characterize the creation of a crime, and the imposition of a punishment. Elsewhere, the statutes enact that whoever shall intermarry, or cohabit, being within the degrees of consanguinity within which marriage is prohibited, shall be deemed guilty of incest. Archbold, Crim. Prac. & Pl. 615—8 *et seq.* Our statute is simply, 'whoever shall commit the crime of incest'—a crime which has not a fixed and definite meaning of itself, which varies in different countries and even in different parts of the same country, so that an act, undeniably lawful in one, is incestuous cohabitation in another.

Waterman tells us, writing of the criminal statutes of the States, that in making adultery punishable in the common law courts, they do not give a definition of the offence, and that such is frequently the case as to the higher crimes. "They are not defined in our statute book,

but are assumed to be well known as offences at common law; and under the general term denoting the offence, it is declared by law to be a crime, and the mode of trial and measure of punishment are alone prescribed by statute. If questions arise in such cases as to what constitutes the offence, recurrence is to be had to well established definitions, sanctioned by books of authority and adopted by long usage, and with reference to which, it may be supposed our legislatures have acted in passing the law punishing the offence." But he adds, "It so happens, that on the present question (adultery) we derive less aid than usual from the lights of the common law, the crime of adultery not being cognisable by the temporal courts in England as a public offence, but only as a private injury, and hence we have not that distinct character of this crime well defined and made familiar to us by the books of common law that will be found to exist in relation to other offences." Archbold, Crim. Prac. & Pl. notes 615.

That is precisely the difficulty in the present prosecution. And it is not removed by arguing from modern enactments, that they make offences, the injuring or destroying any line of telegraph, or railway, or stuffing ballot boxes, and that to ascertain their meanings we can not go to the common law, but must understand and construe those words in their ordinary and usually accepted signification. Injuring a telegraph or railway means the same thing in England that it does in America. Stuffing a ballot box means the same thing in Massachusetts as in Louisiana. But incest means a totally different thing in each of these places.

We are compelled to discharge the prisoner, and in doing so, we call the attention of the legislative department of the Government to the defect in the statute, to the end that it may be speedily remedied. It should declare that intermarriage or cohabitation between persons within the degrees of consanguinity within which marriage is unlawful, constitutes the crime of incest, or such words as are used elsewhere in other criminal statutes, and which have always been held to be necessary for the proper definition, and punishment of this and crimes which like this vary in meaning according to the temper, or religious notions of different countries. For much curious learning on this matter, *vide* Shelford on Marriage and Divorce, 154 *et seq.*, and for computation of degrees, Cooper's Justinian, notes 422—431.

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, the verdict of the jury is set aside, and the prisoner is ordered to be discharged from custody.

No. 7027.

THE STATE VS. GEORGE TENNANT ET AL.

The citation of appeal, in a case where the State is a party, must be served on the attorney for the State who has obtained the judgment appealed from. If absent, the service must be made at his domicil as in ordinary cases.

The obligation of sureties on a bail bond is not affected by the fact that the indictment was found for an offense of a higher grade than that expressed in the bond, and which higher crime includes the lower.

It is sufficient, if by the terms of the bail bond, the offense is substantially although not technically described.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

J. H. Lemon, district attorney, for plaintiff and appellee.

Herron, Bird & Beale for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. George Tennant, George Brown, and seven others were indicted for murder, notwithstanding which, it appears that the two above named were bailed. The bail bond was forfeited, and the three securities have appealed by petition from the judgment of forfeiture.

The citation of appeal was directed to the district attorney, and served upon a person residing at his domicil, he being absent, and he insists that in that case, the service should have been on the district attorney pro tem. He moves to dismiss on that ground.

It has been held that the attorney for the State, who has obtained the judgment appealed from, is the officer upon whom the citation of appeal should be served. State v. Placenzia, 6 Rob. 441. If he be out of office, the service should be upon his successor, but if still in office, and absent, as was the case here, the service should be at his usual residence in the manner required by law for such service. The fact that another officer performs temporarily his active functions, during his absence, will not justify us, in the absence of any legislation on the subject, in requiring that service of a citation of appeal should be served vicariously on such other officer.

Another ground for the motion to dismiss is, that two of the securities, appellants, injoined the enforcement of the judgment on the same grounds upon which this appeal is based, and appealed from the judgment dissolving their injunction, and then abandoned their appeal. If there were any evidence of this, the action of two of the appellants could not prejudice the rights of the third security, but there is nothing whatever in the record to shew any injunction by any person, much less to shew for what causes an injunction was sued out, or that it was abandoned.

The motion to dismiss is denied.

It is objected that the offence mentioned in the bond, 'shooting with intent to kill', is not the offence of which the parties were indicted, which was murder. The obligation of the bail bond is, that the prisoners shall appear and remain until discharged in due course of law, and their sureties are bound, though the indictment be for a different offence from that for which they were committed. State v. Ridding, 8 Annual, 79. The validity of a bail bond is not affected by the indictment being found for an offence of higher grade than that expressed in the bond, and which higher crime includes the lower. State v. Cunningham, 10 Annual, 393. Even if this latter quality be wanting, where the accused is bound not only to appear at court to answer a specific charge, but also not to depart thence without leave of the court first had and obtained, the bond, if violated, can be forfeited, and the securities held to its payment. State v. Cole, 12 Annual, 471.

It is also objected that the offence, described in the bond, is technically not a crime.

There is not required in a bail bond the same accurate verbal statement of an offence that is required in an indictment. People v. Blankman, 17 Wend. 252. It is sufficient, if in the bail bond it be substantially, though not technically set forth. The reasons that impel courts to require strict conformity to statutory or general rules for the structure of indictments, and for the description of crimes therein, do not apply to bonds, executed to enable accused persons to liberate themselves from imprisonment.

Judgment affirmed.

No. 6853.

HENRY RENSHAW vs. GEO. W. STAFFORD, EXECUTOR, ET AL.

The acknowledgment of a succession debt by the administrator of the succession suspends the prescription of the debt as long as the property of the succession remains in the hands of the administrator, under administration.

The owner and mortgagor of property sold for taxes, can not buy it in, and thus acquire a title to the prejudice of the mortgagee.

The mortgagee's rights on the property will remain in full force.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Bowman*, judge *ad hoc*.

Clarke, Bayne & Renshaw and *Jas. G. White* for plaintiff and appellant.

Robert P. Hunter for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff is the holder of four promissory notes of $3375

each, executed by the late L. A. Stafford, and secured by mortgage on the Edgefield plantation, in Rapides. The notes matured January 23d, February 23d, March 23d, and April 23d, 1861, and were duly presented to George W. Stafford, dative executor of deceased, and by him duly acknowledged as just claims against the estate of L. A. Stafford on 20th December, 1865. The mortgage has been kept in full force by re-inscriptions from time to time. This suit is brought to enforce the said notes and mortgage on the said plantation, and to annul, or have declared inoperative, a certain tax-sale thereof, made December 13, 1875, to Mrs. Sarah C. Stafford, the widow in community of L. A. Stafford, and certain sales of portions thereof by her to other parties; also to enjoin the tax-collector and Auditor from making or completing said sale to her. The executor and Mrs. Stafford pleaded a general denial and the prescription of five, and in this court, of ten years. The other defendants file a general denial.

As stated, these notes were formally presented to and acknowledged by the dative executor on 20th December, 1865. The present proceeding was commenced May 16, 1876. George W. Stafford qualified as dative executor of the estate of L. A. Stafford 2d October, 1865.

Between these dates no judicial proceedings were had upon these claims. The estate continued in the hands and under the control of the dative executor, who seems to have rendered no account of his administration, or done any other act looking to a settlement of its affairs. In November, 1875, the whole plantation was adjudicated to the State for several years delinquent taxes, which with the penalties were permitted to accumulate to amount of some $4000. The collector thereupon conveyed or sought to convey it, under act 105 of 1874, to Mrs. Stafford under circumstances hereafter to be stated.

The first question to be determined is that of the prescription of plaintiff's debt; for if it be prescribed he is without interest to contest the sale to Mrs. Stafford or its effects.

We premise by stating that we do not consider the question as any longer an open one, as to the five-year prescription. It does not apply to a case like this. See 12 R. 507; 29 A. 495. We propose therefore to discuss the following questions:

First—Is the claim of plaintiff barred by the prescription of ten years? and,

Second—If so, from what date or event does that prescription begin to run?

It may, we think, be conceded that the prescription of ten years is applicable to this debt, for it is one of that class denominated personal actions, which finds its prescription in the rule of art. 3544 C. C.

The real difficulty arises in determining the question when and in

what event does this prescription begin to run? Is it from the date of the presentation to and acknowledgment by the administrator? Or is it from the time the administrator renders his first account without placing thereon the claim so acknowledged, or is it from the date of his final account? We confess that these questions are surrounded with many and grave difficulties, and that there are apparent conflicts in the adjudications bearing upon them. A safe rule under such circumstances is to resort to fundamental and original principles of the law, and ascertain which of the various theories best accords with these.

We think that the following proposition may be accepted as fundamental:

That an administrator or dative executor is an officer of the court, and primarily the representative of the creditors of the estate. The effect of an administration is to take the property of the deceased out of the custody and possession of his heirs and place it in the hands of a trustee for the benefit primarily of the creditors, to be by him administered under the supervision and control of the court. It is in its effects not dissimilar to a deposit in pledge for the security of the creditors of the estate. C. C. 2979 *et seq.* There is no philosophic reason for distinguishing the effects of such an administration from those which flow from the administration of the estates of insolvents in the hands of syndics. The objects and purposes of the law are the same in both cases, to wit, the preservation of the property and its distribution to those entitled to it. The methods of procedure are very similar, and in many respects identical. The only real difference in the two cases is that one appertains to the estate of a living, the other to that of a dead man; the surplus of the estate after paying its charges is delivered in the one case to the living debtor, in the other to the heirs of the debtor. It has been said by this court, 2 A. 925, that "the property of a succession is the common pledge of the creditors. That an administrator is the trustee of the creditors; his first duty is to them, and his imperative obligation is to watch over their interests."

In 3 A. p. 531, the court say: "The assets left by an insolvent are the common pledge of his creditors. That pledge continues as long as there are assets to be divided."

If the administrator and dative executor (for their relations to the creditors are the same, see 13 A. 584, 18 A. 63), are trustees for and of the creditors; if they are the judicial depositaries of the property of the estate, then it seems to follow that their possession is that of the creditors of whom they are the mandataries in some sort. It results further that the creditors are in possession through these trustees of the property and effects of the estate, which are their common pledge.

It is the well-settled jurisprudence of this State that possession by

the creditor himself, or by his mandatary, of the pledge securing his debt operates a suspension of prescription as long as that possession continues. See 1 R. 556; 8 R. 145; 11 R. 183.

As long therefore as the heirs of the deceased allow the property of his estate to remain in the custody of the administrator, the trustee of the creditors, the principle stated requires that prescription, at least and certainly so far as their debts bear upon the objects of the pledge, be suspended.

The operation of this rule is of course limited to those creditors whose claims have been duly "recognized" by the administrator, or by judgment of court; for, until recognized in one or the other way, they are not classed as creditors of the estate, to be paid concurrently therefrom. C. P. 987.

We think these views harmonize with the provisions of the Code of Practice. The 984th article of that Code provides that "no bearer of a claim for money against a succession, etc., shall commence an action against such succession before presenting his claim to the administrator." The art. 985 directs the mode of recognizing the claim if the administrator finds it just. Art. 986 provides that "if the executor or administrator have any objection to it and consequently refuse to approve it, the bearer of the claim may bring his action," etc. Art. 987 declares that the creditors, whose claims have been thus recognized (*i. e.* by acknowledgment or judgment), can only be paid concurrently, etc. Art. 988 provides for calling together these recognized creditors, when the administrator is ready to pay the debts. Art. 989 says that as these creditors "can only obtain payment after certain delays, interest shall be allowed on their debts," etc. By arts. 1053 and 1054, the administrator can not be required to pay other than certain privileged debts until after the expiration of three months, even if he have funds.

We think it manifest that the law never contemplated that a creditor whose debt has been formally acknowledged should bring a suit to establish his claim. The policy of the law discourages such proceeding; would punish it by inflicting the costs thereof on the creditor. True, the law gives him after a reasonable time, which may be a few or many, but never less than three months, according as property may be sold for cash or on credit, and according as other contingencies may happen, a right to compel the administrator to account. But if the theory of the defense is correct, such a proceeding by a judgment or acknowledged creditor would not prevent prescription running against them. For if a judicial demand interrupts prescription it would seem that it is only when the object of that demand is the establishment of the right of the creditor; whereas, a proceeding against an administrator for a sale of property or for an account would be one in execution of an established

right, rather than one in recognition of a disputed one. To illustrate, a creditor, on refusal of the administrator, proceeds by suit to obtain judicial recognition of his claim. Having obtained his judgment of recognition, he continuously for eleven years pursues the administrator to compel sales of property and accounts of administration. After ten years of pursuit the administrator, who is his trustee, turns upon him and says: "Your judgment is extinguished by ten years prescription; you have not cited me, and had your judgment revived." Would it not be a full answer for the creditor to say, "You are my trustee; you hold property in your hands, put there as a pledge for my debt; your possession is my possession, and no prescription has run or can run as long as the heirs or other owners leave the pledge in your custody?"

This was the view taken by this court in the case of Succession of Romero, 29 A. 495. It is also the doctrine held by our own courts in cases of "Cessio Bonorum," 11 R. 348; 1 A. 365; 12 R. 155; 3 A. 531.

We have seen that there is no substantial reason for distinguishing between the cases of administrations of insolvent estates and those of deceased persons. In fact, insolvent successions are directed to be administered as estates of insolvents. See C. C. 1172 *et seq.*

We are referred by the counsel of defendant to the decision of this court in succession of Dubreuil, 12 R. 507, 516; and to that in Sevier vs. Gordon, 21 A. 373, as holding the doctrine that prescription begins to run against an acknowledged claim from the date of the acknowledgment. It is true that in the former case, on rehearing, this court so held, and that in the latter case the decision in 12 R. is referred to approvingly. On that rehearing Judge Simon, as the organ of the court, says: "We confess that the question presented is not a very clear one." We think that in the original opinion in that case the decision, rendered by Judge Morphy as the organ of the court, is more conformed to the general principles of the law than the conclusion reached on the rehearing. Judge Morphy says: "Although under our laws no executory judgment can be obtained against a succession, the creditors are not without the means of asserting their claims and taking the necessary steps to interrupt prescription. All demands for money may be presented to the administrator, to be acknowledged by him. If the debt is admitted to be a just one, he shall write on the evidence of it a declaration which he shall sign, stating that he has no objection to the payment of such claim, after which the debtor shall submit it to the judge that it may be ranked among the acknowledged debts of the succession. C. P. 984, 985. From the time that this is done, *which is equivalent to a judicial demand*, prescription, we apprehend, *must remain suspended*, as the creditor *can do nothing more against the estate*, except it be to coerce the administrator to a prompt settlement of the estate." The rehearing

was granted solely on the ground that this opinion seemed to rest upon a state of facts which did not exist, to wit, that after having been acknowledged the claim had been presented to the judge to be ranked. On the rehearing stress is laid upon the fact that it was not so presented to the judge to be ranked; and this is the ground upon which the court reversed its former decree. The whole case proceeds upon the hypothesis that had this formality been complied with, then the opinion delivered by Justice Morphy would have been correct. Now we think that after the claim has been "recognized" by the administrator, its validity as an acknowledged debt of the estate in no way depends upon its being "ranked" by the judge. This last formality touches not the question of existence or validity of the claim, but its "*rank*" or "classification" merely. This presentation to the judge is *ex parte*, and no time is fixed within which it is to be made. For aught that appears in the law, this presentation to the judge, for the purpose of ranking the claim, may well be done when the administrator presents his account. Indeed, it would seem to us that that would be the proper time, as it would then be done *in concursu* and contradictorily with the other creditors. In practice such is the mode.

We therefore conclude that after a creditor of an estate has had his claim duly acknowledged by the administrator the law does not contemplate any further proceeding on his part to establish it, as against the estate. That in principle the administrator is his trustee, and holds in possession, for his benefit, the property of the estate, which is the common pledge of the creditors. That the creditor is not obliged to inaugurate judicial proceedings to preserve his right whilst this state of facts continues; and until an account is rendered ignoring his claim, or the possession of the administrator terminates, prescription is suspended. We think, therefore, that the plea of prescription is not well founded.

ON THE MERITS.

George W. Stafford, the executor, is the son of L. A. Stafford, deceased, and of Mrs. Sarah C. Stafford, his widow, who has accepted the community.

It seems that the executor and the family of the deceased resided upon and enjoyed the fruits and revenues of the Edgefield plantation from 1865 to 1875, but failed and neglected to pay the taxes thereon, which accumulated until they amounted, in November, 1875, to some $4000, when the property was advertised for sale to pay the same. The plaintiff went from New Orleans to Alexandria to attend this sale, and protect his interests as a mortgage creditor. At that offering the

property was put up in lots, and some lots were adjudicated to plaintiff, and some to George W. Stafford; together sufficient to cover the taxes. Stafford declined to comply with his bids, and the collector, upon that as a pretext, refused to make a deed to plaintiff for the lots he had bought, and announced that he would re-advertise the property for sale. On November 29, 1875, the property was again offered, and adjudicated to the State, for the taxes. On December 3, following, plaintiff deposited $4000 with the Fiscal Agent of the State, payable to the tax-collector of Rapides, and procured a letter from the Auditor advising the collector of said deposit, as "given to cover the purchase from the State of the lands" in question, and requesting the collector to make title to plaintiff. It is not disputed that the collector received these notices before he had made any conveyance to Mrs. Stafford. The collector in his testimony says: "I had received the Auditor's letters of December 3 and 13, 1875, before the title was made to Mrs. Stafford. *This whole business was done with and through George W. Stafford, and I never met Mrs. Stafford in the transaction, nor had I any conversation with her at all.*"

To our minds Mrs. Stafford was the mere *alter ego* of George W. Stafford in these transactions. Good conscience forbids that the executor and widow in community of the deceased, under the circumstances of this case, should be permitted to take advantage of their own wrong, and thus deprive creditors of the estate of its effects. It was the duty of the executor, as, also, of the widow in community—they were under both a legal and moral obligation—to keep down these taxes, and to preserve the property for the creditors. Mrs. Stafford was herself *personally bound*, as widow in community, for one half of these taxes and one half of these debts. The transaction can only be regarded and treated as a payment of the taxes, a redemption of the property for the benefit of the estate of L. A. Stafford.

Cooley on Taxation, p. 345, 346, says:

"Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers. * * So the mortgagor, remaining in possession of the land, owes it to the mortgagee to keep down the taxes, and the law would justly be chargeable with connivance at fraud and dishonesty if a mortgagor might allow the taxes to become delinquent, and then discharge them by a purchase which would at the same time cut off his mortgage. There is a general principle applicable to such cases, that a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party by a neglect of the duty which he owed to such party. The principle is universal, and is so entirely reasonable as scarcely to need the support of authority. Show the exist-

ence of the duty and the disqualification is made out in every instance."

In 11 Ill. p. 383, the court say:

"It would be inequitable to allow Shaw, after mortgaging the lands, to suffer them to be sold for taxes, and by buying them in himself defeat the lien of the mortgage. His purchase of the lands at a tax-sale, under such circumstances, must be regarded in the light of a payment of the taxes by him."

22 Maine 334: "It was, moreover, the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid, and by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioners. And when he received a release of the title, if any were acquired under that sale, he would be considered as intending to discharge his duty by relieving the estate from that incumbrance. To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners would have been to commit a fraud upon their rights. This is not to be presumed. On the contrary, he must be presumed to have intended by procuring that release to extinguish the title under that sale."

25 Cal. 45: "*If the defendant was under any legal or moral obligation to pay the taxes*, he could not, by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly."

42 Maine 244, *et seq.*, was a case as follows: A, for a valuable consideration, agreed to convey to B certain premises within two years, provided B paid a stipulated sum of money within that time to A, and, also, all taxes that might be levied on the premises, and an agreed sum annually for rent. B failed to perform the conditions, allowed the property to be sold for taxes, purchased the tax title, and defended against A by force of that title. The court held: "It was the duty of the tenant to pay the taxes upon the demanded premises. The omission to do so was a violation of good faith and a breach of the condition on which he occupied them. To permit him to set up a title which he has obtained by a violation of his own duty, if it were in other respects good, would be most manifestly inequitable, and in fraud of the rights of the demandant. Such a defense can not prevail, either in law or in equity, and it requires no small degree of assurance to set it up in a court of justice."

The judgment appealed from is erroneous, and it is ordered,

adjudged, and decreed that the same be and is hereby annulled, avoided, and reversed; and, proceeding to render such judgment as should have been rendered, it is now ordered, adjudged, and decreed that the plaintiff, Henry Renshaw, have judgment against the estate of Leroy A. Stafford, deceased, represented by George W. Stafford, executor, for the sum of $13,500, with eight per cent interest on $3375 thereof, from January 23, 1861, and like rate on like sum thereof from February 23, 1861, and like rate on like sum thereof from March 23, 1861, and like rate on the balance thereof from April 23, 1861, till paid.

It is further ordered and decreed that the special mortgage, as claimed and set forth in plaintiff's petition, and in the act of mortgage by Leroy A. Stafford to West, Renshaw & Cammack, of date April 6, 1859, be and the same is recognized and made executory upon the property therein described to pay this judgment, and that said mortgaged property be seized and sold according to law for that purpose.

It is further ordered and decreed that the injunction prayed for by plaintiff be made perpetual against the defendants herein, and that the tax-sales referred to in plaintiff's petition, whereby Mrs. Sarah C. Stafford claims said property, as well as the transfers made by her to James Moore and Charles E. Jonette, be and they are each and all declared inoperative, null, and void as against the plaintiff in this suit.

It is further ordered that appellees pay all costs of this suit in the court below and of this court.

The Chief Justice takes no part in this opinion.

No. 6937.

THE STATE EX REL. T. WHARTON COLLENS VS. ALLEN JUMEL, AUDITOR.

One who has a claim against the State for a salary, or for money due on other accounts, is entitled to have his right to payment adjudicated by means of a mandamus against the auditing officer.

In order to maintain the plea of *res adjudicata* there must be an identity of parties, of capacity, of object, and of cause of action.

When a judge has acquired his office, in the mode prescribed by the constitution, he has a vested right to its emoluments, during the term fixed by the constitution for its duration, and his right can not be impaired by an act of Legislature, passed during said term, abolishing the office.

The Auditor can not be compelled to warrant on the Treasurer in favor of any officer of the State, for any sum beyond the appropriation made by the Legislature for such officer.

APPEAL from the Third District Court, parish of Orleans. *Monroe*, J.

E. Howard McCaleb and *E. H. Farrar* for plaintiff and appellee.

James C. Egan, Assistant Attorney General, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The relator was re-elected Judge of the seventh district court of Orleans parish in November 1872, and was commissioned, and qualified thereunder.

On December 11th. of that year, an act was passed by the legislature abolishing the seventh and eighth district courts of that parish, and providing for the transfer of the records of those courts to other courts named therein, and also creating a new court to be called the Superior district court. Acts 1873, p. 38.

Judge Collens continued to perform the duties of his office until the records of his court were taken away, the clerk was dispossessed of his place, and the court room was occupied by the Fourth court, to which it had been assigned. After that, he held himself in readiness to perform its duties, and refrained from resuming the practice of his profession for two years or more.

In April 1873, the relator applied for and obtained a mandamus to compel the Auditor to warrant on the State Treasury for the two quarters of his salary ending respectively Dec. 31, 1872 and March 31, 1873. The first of these quarters commenced Oct. 1, 1872, at which time Judge Collens was serving under his election and commission of 1868. That case was carried to the Supreme Court, and our immediate predecessors held that he was entitled to his salary up to the promulgation of the Act of December 1872, which abolished his court, and was not entitled to any salary thereafter. Collens v. Clinton, 26 Annual, 406.

The present suit does not embrace a claim for salary for the period included in that suit, but seeks to enforce the right to salary from April 1, 1873, to November 1876, the end of the term for which the relator was elected and commissioned.

The respondent pleads the exception of *res adjudicata*, basing the plea upon the prior suit, and in case it should be overruled answers by a general denial, and with the special averment that there is no appropriation for the payment of the relator's salary. There was judgment for the relator, and the respondent appeals.

As to this last objection the respondent is in error, since it appears that the general appropriation bills for 1873 and 1874, each contain an appropriation of one hundred and twenty-five thousand dollars for the salary of the District judges throughout the State, and refer specifically to the Act of 1868 as the one copied or renewed, at which time the Seventh court was one of those provided for, and besides contain an appropriation of five thousand dollars for the salary of the judge of the Superior district court. The general appropriation bills for 1875 and 1876 provide one hundred and thirty thousand dollars in lump for the same purpose. So far as these bills may be considered as a legislative inter-

pretation of the Act of Dec. 1872, they are an indication that the General Assembly treated the salary as being due the relator.

There are two questions in this case,

1. can the relator sue to recover his salary in this form of action,
2. is his former suit a bar to the present.

The State is a sovereign, and can not be sued by her citizens, in her own courts, without her permission, but a civil proceeding, by which one officer of the State seeks to compel another officer of the same State to perform a ministerial duty, is not, in the proper sense of the words, a suit against the State. Nothing is more common than for a party who has a claim against the State, whether for salary as an officer, or for money due on other accounts, to have his right to payment adjudicated through and by means of a mandamus against the auditing officer. It is recognized by us continually as a legitimate mode of ascertaining what are the rights of persons who have, or who prefer, claims against the State. And to say, that none but an officer of the State can lawfully claim a salary from her, and that the relator can not claim it because his office is abolished,would be to assume in the outset as established, the very thing which is the gist of the controversy.

The plea of *res adjudicata* is not tenable. To sustain that plea, there must be an identity of parties, of capacity, of object, and of cause of action. One of these at least is lacking here. Marcadé says ;—La *cause*, qui doit être la même dans les deux demandes que pour la seconde soit écartie comme déjà jugée, c'est le principe qui engendre immédiatement le droit q'une partie prétend exercer et que l'autre lui conteste * * * du reste, l'*objet* se trouve par la réponse à cette question ; que demande le plaideur? et on trouve la *cause* par la reponse à cette autre question ; sur quoi le plaideur fond-t-il immédiatement sa pretention? Explication du Code Napoleon, *tome* 5. p. 172.

The relator has carefully excluded from his present demand the salary for the two quarters, which formed the object of the demand in the first suit, and upon which there was an adjudication. It seems more probable that, on the part of the respondent, a plea has been confounded with a principle, and that in pleading the judgment in the previous case as an estoppel, he meant rather that the principle or ruling made by this court, as then constituted, was conclusive of the right of the relator, or his want of right, on the principle of *stare decisis*.

That principle is so deeply imbedded in jurisprudence that it is considered one of its fundamental rules, and is not to be departed from, except in those instances when a rigid adherence to it would be more detrimental than a disregard of it. A graver and more important principle lies behind that rule in this case. An unreasoning observance of it here would establish the doctrine that legislatures could control the

operation of the organic law when it prescribes the constitution of the judicial department of the government, and abolish constitutional offices at their own will. It is marvellous that the danger and the error of so radical a change in that system of checks and balances, which has so long been justly deemed the supreme excellence of our republican government, was not perceived.

The constitution has provided that in the parish of Orleans, the General Assembly may establish as many district courts as the public interests may require, and until otherwise provided there shall be seven—that the term of office of a district judge shall be four years, and his salary shall not be increased nor diminished during his term of office—that he, like all other officers, shall continue to discharge the duties of his office until his successor shall have been inducted, except only in cases of impeachment or suspension—and that he is liable to both of these for crimes and misdemeanors, and is also subject to removal for reasonable cause upon the address of two thirds of the elected members of the General Assembly.

When a judge has acquired his office in the mode designated by the constitution, he has a vested right to its emoluments during the term fixed by the constitution for its duration. The legislature can not deprive him of it. He may be impeded in the exercise of his judicial functions. He may be shorn of judicial power, and be deprived of the opportunity to discharge the duties imposed upon him by the acceptance of his office, but he can not be divested of the office except by one of the modes appointed by the constitution for that purpose, and he can not be denied his just demand of payment of the salary, which is prohibited from being increased or diminished during his term.

All devices tending to abrasion of the independence of the judiciary, or to subject it to legislative or popular caprice, have been uniformly condemned by the wisest men of our country. Numerous instances have occurred in the States of attempts by the legislatures to oust judges from their constitutional offices, and deprive them of their salaries, and in no instance has the doctrine announced in the relator's case in the twenty-sixth Annual found any favour. A case in Illinois meets the point exactly. Ballou was elected a judge of the circuit court, was commissioned and qualified, and two years afterwards and before the expiration of his term, the legislature repealed the act which created the circuit of which he was judge, and established another circuit in its stead. The court say;—"The question is, can the legislature expel a circuit judge from his office by creating a new circuit, and taking from him the territory which constituted his circuit. The bare reading of the constitution must convince any one that it intended to prohibit such a proceeding. It was the intention of that instrument to place the

judges entirely above and beyond legislative control or interference, except by impeachment or address. It is the constitution which creates the office of circuit judge, and not the legislature. * * * * It is unnecessary now to say whether the legislature may reduce the number of judicial districts by abolishing one and attaching its territory to another. If it may, then the office would cease upon the expiration of the term of the judge, but until the expiration of his term, the constitution has not provided, nor has it authorized any mode of expelling him from his office." 23 Ill. 550.

The independence of the judicial department of the government is at once the anchor of our stability, the prop of our strength, and the shield of our defence. Its necessity was early felt—its importance instantly recognized. Said Mr. Hamilton;—"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals, from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. * * * * It is not to be inferred from the principle (that constitutions may be altered or abolished) that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body." No. 78 of the Federalist.

The relator is entitled to his salary for the term of his office, not included in his former suit, and the respondent should have audited his claim therefor to the extent of the appropriations, and drawn the warrants upon the Treasury in accordance therewith. We can not however make the mandamus peremptory so as to compel the Auditor to warrant for any sum beyond the appropriations for these officers. The extracts from the Auditor's books shew that there is a balance of the appropriation for each year unexpended, and that this balance is a different sum in each year, amounting to over thirteen thousand dollars in 1873, but to smaller sums in each of the subsequent years. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is amended by making the mandamus peremptory so far as to direct the Auditor to warrant on the Treasury in favor of the Relator to the extent only of one half of the unexpended balance for each year on

his books to the credit of the District Judges Fund, unless said balance exceeds the amount of the warrants to which he is entitled, in which case the Auditor shall warrant for only such sum as the salary of the Relator amounts to, and as amended, that it be affirmed, the relator to pay costs of appeal.

DISSENTING OPINION.

DEBLANC, J. Relator was elected and qualified as the Judge of the 7th district court for the parish of Orleans. A short time after his election, the Legislature abolished the court over which he was then presiding.

In August 1877, he applied to the State Auditor for warrants on the Treasury, for the salary which he claims as Judge of that abolished court, from 1873 to 1876.

The Auditor refused to comply with relator's demand: he obtained a mandamus against that officer to compel him to grant it, and the mandamus was made peremptory.

In my humble opinion, this was a mistake.

If due at all, the claim urged by the Relator would be due—not for services actually rendered—but rather as damages for the arbitrary destruction of the office to which he had been elected, and the consequent deprivation of the emoluments to which—otherwise—he would have been entitled.

To allow his demand, we have to decide:

1. Whether the act by which the 7th Court has been abolished was constitutional.

2. If it was not, whether a State can be held liable in damages for the errors and injustices of a Legislature.

In this instance, we are called upon—not merely to coerce the performance of a pre-existing duty, not merely to enforce an acknowledged, an ascertained right, but to condemn the State on a suit brought—not against it—but in its name, to pay a disputed claim. This, I believe, we can not do on a proceeding directed against the Auditor alone.

Relator's counsel contends that—in 1873—the Legislature made an appropriation to pay the salary of the district judges, and that—considering its amount—said appropriation necessarily includes the salary of even the judges of the abolished courts. Had it been the intention of the Legislature to do so, it would certainly have qualified that appropriation, so as to leave no doubt in regard to its destination.

As to its amount, tho salary of a district judge is fixed by the constitution, and—I admit—no act of the Legislature, no decree of any court can reduce, increase, or change that amount; but—under the pe-

culiar circumstances which surround this exceptional case, is that salary due? It may be due; but that is a fact which should be judicially ascertained in an authorized action against the State.

High. Ext. Remedies, sect. 10; 27th A 430; 29th A 267, 850.

For these reasons, I respectfully dissent from the opinion and decree of the Court.

No. 6720.

THE STATE VS. J. ZIORD ALIAS J. M. WARREN.

An indictment for larceny which describes the property stolen as "ninety dollars in paper currency of the United States of America," is sufficiently specific. The value of the property need not be alleged. In the absence of proof to the contrary, it will be presumed that a person convicted of crime was properly represented by counsel in the lower court.

APPEAL from the First District Court, parish of Orleans. *Abell*, J.

H. N. Ogden, Attorney General, for the State.

Simeon Belden for defendant.

The opinion of the court was delivered by

SPENCER, J. Defendant was indicted and convicted of larceny. He appeals and assigns as error—

First—That the description of the thing stolen is insufficient, and no value is alleged. The information charges the larceny of "ninety dollars, in paper currency of the United States of America," and states no value thereof.

In an indictment for the larceny of bank notes it is necessary to aver the value; but not so of government coin or money, which are themselves value. See 1 Whart. sec. 361.

We think the charge is sufficiently specific in describing the thing stolen as "ninety dollars in paper currency of the United States of America."

The prosecution in such cases as this is not supposed to be in possession of, or to have access to, the thing stolen, so as to give a minute and particular description of it. To require such description would virtually defeat all prosecutions for the theft of money. It is sufficient that from the charge in the indictment and the description of the thing, it appears a crime has been committed, if the facts be true. See Whart. vol. 1, sec. 358.

It has been held sufficient to charge the larceny of so many dollars in "U. S. gold coin;" also, "in specie coin of the U. S.," without desig-

nating the kind of coin, or the number or denomination of the pieces. Whart. vol. 1, sec. 363.

Second—It is assigned, also, as error, that the record does not show affirmatively that the accused had counsel. But it does appear that witnesses were sworn and examined in his behalf, and that counsel moved for an appeal.

In the absence of proof to the contrary, we must presume that the court *a qua* did its duty in this regard. A party has the right, the privilege, of being heard by himself or counsel, but is not obliged to have counsel. He may prefer to defend his own cause. It is the duty of the court, if the accused desires counsel and is unable to employ one, to assign one to him; but we know no law or reason requiring the facts in this regard to appear as part of the record. Besides, if the party was improperly denied counsel on trial, it should have been made to appear by motion for new trial.

The judgment and sentence appealed from are affirmed.

No. 6898.

PIKE, BROTHER & CO. vs. HART & HÉBERT.

The individual members of a commercial firm may execute a valid note, and a valid mortgage securing said note on their individual property, in favor of the firm, and any third person acquiring the note from the firm, in good faith, for value, and before maturity, may enforce its payment.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Saml. P. Greves and *Lamon & Favrot* for defendants and appellants.

Thos. B. Dupree and *Herron & Bird* for plaintiffs.

The opinion of the court was delivered by

EGAN, J. This case was before us at the last term on an injunction against executory proceedings; see 29 A. 262. It now comes up on appeal from a judgment rendered *via ordinaria*, to which the form of action was changed subsequent to our decree.

The plaintiffs' claim is for judgment and recognition of mortgage, as holders before maturity of a note secured by mortgage, given under the following circumstances:

On the twenty-sixth of November, 1873, S. M. Hart and F. E. Hébert, individually, executed their promissory note, payable to the order of Hart & Hébert, a commercial firm composed of themselves. The payment of the note was secured by mortgage in favor of the said commer-

cial partnership or any future holder of the same, on property of which S. M. Hart and F. E. Hébert, individually, were joint owners.

The mortgage contained the pact *de non alienando*. The firm subsequently failed, and transferred the mortgaged property with other assets to liquidators for the benefit and account of their creditors. The liquidators, claiming to be third possessors, intervened, and set up that the plaintiffs had no mortgage. That if any ever existed it was extinguished by confusion and compensation. The ground taken is that S. M. Hart and F. E. Hébert, the mortgagors, being the same persons who composed the firm of Hart & Hébert, in whose favor the note and mortgage were executed, they were at once the owners of the property and of the mortgage and note which it was intended to secure. In other words, that they were at one and the same time both mortgagors and mortgagees, and makers and payees of the note. That one can not make a mortgage in his own favor, but only of another, under article 3290 of the Civil Code, and that thus the extinguishment and confusion pleaded took place. C. C. 3374. It is hardly necessary to say that if there were that identity argued for by the counsel for the intervenors, it could not affect the notes which would then be simply payable to their own order, and when indorsed to third persons be exigible by them. This, however, is not contended. It is, however, true to say that "the ideal thing," the partnership, is perfectly distinct from the individuals who compose it; and may have, indeed, always does have properties, rights, and obligations equally distinct, and which the law so recognizes. This is elementary. Our own C. C., article 2856, says: "Every partner owes *to the partnership* all that he has promised to bring into the same." Article 2857: That, in case of eviction of a thing promised to be brought into the partnership, he is bound in the same manner as a seller toward the purchaser who buys from him. Article 2858: That he owes interest on sums promised to be put in the partnership from the day he was bound to pay the same; and so, also, on moneys taken out of the funds of the partnership; so, also, by the next article, 2859, does he owe the profits made by his skill or industry or credit when he agrees to furnish them, while, on the other hand, he is a creditor of the partnership for any sums paid for its account and obligations, as well as losses incurred for its benefit. C. C. 2864. In view of these provisions, the fallacy of the argument is manifest, for if there may be a principal obligation of the partners toward the partnership, then may it likewise have its accessory security, the mortgage, as well. There is nothing in the law to prohibit it, and it is of common occurrence, either to make up the original capital, or to raise funds for the use of the partnership; and this may be done by one or all of the partners. The argument of intervenors' counsel proves too much, for, if carried out, it would result

in the inevitable conclusion that though the title to the mortgaged property, and of all their other property, was in the name of the individuals, it belonged to the partnership, because it belonged to the individual partners. This is not true of any property, and it has been often held that land even acquired in the name of a commercial firm belongs not to it, but to the individual members, and is not even liable to be first discussed by partnership creditors. See Poydras vs. Laurens, 6 A. 771; Stillman vs. Purnell, 3 L. 497; Weld vs Peters, 1 A. 432. But, were it otherwise, it was competent for either or both the partners not only to execute notes, but, also, to give mortgages to secure them in the hands of any future holder, or to secure debts having no legal existence at the date of the mortgage. C. C. 3292, 3293; 7 A. 297; 18 A. 234; 21 A. 668; 22 A. 286.

We recently held, in the case of Billgery vs. Ferguson, see 30 A. p. 84, that a mortgage, if even given without any consideration, arising between the parties at the time, but on its face to secure certain promissory notes named therein, which subsequently passed into the hands of a third *bona fide* holder, was enforceable in law at the instance of such holder, and for his benefit.

In the present case the note sued on did so pass before maturity, and there is nothing to question the good faith, either of the makers or of the holders, nor is it in any manner shown, or even pleaded, as it was in the Billgery case, that the transaction was simulated or unreal. On the contrary, there is every thing to support the reality and legality of both note and mortgage. Indeed, it is in evidence that another note of the same class and amount, secured by the same mortgage, had been actually paid. The intervenors claim to be third possessors, but are not under the evidence entitled to occupy even that position, as they are shown to be and allege themselves simply liquidators of Hart & Hébert, and in that capacity to have received from the partners a transfer of the land mortgaged for the benefit of creditors. This is at best but a security and means for the payment of the debts, coupled with the power to sell the property for that purpose, the real title being still in the hands of the debtors. This, however, is immaterial, as we have already seen that the mortgage contains the pact *de non alienando*, which entitles the mortgagee to proceed directly against the property, without resort to the delays and formalities of an hypothecary action.

The judgment appealed from is correct, and is affirmed. It is further ordered that the appellants pay the costs of appeal.

No. 6789.

WORKINGMEN'S BANK VS. BLAISE LANNES ET AL.

In a suit to annul a tax sale of real estate made by a State tax collector, the State is not a necessary party.

Act No. 7, passed by the Legislature at its extra session, May 1875, postponed the payment of all taxes then due the State until the first of November, and any sale of lands made by a State tax collector between the passage of said act, and the first of November, 1875, on account of delinquent taxes, is null and void.

Before a valid sale of real estate can be made by a State tax collector, on account of unpaid taxes, it is necessary that the owner of the real estate should have had ten days written or printed notice to pay the accrued taxes.

Any absolute nullities in a tax sale of property may be set up, and availed of by the creditors of the owner.

A tax sale of property assessed in the name, and for the taxes of one person, which belongs to another; or made under a seizure recorded as against one not the owner; or made under an advertisement describing it as the property of one not the owner is illegal and void.

In forced alienations without legal process, all the formalities prescribed must be observed, under pain of nullity.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Hornor & Benedict and *F. W. Baker* for plaintiff and appellee.

R. King Cutler and *Horace C. Upton* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. The Workingmen's Bank proceeded *via executiva* on certain notes of Blaise Lannes, representing the credit portion of the price of two lots of ground, sold by Martin Lannes to his brother Blaise, in October, 1873, secured by vendor's mortgage on the property. Pierre Lannes injoined the sale, claiming to be the owner of the two lots, in virtue of the sale and conveyance made to him by the tax collector, in August, 1875, and the deed subsequently made to him by the Auditor of Public Accounts, for the taxes of 1873, due by Martin Lannes.

The bank, in answer to this injunction suit, alleged the nullity of the tax sale. The district court decided that the title conveyed to Pierre Lannes could not be attacked otherwise than by direct action, and perpetuated the injunction, reserving to the bank the right to proceed by direct action; and this judgment was affirmed on appeal. 29 AN. 112.

The bank then brought this suit against Blaise Lannes and Pierre Lannes, alleging the nullity of the tax sale; and praying to have it declared void, and for judgment against Blaise Lannes, for the amount of the mortgage debt, with recognition of the right of vendor's mortgage on the property.

Defendants excepted that the title of Pierre Lannes could not be disturbed without making the State, his vendor, a party; that the allegations of the petition are too vague to enable defendants to answer until

plaintiff's cause of action is set forth with more certainty; and that the petition discloses no cause of action.

These exceptions were properly overruled. The State can not be sued except with its consent, specially granted. The allegations of the petition, the claims of plaintiff, and the causes of nullity, are set forth in very clear and distinct terms; and, if true, they show perfect cause of action.

Defendants then plead the general issue; and the judgment of the court, from which they have appealed, declared the nullity of the title of Pierre Lannes; and condemned Blaise Lannes to pay the mortgage debt, as prayed for in the petition, reserving to Pierre Lannes the right to claim such sums as he may have legally paid for taxes on the property.

Eight causes of nullity are set out in the petition:

First—That the tax sale was made in violation of the laws of the State, and particularly act No. 7 of the extra session of 1875.

Second—That the property was not assessed according to law, neither the name of the owner nor the proper description being given.

Third—That demand and notice to pay the taxes was never given according to law.

Fourth—That no legal seizure was ever made, no legal notice of seizure, no legal recordation of seizure caused to be made.

Fifth—That the owner of the property owned personal property liable to seizure of sufficient value to pay the taxes.

Sixth—That no legal advertisement of the sale of the property was made.

Seventh—That no legal deed or act of sale was ever passed, executed, or recorded.

Eighth—That no money was paid by Pierre Lannes; that the sale was fraudulent, made at the instance of Blaise Lannes, to defraud petitioner; and Blaise Lannes is now and always has been the true owner, notwithstanding said pretended sale.

The act of 1875, p. 106, is entitled "an act to relieve delinquent taxpayers from the payment of penalties in certain cases." The first and second sections relate exclusively to taxes due on lands overflowed during the flood of 1874; and the delinquents are relieved of all penalties, *provided* the past due taxes are paid on or before the first of December, 1875. The third section declares that "upon payment of the principal or the amount of the tax itself on or before the first of November, 1875, all interests and penalties thereon shall be remitted on all taxes due throughout the State."

The last clause of section one declares "that the provisions of this act shall apply only to taxes due on lands overflowed during the flood

of 1874." Construed strictly, this would make the third section nugatory; but the third section is a later expression of the legislative will. The statute is remedial; and it must be liberally interpreted, and in such manner as to give effect to the whole. Day of grace is given to the first of December, 1875, only to those owing taxes on lands overflowed in 1874, on their complying with the requirements of section two, stating under oath that the lands were overflowed, and that they were unable to derive revenue from them sufficient to support themselves and families, and to pay the taxes due.

Section three is broader; and it covers delinquents throughout the State; the only difference being that delay is given them to the first of November, one month less than to the sufferers by the flood; and they are not required to make oath or to do any thing else except to pay the amount of the tax itself, without interest or penalty, on or before the first day of November, 1875.

Section four repeals all contrary or inconsistent laws, and gives effect to the act from its passage, May, 1875. Certainly any law which authorized or enabled a tax collector to compel the payment of taxes due at the date of this act, by any means or process, before the first of November, 1875, would have been not only inconsistent with the act of May, 1875, but would have left the tax payer at the mercy of the tax collector, the will of the Legislature to the contrary notwithstanding.

Act No. 47 of 1873, section one, authorized tax collectors, after the public notice required by law, to give ten days written or printed notice to the owner to pay the tax assessed on his property, after which delay, if the tax was not paid, the tax collector might seize the property, by recording a description of it, with the amount due, in the mortgage book of the parish, and on the fourth day of such recordation "shall proceed to sell said property, without legal process, after advertising three times, within ten days, in the official journal. *Provided*, that when personal property sufficient in amount is found to satisfy the State's claim against such tax payer, the same shall be seized to satisfy such claim in preference to real estate."

It was under this statute that the tax collector in the Sixth Municipal District sold the property in question, on the fourth of August, 1875.

There is nothing in the deed or the record to show that any written or printed notice to pay the tax was ever given to the owner, or agent of the owner of this property, or to any other person whomsoever.

On the twelfth July, 1875, an entry was made in the mortgage book of the parish of Orleans, beginning "By virtue of a writ of seizure and sale issued by John Garstcamp, tax collector, * * * in obedience to section one of act No. 47, * * * the said tax collector has seized and taken into his possession the following described property to pay and

satisfy the amount enumerated and due by the owner thereof for State taxes for the year 1873, to wit:

2129.—Martin Lenas. Cancelled August 6, 1875, J. M. Conway, Deputy Rec.	Lots Nos. 5 and 6, square No. 13, bounded by Tchoupitoulas, Jersey, Marengo, and Milan streets, measuring sixty feet front on Tchoupitoulas by a depth of 117 feet."

Next follows the advertisement in the official journal of twenty-seventh July, third, fourth August:

"Tax Collector's Sale, No. 2129. * * * State of Louisiana vs. two lots of ground, fronting on Tchoupitoulas street, in square No. 113, assessed in the name of Martin Lenas." * * * "I will proceed to sell at public auction, at my office, No. —— Berlin street, in the Sixth District, * * * on August 4, 1875, * * * for taxes of 1873, amounting to $40 60, together with all costs, penalties, and charges. At said sale the property will not be adjudicated unless the bid is for a sufficient amount to satisfy the aforesaid claim, together with the penalties thereon, and all costs and charges which may have accrued. The purchaser at this sale will be put in immediate possession."

The next is the tax collector's deed, dated fifth August, 1875, reciting the sale and adjudication to Pierre Lannes, for the taxes due by Martin Lenas, for the price of $110 cash, of which $58 85 were applied to the taxes, costs, and charges, and $51 15 remained in the hands of the tax collector as "overplus," to use his word; and on the fourteenth February, 1876, the Auditor of Public Accounts conveyed the property to Pierre Lannes. In this deed it is stated that the property had belonged to Martin Lannes, in whose name it was assessed for the taxes of 1873; and the Auditor conveys to Pierre Lannes all the right, title, and interest of Martin Lannes in and to the property.

And this is the title which Pierre Lannes sets up and relies upon against the creditors of his brother having vendor's mortgage on the property for four fifths of the purchase price.

We do not think it necessary to proceed further in the investigation of this case. It exhibits an outrageous violation of the right of property by the tax collector; a bold defiance of the remedial act of 1875, which Blaise Lannes would hardly have submitted to if his mortgage notes for the price had been paid.

The sale on the fourth of August, 1875, for the taxes of 1873, was a nullity. It is to no purpose to say that Blaise Lannes, the owner, did not complain. His creditors have rights of which he can not deprive them; and when a title adverse to the claim set up by them is interposed, they may oppose the absolute nullities of that title, even if he should prefer to waive them in favor of his brother. The tax collector was divested by the act of 1875 of all power to enforce the collection of

taxes by sale or otherwise before the expiration of the delay fixed by the Legislature, first November, 1875.

It would not have been lawful to sell property assessed in the name of Martin Lannes, belonging to Blaise Lannes, for taxes due by Martin Lenas; nor under a seizure recorded as against Martin Lenas, nor an advertisement describing it as the property of Martin Lenas; nor was it lawful for the Auditor to convey the property of Martin Lannes in confirmation of a sale and conveyance by the tax collector of the property of Martin Lenas. We do not think the tax collector could legally have made the sale at his office, especially under an advertisement which gave no other description of the place than "at my office, number Berlin street, Sixth District:" nor do we understand the act of 1873 as authorizing the sale by the tax collector without the previous ten days written or printed notice to the owner or his agent to pay the taxes.

In forced alienations, without legal process, all the formalities prescribed must be strictly observed under pain of nullity; and it must appear that all has been done that the law requires to authorize the sale, and to make it complete and perfect. It should be shown, in a case like this, by the recitals in the deed, if not otherwise, that the notices required by law had been given. Nothing would justify the tax collector in selling two lots of ground to pay the taxes when one would suffice; nor to retain the "overplus" resulting from an excessive sale.

Pierre Lannes knew that this property did not belong to Martin Lenas. The act of sale by Martin Lannes to Blaise Lannes was recorded on the day of its date, October 10, 1873; and the tax collector and Pierre Lannes, were, by operation of law, affected with notice and knowledge of the title as it stood upon the public records. The tax collector knew that the property had been assessed in the name of Martin Lannes; and the use of the fictitious name of Martin Lenas, in the recording of the seizure, and in the advertisements and the tax collector's deed, can not be attributed either to error or ignorance on the part of the tax collector or of Pierre Lannes. Perhaps it was designed, certainly it tended, to conceal the fact that the property of Blaise Lannes was about to be sold for the taxes of 1873, assessed against the former owner, Martin Lannes, and assumed by his vendee, Blaise Lannes.

After the six months allowed for the redemption had expired, when the Auditor made the final confirmative conveyance, he gave correctly the name of Martin Lannes as the person who was the owner against whom the assessment for the taxes of 1873 was made: and as the person whose property was seized and sold by the tax collector, on the fourth August, 1875, for the taxes so assessed, and purchased by Pierre Lannes; and this conveyance was not of property belonging to Martin Lenas,

the fictitious tax payer, but of "all the right, title, and interest which the said Martin Lannes has or had in or to the same."

The pretensions of Pierre Lannes have the support neither of good faith nor any equitable consideration whatsoever. They are equally unsupported by the law under which he claims; and the judge of the district court has done justice between the parties on the issues made and submitted to him.

The judgment appealed from is therefore affirmed with costs.

No. 6039.

CITY OF NEW ORLEANS VS. THE MECHANICS' AND TRADERS' INSURANCE COMPANY.

The notes, bills, etc., representing the money loaned at interest by a corporation, constitutes a part of its property, and are liable to taxation.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Saml. P. Blanc for plaintiff and appellee.

H. N. & O. N. Ogden for defendants.

The opinion of the court was delivered by

SPENCER, J. This is a suit to recover of the defendant $1846 25, taxes of 1875, on an assessment of "personal property," to wit: "merchandise, capital, and money at interest."

The defense relied upon in this court is, that "credits," "money at interest," are not *property* within the meaning and intent of article 118 of the Constitution, and that the Legislature has no authority to impose, therefore, a tax upon them.

The argument is, that to tax credits, promises to pay, notes, bills, etc., is double taxation. Thus, if A loans B one thousand dollars, and takes his note therefor, you tax the money *once* in B's hands, and the same money again in A's under the name of *credits*. It is argued that this process ultimates in the borrower paying a double tax; for it is said that the lender will increase his interest to the extent of the tax, and thereby throw upon the borrower eventually both taxes. If this be so, it might afford the borrower a strong argument for resisting *his* taxes, but we are at a loss to see why the lender should complain, since the theory is that he ultimately pays no tax at all—imposing his taxes on the debtor's shoulders. At all events, it is not pretended that the creditor pays two taxes. At most, he pays but once, and we do not see what mission he has to protect anybody but himself from wrongful taxation.

Credits represent *value;* so much so that it is admitted that to the extent that a man is in debt, to the same extent his creditors may be said to have an eventual title to his property. Now the proposition is that this creditor class, who may in reality own thus, indirectly, the whole property of a State, shall pay nothing for the support of the government. It seems to us that this result is exceedingly inequitable, and that if anybody is to be exempted from taxation on the amount of these credits it should be the man who owes them, and whose property and possessions are diminished in value by the amount thereof.

The argument by which it is attempted to be shown that notes, bills, bonds, stocks, etc. are *not property* is too sublimated and metaphysical to be practical in matters of legislation. If they are not property, they represent value and produce revenue. But to say that our constitution forbids them to be considered as property, would be to expunge from our Codes provisions and principles that are as old as the civil law. See C. C. 474, 481, 483, 484, 491, 2642, 3155, and many others; C. P. 642, 676. They are classed as "things;" may be bought, sold, appraised, seized; and make up and constitute the wealthiest patrimonies in the world. Is it not rational, in seeking the meaning of the word "property" in the constitution of 1868, that we ascertain what has always been its acceptation in our law, in our jurisprudence, and by common usage? And when we ascertain that, from time immemorial, "incorporeal things" of the kind in question have been held and treated as embraced in the term "property," shall we turn our back on all this and run away after the metaphysical abstraction that "property is always and of necessity a physical actuality?"

It is our duty to interpret words in a statute "in their ordinary and usual signification," as they are "popularly used." C. C. 14.

We are referred to no authority for the proposition that notes, bonds, stocks, etc. are not property, except that of the Supreme Court of California in "The People vs. Hibernia Savings Society," lately delivered, and that of a writer in the Atlantic Monthly for September, 1877. These productions are certainly able and ingenious discussions of the abstract nature of property. But it is a full answer for us to say that we are here to interpret the laws of this State as the framers thereof intended and understood them; and we are tempted to say of this California decision what Mr. Walker in his work on "Taxation," p. 59, says of it: "We venture to affirm that the idea that these evidences of debt are not property in the legal acceptation of that term never before entered the brain of a lawyer."

But it seems to us that if it were conceded that these credits are not property, it would not follow that the Legislature could not tax them. The theory of our government is that a State Legislature may

do any thing which *is not prohibited* in the State or Federal constitutions. Now strip these "credits" of their title as "property," and you thereby make them *nondescripts*, and *there is no prohibition* in the constitution against taxing them "as credits" *ad libitum*, for it is only "property," "incomes," and "trades" the taxation of which is restricted by the constitution. We think it better and safer for capitalists that we adhere to the old landmarks, and treat them as "property holders," in duty bound to contribute, like other people, in proportion to their means and the protection accorded them, to the expenses of the government.

The judgment appealed from condemned the defendant to pay the amount claimed, with interest and costs, and it is affirmed.

No. 6862.

JOHN A. MORRIS vs. NEUVILLE BIENVENU ET AL.

One of the defendants in a suit in which a formal judgment has been rendered can not disturb that judgment either by an action of nullity, or by appeal, without making all parties to the proceeding who were parties to the original suit.

An action of nullity can not be maintained pending a suspensive appeal involving the same issues.

One who is a citizen of another State, although he have a dwelling here, and reside in it, for some months during each year, is nevertheless an "absentee" and hence, if he have no known representative here, may be legally represented in a suit brought against him by a curator *ad hoc*.

When an absentee is brought into court not by attachment, but by service of citation on a curator *ad hoc*, it is not necessary to post the citation on the door of the court-room.

It is only where a judgment for money has been enjoined that damages can be awarded on the dissolution of the injunction.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

B. R. Forman for plaintiff and appellant.

Chas. F. Claiborne for defendant and appellee.

The opinion of the court was delivered by

MARR, J. This suit was brought to injoin, and to have declared null, the judgment in the suit of Bienvenu v. Factors' and Traders' Insurance Company, and others, Morris, appellant, which we have just disposed of on the motion to dismiss.

The petition charges that Morris is the owner, and has been in possession for some three years, of the property claimed by Bienvenu in the suit against the Factors' and Traders' Insurance Company, and others: that he is a citizen of the State of New York: that while preserving his citizenship in that State, where he has a summer residence, he has for six or more years past had a dwelling-house, and been a

housekeeper in the city of New Orleans, where he spends the winter; and that he is not an absentee within the meaning of the Codes, which authorize the fictitious citation through a curator *ad hoc*.

The petition goes on to state the bringing of the suit by Bienvenu, and his prayer that Morris be cited through a curator *ad hoc*, and judgment rendered against him for the ownership of the property; and it charges that, "your petitioner was not an absentee, but had a residence in New Orleans, and could not be brought into court by a curator *ad hoc;* that, in fact, no curator *ad hoc* was ever appointed; and that no citation was ever served by posting on the door of the room where the court is held, as required by law."

The defendant, Bienvenu, excepted on several grounds, one of which was that a suit to annul a judgment can not be maintained without making all those who were parties to the original suit parties to the suit in nullity; and another was that the action of nullity will not lie pending an appeal involving the alleged causes of nullity.

The judgment of the district court maintained the exceptions, and dismissed the suit, with $250, in damages against plaintiff and his surety on the injunction bond *in solido;* and they appealed.

The original suit was an action of partition; and Morris was made a party because he claimed to be the owner of the property which Bienvenu claimed. The judgment decreed that the property belonged equally, *in indiviso*, to Marchand, the Factors' and Traders' Insurance Company, and Bienvenu; and it referred them to a notary to make the partition in kind. We do not think that Morris, a defendant in that suit, could disturb that judgment without making all the parties to it parties to the proceeding, whether by appeal, or by action of nullity.

We do not think an action of nullity can be maintained pending an appeal involving the same issues. Possibly there might be such a showing made, *prima facie*, of the absolute nullity of the judgment as would authorize the court in which it was rendered to suspend the execution by injunction pending an appeal not suspensive; but it would be the right of the appellee, thus injoined, to have the reality and the sufficiency in law of the alleged causes of injunction determined summarily on exception or motion to dissolve.

Counsel for appellee argues that there is no proof in the record that the value in dispute exceeds $500; and, therefore, it is not shown that the case falls within the jurisdiction of this court. The description of the property, and the admission on the trial in the district court, that it is leased for $30 a month, suffice to establish a value exceeding $500.

The distinct grounds of nullity set up in the petition may be thus condensed and stated:

1. That plaintiff in injunction was not absent in the sense that the court was authorized to appoint a curator *ad hoc* to represent him.

2. That no curator *ad hoc* was appointed.

3. That no citation was served by posting on the door of the cour-troom.

First. The R. C. C., article 56, requires the judge before whom a suit is pending against an absentee who has no known agent in the State, etc., to appoint a curator *ad hoc* to defend him in the suit; and the R. C. P., article 116, requires the plaintiff who intends to institute a suit against a person who is absent and not represented in the State, to demand that a curator *ad hoc* be named to defend the suit. If, therefore, Morris was an "*absentee*," within the meaning of the Civil Code, or was "*absent*," in the sense of article 116 of the Code of Practice, he was in that condition which authorizes and requires the appointment of a curator *ad hoc*.

According to the Civil Code, article 3556, number 3: "An *absentee* is a person who has resided in the State, and has departed, without leaving any one to represent him.

"It means, also, the person who never was domiciliated in the State, and resides abroad."

By the Constitution of the United States, fourteenth amendment, all persons born or naturalized in the United States are citizens of the United States, and of the State wherein they reside; and by the Constitution of Louisiana, article 2, all persons born or naturalized in the United States, "and residents of this State for one year, are citizens of this State."

No one can claim the privileges of a citizen of two States at the same time. He may have dwelling-houses in two States, and he may occupy and keep house in them at different times; but he is a citizen of the State in which he resides; and he resides in the State of which he is a citizen, although he may absent himself temporarily. The allegations of the petition fix the legal residence of Morris in the State of New York; and the fact that he has had a dwelling-house, and been a housekeeper in New Orleans for six or more years past, where he spends the winter, is of no greater significance than if he had occupied apartments in a hotel or boarding-house during the winter.

In the sense of the Civil Code Morris was an absentee. He was a mere sojourner in New Orleans during the winter, and he was absent from the State whenever he was not actually present in it. It is not pretended that he was present in, nor was he residing in the State when the suit was brought; and in the motion for an appeal, by the curator *ad hoc*, in February, 1876, he is described as "a resident of New York." We entertain no doubt that his status was such as to authorize and

require the appointment of a curator *ad hoc*, to defend the suit brought against him.

Second. In Bienvenu v. Factors' and Traders' Insurance Company, and others, we have sufficiently considered this ground; and we refer to the opinion just read in that case, in which we decided that Morris was legally represented by B. R. Forman, Esq., appointed by the court curator *ad hoc*, within the terms and meaning of the Codes.

Third. We attach no importance to the fact that citation was not posted. Where the property of an absent defendant is attached, the attachment and citation must be served "by affixing copies of the same on the door of the room where the court in which the suit is pending is held." R. C. P. article 254. By express law this formality is required in suits by attachment; but it is of so little real value, as notice to the absent defendant, that it can not be extended by implication to cases in which it is not specially required. Cox v. Bradley, 15 A. 529, and Ticknor v. Calhoun, 28 A. 258, relied on by appellant's counsel, were suits by attachment. In other cases, where an "advocate," or "attorney," or "curator *ad hoc*" is appointed, service is made by delivering to him in person, or by leaving at his domicile, a copy of the petition and citation. R. C. P. articles 195, 294, 737.

The district court erred in allowing damages against plaintiff and his surety in the injunction bond. It is only where a money judgment is injoined that damages can be awarded on the dissolution, under the acts of 1831, 1832, re-enacted in 1855, p. 325; Rev. Stats. 1870, § 1754, 1755. In other cases, where damages can not be claimed in reconvention, under C. P. article 375, as amended by the act number 53, of 1839, sec. 7, the remedy is by suit on the bond. Robinson v. Freret, 9 A. 303.

It is therefore ordered, adjudged, and decreed that so much of the judgment appealed from as condemns appellants to pay two hundred and fifty dollars, damages and costs, be avoided and reversed; that the right of appellee to proceed on the injunction bond against appellants for damages be reserved; and that the said judgment be, in all other respects, affirmed; the costs of this appeal to be paid by appellee, and the costs of the district court by appellant, John A. Morris.

No. 6587.

THE STATE VS. LEE JOHNSON ET AL.

The State must affirmatively show that the confession made by an accused was voluntary. A confession made by a prisoner under any promise of advantage to him, in consequence of it, must be rejected.

APPEAL from the Superior Criminal Court, parish of Orleans. *Shaw*, J.

H. N. Ogden, Attorney General, for the State.

Gabriel Santini and *P. W. Kramer* for defendants.

The opinion of the court was delivered by

SPENCER, J. The only question presented by the defendants on this their appeal from a conviction of breaking and entering, etc., and grand larceny, is as to the admissibility of evidence of the confession made by one of them to an officer in charge.

The bill of exceptions, as prepared by defendant's counsel, recites that in answer to the question whether he had made any promises to the prisoner, by stating to him that he would be permitted to turn State's evidence, the officer replied, "I did." The district attorney adds that *his* recollection of the answer was that "he may have said to him that *he might be used as a State witness.*" The judge adds that his attention was not drawn to the officer's answer particularly at the time, and his recollection is not distinct, but thinks the district attorney's version is correct.

In our opinion either version suffices to show that the confession ought not to have been allowed to go to the jury.

The prosecution must show affirmatively that the confession was voluntary and not made under improper influences. State vs. Nelson, 3 An. 499. The words used by the officer clearly indicate a promise of advantage to the prisoner in consequence of his confession. Archbold, 7th ed. p. 413; Wharton, p. 686; Boyd vs. State, 2 Humph. 390. The evidence should have been excluded on the showing made.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and reversed, and that this cause be remanded as to all the defendants for a new trial according to law.

No. 7028.

JOHN MCCAFFREY, ADMINISTRATOR, VS. CHARLES CAVANAC, ADMINISTRATOR.

Under the present charter of the city of New Orleans the Common Council may lawfully assign to the Administrator of Commerce the superintendence, and management of the bridges across the navigable canals of said city.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

Singleton & Browne and *W. B. Lancaster* for plaintiff and appellant.

Frank C. Zacharie and *Samuel P. Blanc* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. This is a controversy between the plaintiff as administrator of improvements and the defendant as administrator of commerce, under the city government, as to which of said officers has the

superintendence and management of the bridges across the navigable canals of the city of New Orleans. The city charter, section nine, provides:

"In the administration of the government and affairs of the city there shall be, in addition and subordinate to the executive powers of the mayor, seven separate departments, the heads of which shall be known as the administrators of said departments, and shall have the administration and control of the same, subject to the limitations imposed by this act, or other laws, or the ordinances and resolutions of the council, to wit:

"*First.* A finance department, etc.

"*Second.* A department of commerce, which shall have general superintendence of all matters relating to markets, railroads, canals, weights and measures, the fire department, and manufactories, and shall be vested with and perform such other functions and duties as may from time to time be prescribed by the council.

"*Fourth.* The department of improvements, which shall have general superintendence of all matters relating to the streets, sidewalks, pavements, and wharves, and to the construction, cleansing, and repair of the same, the construction and repair of bridges, and the drainage of the city, and shall be vested with and perform such other functions and duties as may be prescribed by the council." Acts of 1870, number seven, page 33–34.

On July 18, 1877, the city council adopted an ordinance reciting that:

"*Whereas*, under article two, of section nine of the charter, the administrator of commerce had general superintendence of all matters relating to canals, etc., resolved, that the administrator of improvements turn over and transfer to the administrator of commerce all canals and bridges over the New and Carondelet canals."

John McCaffrey brought the present suit to prevent and enjoin the execution of the above ordinance, alleging that the control, management, and superintendence of the bridges of this city, including the selection of employees to watch and tend the same, belonged to his department under the provisions of the charter above recited.

Cavanac, the defendant, answered by a general denial; averring the validity of the above ordinance, and that by virtue thereof, and by the terms of the charter, the superintendence of the bridges over navigable canals belonged to his department.

There was judgment for defendant, and dissolving the injunction. Plaintiff appeals.

Our opinion is that the charter is paramount to any ordinance of the city council. That where the charter is silent, or not prohibitory, "the ordinances and resolutions of the council" must govern.

The language of the fourth clause of section nine of the charter gives the administrator of improvements, and seems to confine his powers to "the construction and repair of bridges;" which does not, by its terms or by necessary implication, embrace the *superintendence, management, or control* of such bridges, *after construction or repair*. This proposition gains strength when applied to *bridges over navigable canals*, since article *second* of section nine gives the administrator of commerce "superintendence of all matters relating to * * * canals, etc."

We think there is nothing in the charter in conflict with this ordinance, and, therefore, that the matter is within the control and disposal of the council.

The judgment appealed from is affirmed with costs.

No. 6956.

THE STATE VS. WASHINGTON TAZWELL ET AL.

When the record in a criminal case shows that the grand jury came into court and presented an indictment in due form, it will be presumed, in the absence of specific objection and affirmative proof to the contrary, that the grand jury was properly organized.

The question whether a person tendered as a member of a petit jury sufficiently understands the English language to try the issues of a criminal case, is a question of fact confided exclusively to the decision of the lower court.

Being under the charge of larceny disqualifies a person from serving as a petit juror.

Because a confession of the accused to a prosecuting witness was made in response to a question put by the witness, the confession is not thereby rendered involuntary.

Where the indictment charges that an offense was committed at a certain hour of a certain night, it is sufficient to prove that it was committed at any hour during the alleged night.

It is not necessary, in order to convict one as accessory before the fact to the crime of burglary, to prove that the instrument he furnished his confederate to commit the offense with was actually used by the latter.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

H. N. Ogden, Attorney General, for the State.

John H. Dinkgrave for defendant.

The opinion of the court was delivered by

SPENCER, J. Washington Tazwell and Wilson Kealey, as principals, and Zeke Hall, as accessory before the fact, were indicted and convicted of the burglary of a barn with intent to steal. Errors are assigned upon the face of the record, and a number of bills of exception were taken.

The assignment of errors is to the effect that the record does not show that a grand jury was ever empanelled for the November term, 1877; nor that the person signing the finding on the indictment as foreman was ever selected as such, or had authority so to sign. The record does show that on the thirtieth November, 1877, the grand jury came into court, and, all being present and answering to their names, presented, through their foreman, the indictment in this case; which indictment is endorsed: "A true bill. J. S. Murphy, foreman of the grand jury." The record does not show the names of the grand jurors, nor does it contain the entry on the minutes appointing the foreman; but commences with the "opening of court" on the day the indictment was presented. We do not consider it sacramental that these preliminary proceedings for the organization of the grand jury should be copied into the record. It is enough if it appears that the grand jury came into court and presented an indictment in due form. We will, then, in the absence of specific objection and affirmative proof to the contrary, presume that it was properly organized. The cases cited by defendants have reference to the petit jury organized to try the case. That jury is specially organized with reference to the particular case to be tried, and it might well be that its organization, etc., should appear by the record, but the same reason does not exist as to the grand jury's organization.

The first bill of exception is to taking the case up out of its order, and in violation of rule third of the court. That rule was as follows:

"There will be two calls of the docket. The first for the trial of cases by consent, and for fixing causes for a particular day. On the second call, all causes are set for trial in their order on the docket, *except preference and jury cases*, and such causes as may be assigned for a particular day, and each case when reached must be tried or otherwise disposed of."

This case was a "jury case," and by the very terms of the rule not embraced within the class "set for trial in their order on the docket."

The second bill of exceptions is taken to the ruling of the court on certain challenges for cause by the State of certain colored jurors. "The cause was that they did not sufficiently understand the English language;" they, having been asked, "Do you know what a verdict means?" answered, "No." The act of 1877, number ✓ declares the qualifications of jurors, and gives the judge, properly, much discretion in the matter of its organization, and we would be loth to interfere with it, unless it was manifestly exercised in an arbitrary manner. The question whether or not a juror sufficiently understands the English language is one of fact and not of law. We see no reason to doubt the power of the Legislature to fix the qualifications of jurors upon the basis of

intelligence or education, and if it do not discriminate on account of race or color, etc., it does not violate the Constitution of the State or of the United States. The law certainly does not require that jurors must be scholars, or even that they have any education; but it does require that they comprehend ordinary discourse in the English language, and wisely gives the judge power to determine this important fact, and we have no authority to review his decision thereon. No greater farce could be enacted than to try a man for his life or liberty by a jury who did not understand the meaning of the ordinary words of our language. The judge had the jurors before him, and had better opportunity of knowing this matter than we have, and even if we had the power to review we have no reason to believe that he abused the discretion the law vested in him.

Another juror was set aside because he was under a charge of larceny. A bill of exceptions was reserved, but we presume is abandoned, as it is not urged. At all events, the exception was not well taken.

The next bill is taken to the courts allowing the party whose barn had been entered to state that "he had lost corn prior to the date alleged in the indictment." It does not appear that the witness in any way connected or attempted to connect the accused with these previous takings. We do not see, therefore, that this statement was open to the objection that it was proving another and different offense from that charged. The next bill is to the same party being allowed, on re-direct examination by the State, to testify to a voluntary confession by one of the accused. The bill recites that it was objected to, first, because no question touching said declaration had been asked on the direct or cross-examination; and, second, because the declaration did not appear to have been voluntary, since it was made in response to witness's question whether "he (the accused) did not want to tell all he knew about stealing his (witness's) corn?" We can see nothing in this question calculated to render the declaration involuntary. As to the first objection *the court* says in *its addenda* to the bill that the objection made was "as to the voluntary character of the statement." Of course, we can only know the facts from the statements and certificate of the judge in the bill, and can not take the statements of counsel, except so far as they are agreed to by the judge.

The next bill of exceptions is taken to the refusal of the judge to charge, first, "That as the time at which this offense is said to have occurred is stated by dates (hours, days, months, and year), no evidence of a prior offense should be noticed by the jury."

Second. "That if there be no evidence to show that an instrument furnished by one accused as accessory before the fact was used for the purpose for which it was made, but another and different one is used to

commit the offense, that it has not been sufficiently proved to justify a verdict of guilty as accessory before the fact. That the instrument said in the indictment to have been furnished for the purpose of committing an offense must be proved to have been used for that purpose."

We think the court properly refused to give the first charge, for the reason that it was calculated to mislead the jury into the belief that the State must prove the very hour of the night charged in the indictment. Thus, under that charge, if the evidence had shown the offense to have been committed at eight o'clock p. m., instead of between "nine p. m. and five a. m." of the next day, as charged, it would have led the jury to believe it their duty to acquit. It was certainly sufficient to have proved the commission of the offense at any time during the night laid in the indictment, and such proof would not have been "of a prior offense," within legal intendment.

The second charge requested is manifestly wrong. It would be strange, indeed, if one who had so far counseled, aided, and abetted a burglary as to provide and furnish implements to effect it, could escape because when the burglar reached the place of his crime he found more convenient tools, and did not actually use those furnished him for the purpose by his confederate.

We see no error in the judgment and sentence, and they are affirmed.

No. 6871.

SUCCESSION OF FRANCES PARKE BUTLER.

Testaments made in other States can not be carried into effect on property in this State, until registered in the court within whose jurisdiction the property is situated, and their execution ordered by the judge.

A foreign will, when duly authenticated, and admitted to probate at the testator's domicil, is entitled to be admitted to registry and execution in this State.

The executor of a foreign will is not permitted to exercise his office in Louisiana by virtue of his foreign appointment, but must first obtain the authority of the court here.

APPEAL from the Parish Court of Iberville parish. *Crowell*, J.

Favrot & Matthews for Elliott Henderson, appellant.

George Wailes for administrator and appellee.

Barrow & Pope for intervenors and appellees.

The opinion of the court was delivered by

MANNING, C. J. Mrs. Butler died in July 1875 in Mississippi, where she was then, and for some time before had been, domiciled. Her olographic testament was duly probated in March ensuing, by and before

the proper court, upon the petition of Charles M. Conrad, the executor named therein, who however declined to qualify. At his request Elliott Henderson, a resident of Mississippi, applied for and obtained letters of administration *cum testamento annexo* from the local Chancery court, and qualified by giving the prescribed bond, and taking the official oath.

In July 1876, the suit now before us was commenced by an application of E. G. W. Butler, the surviving husband of the deceased, and A. H. Gay, to the parish court of Iberville, praying that the latter be appointed administrator of Mrs. Butler's succession. He is not an heir, and his application is not made as an alleged creditor. The motive of the husband in the selection would appear to be personal confidence. Legal notice of the application was given, and after expiration of the time for delay, no opposition having been made, Mr. Gay was appointed administrator and qualified, September 4, 1876. No mention is made in these proceedings thus far of the will of the deceased.

In April 1877, Elliott Henderson presented his petition to the Court of Iberville, setting forth that Mrs. Butler had left a will, which had been duly probated before the court of her last domicil, and of which he was the duly appointed and qualified administrator with the will annexed, in the stead of the executor named in the will—that the deceased owned property in Iberville parish which must be administered, and that Gay had been appointed administrator of her succession without any knowledge being imparted to the Court of the existence of a will—and praying that this appointment be annulled and revoked, and that he (Henderson) be appointed dative testamentary executor of the will, a copy of which, with all the proceedings of the Chancery court probating the same, was filed in the Iberville court.

Gay answered, that the will had not been probated, nor its execution ordered by any court of this State, and that it had no legal existence—that it was void for ambiguity and for provisions reprobated by law—and if not void, that he was the proper person to execute it.

Lawrence L. Butler, a son of the deceased, intervened and attacked the will as absolutely null.

Henderson then presented his petition in form to the Court praying the registry of the will, and an order for its due execution, which was made.

Finally, in August 1877, the husband of the deceased intervened, and prayed his appointment as dative testamentary executor, in the event that Gay's appointment as administrator should be set aside.

The trial was had on these pleadings, and resulted in the following judgment;

It is ordered by the Court that the will of Frances Parke Lewis be

probated and recorded, and that the intervention of the forced heirs and Col. E. G. W. Butler be allowed, and that the administratorship of said succession be decided on the petitions of claimants before the Probate Court, and he who is most entitled by law shall receive the said administratorship, and that said administrator so recognized shall settle the said succession in accordance with the laws of the State of Louisiana.

The counsel of Gay and the Butlers, defendant and intervenors, insist that no appeal lies from this judgment, because it decides nothing except that no notice of Henderson's application had been given, and they move its dismissal. We see nothing in the record, and there is certainly nothing in the judgment, from which it may be inferred that want of notice was the point decided. On the other hand, the counsel of Henderson, the plaintiff, construe the judgment as annulling the will for the causes set forth in the interventions, and deferring the adjudication of the conflicting claims for the administration to an indefinite and future time.

It is not possible that this can be a correct interpretation of the judgment, since the will is ordered to be probated and recorded in express terms. The expression, that the interventions be 'allowed,' can not mean any thing more than that they are permitted to be filed, or their previous filing is approved, and the intervenors are 'allowed' to litigate in that form of pleading.

If this be a correct construction of the language of the judgment, the plaintiff has appealed from a decree in his favor, and the defendant and intervenors have moved the dismissal of the appeal, which if granted, would lose them their case. And yet the judgment, to our apprehension, can mean nothing else, if it be conceded that it means any thing.

We are not disposed to conclude the rights of parties in so grave, and to them interesting, a contestation because of a mistaken construction of the phraseology of a judgment, which is so vague and ambiguous as to admit a double doubt;—first, the customary and natural doubt of the defeated party whether the judgment is right; and second, the unusual and unnatural doubt of the successful party of the soundness of the judgment, ripening into such disbelief as to prompt an appeal for its reversal.

We shall therefore remand the case, and in doing so, it will be useful to all the parties to recall to their recollection certain established legal principles which are preliminarily connected with the main questions the lower court will have to solve.

Testaments made in other States, as this was, can not be carried into effect on property in this State, without being registered in the Court within the jurisdiction of which the property is situated, and the

execution thereof ordered by the judge. When the form has been observed of registering the testament, the fact of its having been duly probated at the domicil of the decedent being first established, as was done in this case, the order for its execution is granted as a matter of course. Civil Code, arts. 1681—2, new nos. 1688—9. The foreign will, when duly authenticated and admitted to probate at the testator's domicil, is entitled to be admitted to registry and execution here, even if the appointment of a dative testamentary executor is not asked. Bermudez' case, 13 La. 221. The object of the law is to give to foreign wills the same effect in this State, which they would have in the country in which they are executed, so far as concerns the form and effect of the probate. A court of probate can not therefore refuse to order the execution of a will made out of this State, if it be shewn to have been duly proved before the proper court having jurisdiction of that matter at the foreign domicil. Robert's Suc. 2 Rob. 427.

But the order of the Court for the registering of the will, and even for its execution, does not preclude interested parties from attacking its validity either in whole or in part. The intervenors can as well claim its nullity for the vices alleged by them, as for instance because it is said to contain a prohibited substitution, after the order for its registry and execution has been made, as before.

What person is entitled to appointment to execute the will is left an open question by the lower court, and as we have no authority or power in the premises, except to say whether he has conferred it upon the party legally entitled to it, after his appointment is made, it is only necessary to note here that the executor of a foreign will is not excluded from the appointment because of non-residence, neither is he entitled or permitted to exercise his office here by virtue of his foreign appointment, but must first obtain the authority of the court here. Chiapella v. Couprey, 8 La. 84. Henderson v. Rost, 15 Annual, 405. And if appointed, he must give security like an administrator, but whether an administrator with the will annexed, under appointment of a common law court, is entitled to the same privilege as a testamentary executor, may well be doubted.

The terminology in use at the common law, and here, must not induce the impression of a distinction between offices that does not exist. There is no such thing at common law as a court appointing an executor of a will. That office can only be conferred by a testator. If the executor named in the will dies, or will not act, the Court appoints an administrator as it does in cases of intestacy, only in the former, he is administrator with the will annexed. With us, he who is appointed to execute a will, whether by the testator or by the court, retains the same name in either case.

It is ordered and decreed that the judgment of the lower court is set aside, and the cause is remanded to try and determine two issues;

1. the validity or invalidity of the will, whether in whole or in part.

2. What person is entitled to the appointment as dative executor thereof.

And it is further ordered that the appellees pay the costs of appeal.

No. 6053.

JAMES SHARKEY, TUTOR, VS. LESLIE BANKSTON.

A suit instituted in one parish before a certain district judge, may, by consent of all the parties, be legally tried, and decided by the same judge while holding court in another parish of the district.

A judgment against a party in a suit brought by her, as owner, for the recovery of certain land, may be pleaded as *res adjudicata* in a subsequent petitory action for the same land, brought by her heirs.

So long as a government exercises sway over a territory, and has the physical power and means to enforce obedience, the civil acts of its officers are valid and legally binding.

When a testamentary executrix has been destituted of her office, a dative testamentary executor may be legally appointed to administer the succession.

The contents of a judgment may be proved by parol, when the loss of the court records containing the judgment has been accounted for.

When the money paid for the property of a decedent sold by an order of court, has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering the sum thus used.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Kemp*, J. Trial by jury.

H. H. Bryan, Jr., C. Iveson Bradley, and *J. M. Wright* for plaintiff and appellees.

Jas. H. Muse and *E. F. Russell* for warrantor and appellants.

McEnery, Ellis & Ellis for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs seek in this petitory action to recover certain lands, as heirs of their father and mother. The defendant pleads *res adjudicata*, basing the plea upon a judgment rendered in a suit, wherein the mother was plaintiff, in the several capacities of executrix of her husband, of widow in community, and of legatee of her husband of the same land, and the defendant in that suit being the defendant in this, other defences are made, and among them is prescription.

John Sharkey, the father of the plaintiffs, died the owner of the land, which was sold under order of the court of proper jurisdiction to pay his and his succession's debts, and was then bought by the defendant at its appraised value. The price was paid cash, and was appropri-

ated to the payment of the debts as directed in the mortuary proceedings. The process of monition was afterwards obtained by the defendant, and the sale was approved and confirmed. He then expended a large sum, $12,000, in improvements upon the land, the purchase price of which was only $2,500, and in this suit called Bach, who was the executor of Sharkey, in warranty. The alleged warrantor pleaded the sale under order of the court, the disbursement of the price among Sharkey's creditors, and his discharge by the court upon an account duly rendered of his gestion as executor.

The jury found for the plaintiffs against the defendant, awarding the land and improvements to them, and for the defendant against the warrantor for $2,500. From a judgment in accordance with this verdict, the defendant and the warrantor appeal.

The judgment pleaded as *res adjudicata* was rendered in a suit instituted in the district court of Washington parish. At the December term 1868 of that Court, being unable to try the cause for want of time, all the parties agreed to take it over to St. Helena parish, where the district judge had to go to hold his court for that parish, and there try it. This was done. The cause was not transferred. It was heard as agreed on, and the judgment was sent, with the record, back to Washington parish, and at a subsequent term of that court, the judgment was signed in open court and was entered on the minutes of that court. We discover neither irregularity, nor other objection to this proceeding, which was mutually agreed to and desired by all the parties. Rust v. Faust, 15 Annual, 477.

Mrs. Sharkey was plaintiff in that suit as widow in community, and the judgment rendered therein concluded her rights to her moiety of the land, and as to that moiety, the plaintiffs, who derive title from her, are also concluded. Her additional capacity of legatee of the land under the husband's will, in which she also sued, would seem to have the same effect as to the other half, in the absence of any suit or allegation by his heirs that the property thus bequeathed exceeded the disposable portion, and in the absence of any proof that the will had ever been attacked, or annulled, *quoad* that bequest.

But the sale provoked by Bach, executor, is attacked as null for want of representative character in him. He was not dative executor of Sharkey's will, it is said, because Mrs. Sharkey, the testamentary executrix, was the proper and legal representative of the succession.

Sharkey died in March 1862, or his will was then probated; and his widow qualified under it as executrix. A few weeks thereafter, the city of New Orleans was captured by the naval forces of the United States, and the circumjacent territory fell under the military domination of that Government. The parish of Washington remained under the control of

the Confederate States. Its courts, officers, etc. continued to perform their functions as before. That the official acts of civil officers, performed within and upon a territorial area, possessed, held, and controlled by a government, as this was by the Confederate States, are valid and legally binding, is an unquestioned principle in the law of nations, and has never been denied by publicists. So long as a government exercises sway over a territory, and has the physical power and means to enforce obedience, the civil acts of its officers are validated from considerations of public policy and international interest, and the highest court of the United States has enforced this rule against itself. U. S. v. Rice, 4 Wheat. 246. Lay v. O'Neil, 29 Annual, 722.

Mrs. Sharkey abandoned her home in Washington parish, and went to New Orleans, and there remained, and became subject to the laws, and to the military control, of the Power then supreme there. Her oath of allegiance to that Power was taken. In June 1863 an act was passed by the legislature declaring all offices vacant, whose incumbents had taken that oath after January 1861. Acts 1863, p. 11. Mrs. Sharkey's office of executrix was alleged thus to be vacated, but was not filled until 1866, when Bach was appointed dative executor of the will of her husband. Manifestly, she could not then longer perform its functions. Legally she was an enemy to the government that alone discharged the duties of a government at and over the place where the succession was administered. Vattel, 399. Woolsey, Intern. Law, § 117.

It is said however that her office was never judicially declared vacant, and if it were, there is no proper proof of it. The plaintiff himself, moved by what he then deemed a patriotic zeal, actually instituted suit to destitute Mrs. Sharkey of her office in October 1864, on the grounds that her sworn allegiance to another and a hostile government prevented her from performing any legal functions, and Mrs. Sharkey was present there during that proceeding, and knew of its pendency. A judgment was entered as the plaintiff prayed—he who was plaintiff then being plaintiff now. In May 1866, Mrs. Sharkey, by petition to the circuit court of the United States in New Orleans, alleged that on Oct. 24, 1864 James Sharkey obtained a judgment against her, removing her as testamentary executrix, and that latterly Bach had been appointed, and praying to be reinstated. She did not obtain the desired judgment, and never afterwards attacked Bach's title.

The defendant could not produce the copy of the original judgment of destitution, because it could not be found, but he proved that in December 1864, a body of cavalry made a raid in that locality, and destroyed or mutilated the records of the courts, and tore and scattered the papers taken out of the different offices for miles on their retreat. The loss or absence of the paper was thus accounted for.

If all other defences fail, the defendant holds the impregnable position which our law, and the general principles of equity, alike sustain, viz that where money paid for the property of a decedent has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering, the sum thus beneficially used to extinguish the ancestor's obligation. This principle is not new to our jurisprudence. Our earliest sages consecrated it, and we have already availed ourselves of a fitting opportunity to re-affirm and proclaim it anew. Daquin v. Coiron, 6 New Series, 675. Andrews v. Ackerson, 8 New Series, 205. Elliott v. Labarre, 3 La. 541. Foutelet v. Murrell, 9 La. 299. Brown v. Buony, *ante*, 175. Beauregard v. Leveau, *ante*, 302.

The verdict of the jury ignored this sound principle of ethics and of law, and the judgment upon that verdict is erroneous. Therefore

It is ordered, and decreed that the verdict of the jury is set aside, the judgment of the lower court is avoided and reversed, and that the appellants do now have judgment against the plaintiffs upon their demand, and for the costs of the lower court and of appeal.

Mr. Justice Marr took no part in the decision of this cause.

No. 5502.

WILLIAM S. PETERKIN vs. GEORGE MARTIN.

Except in a case when there is an express agreement in derogation of the general rule, the sale of goods, produce, or merchandise by weight, tale, or measure, is not perfect, and the goods at the risk of the buyer, until they have been weighed, counted, or measured.

The purchaser of goods who has paid their price knowing them to be damaged when he paid for them, is not thereby estopped from suing for a diminution of price, and damages, when it appears that there was an understanding between him and the seller, at the moment of payment, that his rights of reclamation were reserved.

A vendor who is ignorant of the vices of the things sold, is liable only for the difference, at the time and place of sale, between the actual value of the thing sold, and what it would have been worth if sound; and the expenses connected with the sale.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

Thomas J. Semmes and *Robert Mott* for plaintiff and appellee.

J. Ad. Rozier for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This case has been argued before us concurrently with that of "Peterkin vs. Oglesby & Co., and Higby," just decided, upon the

suggestion that they involved substantially the same questions. But, as will be seen in the opinion in that case, we held that the plaintiff had failed to prove satisfactorily that the corn bought of Oglesby was, *in fact*, at the time of its weighing and delivery unsound.

In the present case, however, it is shown that, at least, that part of the Martin corn which constituted the last put aboard the vessel was, at its delivery on the fourth and fifth May, in a damaged and heated condition. This lot so last put on board consisted of about 2084 bushels of yellow, and 892 bushels of mixed corn, all belonging to Martin; and this mixed corn was evidently of the same lot of mixed corn that Martin had sold to Peterkin, and of which 5764 bushels had been run aboard with the Oglesby corn, since it is shown that all of Martin's mixed corn was kept together in the bins of the elevator. We think the evidence justifies us in concluding that the Martin corn was not, at the date of its weighing and being put aboard, in good, sound, merchantable condition.

The evidence shows that the plaintiff at time of contract agreed to pay the market price of good, sound corn, and he was entitled to such an article, unless there are circumstances in this case which vary the rule that a sound price entitles the purchaser to a sound article.

This the defendant contends is the case. He says that on the tenth April he sold the plaintiff all the mixed corn he had in the elevator, being six, seven, or eight thousand bushels, at sixty-five cents per bushel, to be taken away in a few days, and he contends that at that date it is not shown that the corn was unsound. That it was a sale of a determined lot, and that it put the thing at the risk of the purchaser from that date; that the sale was complete and perfect, therefore, on the tenth April. We do not think so. Article 2458, Civil Code, provides: "When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller until they be weighed, counted, or measured, etc." Article 2456, C. C., declares the sale "to be perfect between the parties, and the property of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, or the price paid." We apprehend that in a case like this (admitting, for the sake of the argument, it was a purchase of all the mixed corn of Martin in the elevator, though Peterkin seems to deny this), where the quantity was stated to be between six and eight thousand bushels, at sixty-five cents per bushel, the price was not agreed upon and ascertained in the sense of article 2456. Had the elevator taken fire, and the corn been consumed before it was weighed, defendant could not have sued for any specific sum as the ascertained

price of the corn. We think the rule of article 2458 governs this case. That by the very terms of that article a sale "by weight, tale, or measure," is not a sale "in lump." We agree with plaintiff's counsel that there can be no sale in lump, except for a lumping price. These views are, we think, in harmony with the jurisprudence of this State. See Goodwyn vs. Pritchard, 10 A. 250, where the precise point is decided. Also, Larue vs. Blair, 10 A. 242; 21 A. 235 and 414. Nothing short of an express agreement, in a case like this, will put the thing before it is weighed at the risk of the buyer. The argument of defendant's counsel as to the inexpediency or improbability of selling such articles as corn, eggs, butter, etc., subject to the call of the purchaser, can not vary a rule of law, or supply the place of proof that there was an agreement to vary it. It may be that a seller would do a very foolish thing in so doing, but if he does do it, he has no one to blame but himself.

We hold, therefore, that the sale was not perfect until the weighing and delivery (which are contemporary acts at the elevator) on the third and fourth of May.

As we have stated, the evidence satisfies us that the Martin corn was not in good merchantable condition at that time, and was not such an article as the defendant should have delivered. But it was loaded on a vessel which the plaintiff had chartered at heavy cost, and was mixed with other corn before plaintiff discovered its condition. It was impracticable to cancel the sale under these circumstances; and the purchaser had the right to keep the thing, and "content himself with résorting to" an action for diminution of the price. C. C. 2541, 2542. These were the rights of the plaintiff on the fifth of May.

On the eighth of May, after some ineffectual efforts at adjustment, Martin brought suit and sequestered the corn on board ship. On the ninth May Peterkin paid him the full amount demanded, and thereby released the corn from seizure. On the one hand it is contended by Martin that this payment after suit, with full knowledge of the defects of the thing, estops plaintiff from bringing this suit now before us—which was only filed June 5, nearly a month after the payment. On the other hand Peterkin contends that said payment was made under duress and circumstances which deprive it of the character of a voluntary payment. That he had chartered the ship Caspari, at heavy cost; that she was loaded with 23,000 bushels of corn; that he had borrowed money in bank to make payments on her cargo, and given bills on London, with the promise to procure and annex the bills of lading; that the ship was on demurrage at a cost of eight pounds sterling per day; that this seizure prevented her sailing, and prevented his getting the bills of lading, and that it would have been ruinous to have awaited the results of a lawsuit. Under these circumstances, he paid the price.

Even if it be true, as contended by defendant's counsel, that a payment after suit, and in consequence of suit, can under no circumstances be held to have been made under duress (a proposition we are not prepared to unqualifiedly assent to), we think, under the facts of this case, the payment was made with the understanding and agreement that plaintiff's rights of reclamation were reserved.

The defendant himself in his testimony says that *after his seizure of the corn* Mr. Chism came to him on behalf of Mr. Peterkin, and proposed to leave the matter to arbitration; and that if he consented, Peterkin would at once pay the money, which defendant assented to. He says in another place that the proposition he accepted was "that the bill should be paid, and the matter left to arbitration." Chism substantially confirms these statements of Martin. Peterkin paid the amount of the defendant's bill on the ninth May. Under these circumstances, and in view of the strong equities of the plaintiff's claims, we are not disposed to enforce a doubtful and harsh rule which would cut off all right of reclamation.

The plaintiff's right of reclamation being determined, the next question is the extent of defendant's liability. Is he liable only for the difference between the value of the corn delivered and that of a sound article, at the time and place of sale? Or, also, for the damages suffered by plaintiff by delay and expenses of unloading the ship and passing the corn through the elevator again and reloading it, as well as for expenses of surveys here and in Ireland, loss on resale in Ireland, shrinkage, freights, etc.

The rule is that, where there is no fraud or bad faith, failure to comply with a contract renders the party liable only for such damages as the parties must have reasonably foreseen as the direct and immediate consequences of the breach.

It results from article 2545, C. C., that a vendor ignorant of the vices of the thing sold is not responsible in damages, but only to restitution or diminution of the price and repayment of expenses connected with the sale.

Now it is not shown satisfactorily that Martin even knew that this corn was bought for shipment to Europe, or for other long voyage. Peterkin says Martin was informed it was to be shipped, but does not say where. Martin denies that he knew any thing about its destination. There is no pretense of proof that Martin knew any thing of the unsoundness of the corn, or was in any way guilty of concealment, deceit, or fraud.

"In cases of this sort, where the seller is not cognizant of the hidden defects of the thing sold, he is liable for the difference, *at the time and place of sale*, between the actual value" of the thing sold, and

what it "would have been worth" if it had been a sound article. "The actual loss incurred by plaintiff in the foreign market where he sold the thing * * * is not the rule of damages, although it may be considered with other evidence for the purpose of estimating the per centage of inferiority." Fuller vs. Cowell, 8 A. 136; see, also, 1 A. 27; 2 A. 67; 7 A. 613.

We think the rule, as stated above by Eustis, C. J., in Fuller vs. Cowell, is correct, and we shall apply it to this case.

In this record there is no very satisfactory proof of what was the value of this corn delivered to plaintiff by defendant at the time and place of sale, to wit, New Orleans, May 5, 1871. In the case of Peterkin vs. Oglesby, above referred to, the evidence on this subject is more full and satisfactory; but we can not regard that evidence in this case. The testimony taken in England shows that the corn was sold there at a loss of about twenty-five cents per bushel. Plaintiff in his original petition in this case alleges that it was worth about fifty cents per bushel here. That petition was filed about a month after the sale. We think that in the interest of all parties this litigation should, if possible, be now terminated; therefore, we will adopt fifty cents per bushel as the actual value of the corn delivered on May 5, 1871, in New Orleans. This would make a difference of fifteen cents per bushel; the corn having been bought at sixty-five cents. The number of bushels sold was 8735 41-56, which, at fifteen cents, amounts to $1310 35, for which we think plaintiff should have judgment. We allow nothing to plaintiff for the unloading and re-elevating the corn to fit it for sea voyage, because the evidence does not satisfy us that defendant knew plaintiff's purposes in buying, and could not, therefore, have foreseen this expense.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that plaintiff, William S. Peterkin, do recover of the defendant, George Martin, $1310 35, with legal interest from seventh day of June, 1871, till paid, and costs of both courts.

No. 7096.

FRITZ HACKENBURG VS. MRS. C. GARTSKAMP, TUTRIX, ET AL.

A contract of mandate for the purchase of real estate can not be proved by parol evidence, even when fraud in the alleged agent is set up.

Extra judicial admissions and confessions of a party can not be proved by parol, in a case where testimonial proof is inadmissible.

APPEAL from the Second Judical District Court, parish of Orleans. *Pardee*, J.

J. N. Hagins and *J. Q. A. Fellows* for plaintiff and appellant.

B. C. Elliott for defendant and appellee.

The opinion of the court was delivered by

SPENCER J. On 17th February, 1866, Mrs. Chiapella, by public act before Selim Magner, notary, executed in favor of John Gartskamp an act of sale of three lots of ground in the Sixth District of New Orleans, wherein she acknowledges to have received from him the price, as follows: $500 cash, and the note of purchaser for $500 more, payable to his own order, and endorsed at one year.

John Gartskamp died some years ago, and said property was inventoried as part of his estate, and is in possession of his widow and heirs, defendants in this suit, who produce and file in evidence herein the note above described.

On 10th January, 1878, plaintiff brought this suit against said widow and heirs, and alleges—

First—That he purchased by act before Selim Magner, notary, on the 17th of February, 1866, these three lots and paid the price thereof, one thousand dollars, to Mrs. Chiapella.

Second—That John Gartskamp, deceased, acted as his agent and took the title in his own name.

Third—That Gartskamp repeatedly acknowledged the property to be plaintiff's and promised to transfer it, and would have done it, but for his death.

The case came up for trial on first of February, and plaintiff amended his petition, alleging—

Fourth—That Gartskamp took the title in his own name without the knowledge or consent of petitioner, concealed said fact from petitioner for a long time in fraud, and that on making the second payment, nine months after the sale, petitioner was still ignorant that the title stood in Gartskamp.

On the trial plaintiff offered to prove these allegations by his own testimony, and that of other witnesses, which testimony being objected to by defendants, as inadmissible, was rejected by the court, to which plaintiff excepted. There was judgment for defendants, and plaintiff appeals, and presents as the sole ground for decision the admissibility of parol evidence to prove the allegations of his petition. He does not produce or pretend that there ever existed any written evidence whatever of the facts he alleges.

First—He seeks to prove by parol a contract of mandate for purchase of real estate, which is prohibited by article 2992 C. C.

In Muggah vs. Greig, 2 L. 593, where the title of a slave was in Muggah, but the possession in Greig, who set up that the purchase was made for him, with his money, and that the slave had been delivered to him, this court said:

"In the contract of sale or other transfer of immovables required

by law to be made in writing and which the parties are not permitted to support by testimonial proof, written evidence ought to be produced, as being alone legally admissible to establish the authority by which an agency is assumed for either of the contracting parties."

But the case of Baden vs. Baden, 4 L. 166, is still more pointed and conclusive. That suit was brought to compel the defendant to convey and transfer to the plaintiff certain lots of ground, which plaintiff alleged were bought for her deceased husband (of whom she is heir), through the agency of defendant, who fraudulently took title and refuses to convey. The defendant in that case, as in this, offered in evidence an authentic act of sale to himself, showing that he took the title in his own name and paid the price, part in cash, and gave his note for the balance.

Plaintiff offered to prove by parol that defendant, in making said purchase, acted as agent of her husband. The evidence was objected to. This court say, "the decision of the case depends entirely on the legal admissibility of testimonial proof to establish a contract of agency relating to sales and purchases of real estate." It then states that the negative had been held in Muggah vs. Greig, 2 L. 593, and continues, "But plaintiff's counsel claims the right to introduce parol proof to establish the mandate against defendant, on the ground of allegations of fraud against him in the petition. It is perhaps true, that contracts however solemnly entered into in appearance, and however completely clothed with legal formalities, may be annulled on account of simulation and fraud; and to prove such simulation and fraud, testimonial proof may be resorted to; but this can be legally done only when necessity requires an infringement of the general rules adopted to protect the inviolability of written contracts. The provisions of our Code render incompetent all oral testimony to prove a contract relating to the sale of real estate; and no means are left to a vendee of such things to enforce a verbal agreement to sell, except the oath of the vendor, although there is certainly a want of good faith and fraud on his part, in not performing his promise. When third persons attack contracts for fraud, testimonial proof is of necessity admissible to establish it. But when the allegation of simulation and fraud comes from one of the parties to a contract, he is bound to establish it by some written evidence, such as counter letter, etc." The court then says that "plaintiff's object is virtually to make out a title in herself to real estate by oral evidence alone," by basing her claim on a parol contract of mandate. "To admit such proof would, in our opinion, violate the rules of evidence ordained by the articles of the Code and destroy the protection intended to be given by them to proprietors of the most important property (real estate) in the State." See, also, 10 R. 35; 1 A. 73; 3 A. 333; 5 A. 132 and 204.

Second—Plaintiff seeks to prove by parol the acknowledgments and extra judicial confessions of Gartskamp, in support of a demand, "of which testimonial proof would be inadmissible," which is not permitted. See C. C. 2290.

If plaintiff's pretensions were admissible, the last barrier of safety for titles of real estate would be gone; for it would be then, by false swearing, possible to defeat every title.

What the plaintiff alleges may be true; yet it is far better that he suffer the penalty of his own negligence than that the door to fraud and perjury be thrown open and titles to real estate be rendered insecure.

There is nothing in the case relied upon by plaintiff, 7 Mart. 243, "Hall vs. Sprigg," to show that there was not written proof of the agency. See review of this case in 2 L. 593, above cited. The claim was that the defendant acting as plaintiff's agent, and buying with his money, had taken the title in his own name and refused to convey it to his principal. The objection was that parol evidence was inadmissible against or beyond the contents of the written title to defendant. The court said:

"No such thing is attempted here as contradicting the contents of the act; the plaintiff admits the whole of it; but he says that no such act ought to have been executed to the defendant in his own name, because he purchased as agent; and he says that after having caused the instrument to be so made, he is bound to transfer the property to his principal."

But if that case (which was decided under the Code of 1808) can be construed as establishing the doctrine that by merely alleging parol agency in a purchase of real estate, and fraudulent refusal to convey, one can recover real property, and maintain and establish title thereto, *wholly by parol proof*, we must say that it is in direct conflict with what are now fundamental principles of our law of titles, and overruled by the jurisprudence of half a century.

In the case of Caldwell vs. Hennen, 5 R. 20, cited by plaintiff, the agency was conclusively shown by written memoranda and other papers, made by A. Hennen, who actually made a formal title to his principal.

In Livingston vs. Morgan, 26 A. 646, also cited by plaintiff, the defendant had written numerous letters to plaintiff's mother acknowledging the agency, and besides freely admitted on trial all the facts, but defended his rights on the ground that plaintiff had not provided the money to meet his (defendant's) notes given for the price, after due notice to do so, and that, as he had been left to pay for the land out of his own means, it was his, etc.

In conclusion, we would say that an action to enforce the contract of mandate, the trust of which it is alleged the agent has fraudulently violated, presupposes that there was such contract; and such action

must fail when no legal proof of this fundamental fact is produced. In other words, one must establish by legal evidence the existence of a contract before he can show by parol its violation.

There is no error in the judgment appealed from, and it is affirmed with costs.

DISSENTING OPINION.

EGAN, J. The reports of the decisions of this court are full of cases where parol evidence has been received and considered to affect title to real estate where fraud or error are charged. Were it otherwise, the doctrines of the law and the provisions of the Code on the subject of the effect of fraud and error invalidating contracts may as well be expunged, as those guilty of fraud seldom or never leave written evidence of the fraud behind them, and error can seldom be otherwise shown. See C. C. 1881 and 1882. The reason why the true character of a simulated or pretended conveyance of real property can not ordinarily be shown as between the parties otherwise than by a counter letter, is because such conveyances are usually made to effect some fraudulent purpose, such as to shield the property of a debtor from the pursuit of his creditors, and in such case another principle of law intervenes and the law leaves the parties to the fraudulent conveyance where it finds them. That this is so, is manifest, because even in the same case, without any specific provision of the law in exception of the rule requiring written evidence to affect title to real estate, the courts have always permitted creditors to avoid the fraudulent contract made to their prejudice, and for this purpose, to introduce parol evidence. Indeed, it may be doubted if we are without positive warrant for this in the general provision of article 1848 of the C. C. as to how fraud may be proved—*(i. e.)* by simple or by conclusive presumptions, or by other evidence—a provision of the law which has been uniformly interpreted in all that class of cases to permit the reception of parol evidence of the fraud. So, also, in regard to the proof of error, see 15 L. 311, Robert vs. Boulat, 9 A. 29, in which case the defendant was allowed to prove by parol that he was the real and actual purchaser of real estate instead of another person, to whom the sheriff had, through mistake, made the deed, and in whose name it had stood for years on the record. I think that the doctrine is as much consecrated in our law as in any other system that "*uberrima fides*" is required of agents acting for others, and that they can not profit by their own fraud to appropriate either the money or the property of their principals; see Newton vs. York, 13 A. 18. To permit this would be to offer a premium for fraud and dishonesty. There is no propriety in applying to such cases the provision of the C. C. requiring a

power of attorney to buy real estate to be in writing. It seldom happens that the principal who signs the power retains, or has any written evidence signed by the agent, of his acceptance of the trust or agency. The requirement that the power shall be in writing, as was well said in the case of Smith vs. Kemper, 4 M. 409, is intended for the protection of the agent and not of the principal. In point of fact, the agent seldom signs or accepts the power in writing for any purpose, and it would be singular indeed if the principal should be allowed to prove the agency by a writing signed by himself alone, and which might be created by him at pleasure, and not to do so by the testimony of witnesses and admissions and acts of the agent. On the other hand, it would be equally singular if, as is the uniform practice, the only written evidence of the agency or power should be delivered to and left in the hands of the agent, who might deny its existence at pleasure to accomplish his fraud, and thus conclude his principal from all proof of the agency, if his own acceptance and acts as agent could not be shown by the best evidence in existence as in other cases. In the case of Hall vs. Sprigg, 7 M. 244, it was held that a purchase of land in one's own name, though with the money of another, and as his agent, may be shown by parol. In Smith vs Kemper, 4 M. 409, it was held that the defendant claiming to be plaintiff's agent, who had bought land without the knowledge or authority of the latter in his name, can not defeat the sale till the plaintiff declare whether he accepts it or not, and that the plaintiff should recover the land. See, also, Giannoni vs. Gunny, 14 A. 632. In the case of Brice vs. Doyal, 10 A. 575, it was held that the principal might recover a slave purchased by his agent without written proof of his agent's authority to buy, and the suit itself was held to be equivalent to an original mandate in due form. C. C. 2979. In Nolan vs. Shaw, 6 A. 40, it was held that an agent using money or property of his principal has no title. In Exchange Bank vs. Yorke, 4 A. 138, it was held that where an agent makes for himself a purchase he should make for his principal, the latter may take and the former must account for it. It is matter of every day experience that administrators, tutors, and other fiduciaries and agents, made so by law, can not use the funds of their principals to acquire property for themselves, or acquire for themselves the property under their control, and that those whose interests are sought to be thus affected have the option to claim either the property, whatever its character, or the price or damages. This is but carrying out the universally recognized principle that an agent shall not be allowed to profit by a violation of his own trust or to do any act which shall place his own interest in antagonism to those of his principal. I am aware that there are decisions of this court based solely upon the literal terms of the law requiring written evidence to affect title to real estate in

direct conflict with these views. I think that those decisions, however, are based upon too narrow a view of the law and a too literal application to cases like the present of general principles not so intended, and from the operation of which there is as much reason to except cases like the present as those of any other class involving fraud, error, or violations of trust. The decisions of other States and countries, and of the United States, teem with authority in consonance with the views for which I argue and which were, I think, properly recognized in the cases quoted, and especially in the earlier decisions of this court, to which as supported by right reason, and sound morals, I think we should recur. The works of highest general authority also, without exception, inculcate the same principles and doctrine. Indisposition has prevented my enforcing and elaborating my views on this important branch of the law as I would desire and had intended. I would reserve the right still to do so but that the condition of the docket and rapid approach of the close of the term of this court forbid it. For these reasons I dissent from the views of the majority of the court in this case, and think that it is one of the cases in which that "*necessity*" for a departure from the ordinary rule referred to by this court in 6 A. 166 exists. See, also, 5 R. 20, and 26 A. 646. It is no more attempted here than in Hall vs. Sprigg, to contradict the written title, but to claim the benefit of it. If no written title had been made, then the principle invoked by the defense would apply, but as it was made, the inquiry is, who is the real beneficiary under it. This, in a case of violation of his trust by the agent, we think may be shown by parol, as otherwise the grossest fraud would be protected by resort to rules of law not intended to have that effect.

No. 6894.

THE STATE VS. JOSEPH M. JOHNSON.

The word "pants," in an indictment for larceny, sufficiently describes a thing which may be the subject of larceny.

It is not a just ground of complaint that the court below, in charging the jury that they were judges of the law and the evidence, added the words that, "if they thought they knew more of the law than the judge, it was their privilege to so believe."

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

H. N. Ogden, Attorney General, for the State.

Robert Caldwell and *Jno. H. Dinkgrave* for defendant.

The opinion of the court was delivered by

DEBLANC, J. The accused was indicted for the larceny of "a pair of pants," found guilty and sentenced to hard labor. He appealed and

contends that—for two reasons—the judgment pronounced against him should be arrested or this case remanded:

1. Because the judge refused to charge the jury that the word "*pants*" is indefinite, has no meaning in law, and can not be the subject of larceny.

2. Because, to the charge asked of, and given by the court, "that the jury are the judges of the law and the evidence, the court added: "if you believe that you know more law than the judge does, you can believe so."

1. Here and in common parlance, the word "*pants*" has completely superseded the word "*pantaloons*," and "the common acceptation of property is to govern its description, and the certainty must be to a common intent, by which is meant such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court that it could have been the subject matter of the offence charged.

Wharton, Criminal Law, ed. of 1874, vol. 1, p. 357, No. 355.

Neither the prisoner, the jurors, nor the judge could have been misled by the use of the word "*pants*," which sufficiently describes a thing which may be the subject of larceny.

2. The court did charge the jury that they were the judges of the law and the evidence, but defendant's counsel contends that it destroyed the effect of that charge, by adding—in substance—that if they thought they knew more of the law than the judge, it was their privilege to so believe. That remark did not tend to restrict the privilege so broadly acknowledged, nor even to repress the physical power which the jurors had and have to disregard the instructions of one, who—after all—is their legal, safest and most reliable guide.

If the jurors are unqualifiedly the judges, the sole judges of the law, why is it made the duty of the court to charge them, and exclusively as to what law is or is not applicable to the cause submitted to them?

The prisoner's objections to the judge's charges are not tenable.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed.

CONCURRING OPINION.

MANNING, C. J. It is not correct to tell a jury that they are the judges of the law, without explaining the modified sense in which alone they are so. It is not, and never has been, within the province of a jury to decide what the law of a case is. Except in periods when revolutionary passions dominated men's judgments, a jury has never been supposed to have the legal right to disregard the law as pronounced by the court to them.

It has become so customary of late years in this State for juries to be told, that they have that power, without adding that the exercise of this physical power is of itself a moral wrong; and the practice has become so general for the counsel of an accused person to persuade the jury that they have the right to usurp the function of the judge in this particular; and that too, not only without restraint by the judge, but often with his acquiescence; that from much repetition, it has almost come to be regarded as sound law.

I think it is time for this court to suppress this legal heresy, and to bring back the lower courts, and the profession, to the true, and now generally accepted rule, that the legal duty of a jury is to receive the law from the judge; and that a jury can not rightly exercise the physical power of disregarding the instructions of the court upon the law, any more than they can rightly find a verdict directly opposed to the proof of the facts.

The jury can not determine the law, or decide what is the law, or judge of the law, in any cause, except only in so far as the question of law is a component part, as it always is, of a general verdict. For example—the question of guilt in a criminal prosecution is compounded of two ingredients, 1. did the accused commit the act, and that is matter of fact, 2. is the act thus done a criminal offence, and that is matter of law. When the jury return a general verdict, they have necessarily passed upon the question of law, as well as upon the question of fact. But that is not what juries understand a judge to mean, when he tells them they are judges of the law as well as of the facts; nor is that what juries understand a judge to mean, when he tells them they have the *power* to decide the law in a given case; and therefore to tell them that, and nothing else, misleads them.

"My opinion, said Mr. Justice Story, is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law, as laid down to them by the court, but I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure." Battiste's case. 2 Sumn. 243.

So also Chief Justice Shaw;—"it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion

or direction of the court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide all questions of fact according to the evidence." Commonwealth v. Porter, 10 Metc. 263.

"My firm conviction, said Mr. Justice Curtis, is that under the constitution of the United States, juries in criminal cases have not the right to decide any question of law, and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court." U. S. v. Morris, 1 Curtis C. C. 23.

There has been manifested so much misconception of the law on this matter of late, that I have thought it appropriate to state my views more at length than is done in the opinion of the court, in which and in the decree, I fully concur.

No. 5501.

WILLIAM J. PETERKIN VS. J. H. OGLESBY & CO. ET AL.

Before a vendee can recover for diminution of the price, and for damages, on account of the damaged condition of the merchandise bought by him, he must show with reasonable certainty, that the merchandise was in an unsound condition at the time he became its owner.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

Semmes & Mott for plaintiff and appellant.

Kennard, Howe & Prentiss for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. The plaintiff on tenth April, 1871, bought of the defendants about "14,000 bushels mixed corn in elevator from same lot as went on steamship St. Louis, * * * part payment to be made down and balance as soon as on board ship * * at sixty-five cents per bushel of fifty-six pounds." The plaintiff had on same day chartered the ship "Caspari," and, also, bought another lot of corn in elevator from George Martin at sixty-five cents per bushel, said lot supposed to be between 6000 and 8000 bushels.

The ship came to the elevator to receive her cargo on May 1, and on the order of Peterkin to that effect the elevator commenced, on the evening of that day, to run the Oglesby corn aboard. The process of weighing is effected as the corn passes from the bins to the vessel. The evidence shows that the loading and delivery of all of the Oglesby corn, and the greater part of the Martin corn, was completed early on the

evening of the third May. Thereafter the corn put in was of the lots bought from Martin, the delivery of which into the vessel was continued for some time on the fourth May, when the plaintiff visited the ship, and on inspection found the corn at the hatches fore and aft to be in a heated and damaged condition. He immediately protested to the foreman of the elevator, who, he says, had handed him the samples from the hatches with the remark that "*this*" (from the front hatch) "is the Oglesby corn," and this" (from the rear hatch) "is the Martin corn." On the fifth of May the plaintiff returned with a friend to the ship, and again took samples from the two hatches, and found the corn heated and deteriorated. The plaintiff took the samples to Higby and to Martin, and protested against receiving or paying for the corn. No satisfactory arrangement having been effected, the defendants, Oglesby & Co. and Higby, sued out a sequestration on eighth May against the corn, for the price thereof, less $5000 which had been paid, and the corn was sequestered on board ship. Peterkin had borrowed money from one of the banks to pay for the corn, on the promise to furnish therefor exchange on London, with the bills of lading of this corn annexed; which he could not do in consequence of this seizure. He had the vessel under charter, and she was on demurrage, at a heavy cost to him. On the ninth May he paid in full to Oglesby and Higby the amount demanded by them in said suit, and the costs thereof; thereby releasing the sequestration. A similar suit was brought by Martin for the corn sold by him, which was also dismissed in consequence of payment of his demands.

The plaintiff having thus released the cargo, the corn was, after being again passed through the elevator to dry it, shipped to Ireland and sold at heavy loss.

Plaintiff, on fifth June, 1871, brought against Oglesby & Co. and Higby this action *quanti minoris*, and for damages and expenses incurred by him, in so unloading and passing it through the elevator, and in paying for detention of the vessel, etc.

Many interesting legal questions have been raised and discussed by counsel at great length, but, under the view we take, it will not be necessary to pass upon them in this case.

Before a plaintiff can recover in a case like this he must prove with reasonable certainty that at the time he became owner the merchandise bought was in an unsound condition. For if the deterioration took place after his acquisition the loss is his, and he has no action for diminution of the price. We have read attentively the whole evidence in this case, and the more important parts of it several times, and we think that plaintiff has not only failed to prove this indispensable fact, but that if there is any faith to be given to witnesses apparently without

interest, and with the best means of knowledge, the defendants have proved the contrary to be true.

Bernine, the foreman of elevator, who had charge of this work of loading and delivering this corn from the elevator on the ship, swears that the Oglesby corn was the first put aboard; that it was at the bottom; that when put aboard it was cool and sound; that the heated corn taken as samples from the hatches after the loading was nearly done, on the fourth and fifth May, was the Martin corn. In these statements he is fully confirmed by L. J. Higby, one of the defendants, and president of the elevator company. As to the soundness of the Oglesby corn at the time it was put on board, he is also confirmed by Thuron Higby, secretary of the company, who swears that on the twelfth, and about twenty-sixth April, Peterkin examined the Oglesby corn in the bins of the elevator, and pronounced it good. Peterkin himself admits such examination about twelfth April, but denies it at the later date. It is shown that this Oglesby corn was the balance of a lot out of which plaintiff bought his shipment on the steamship St. Louis a short time before, and it is admitted this St. Louis shipment was good sound corn.

Now the only evidence which we find of the unsoundness of the Oglesby corn at the time of its delivery consists:

1. In Peterkin's statement that Bernine, the foreman, on the fourth May took a sample out of the forward hatch and one out of the aft hatch, and on handing him the former said: "This is the Oglesby corn," and of the latter, "this is the Martin corn," and that both samples were heated and damaged. Bernine positively denies making these declarations, and says he could not have said "This is the Oglesby corn," because it was not.

2. On the fifth May samples were taken from same hatches, the ship's bins being full, and these samples were found heated. About eleventh or twelfth May samples were taken by Belknap, a corn broker, by means of a "tryer" piercing the cargo to depth of about five feet below surface, and were found heated and discolored. Bernine, who loaded the vessel, gives it as his opinion that the Oglesby corn was not reached by this test.

3. When the vessel was unloaded, about fifteenth May, the whole cargo was found heated and damaged. It is shown, we think, satisfactorily, that if, at that season, damaged and heated corn were piled upon and mixed with sound corn, the whole would likely become infected in the course of a week or ten days; so that the fact of the Oglesby corn being heated at the time of unloading does not prove it to have been so when loaded.

Now can we accept these circumstances as establishing with reasonable certainty the bad condition of the Oglesby corn at the date of its

delivery, when its good condition is absolutely and positively sworn by one of the defendants, and by two other witnesses, who have no interest, and who had of necessity the best means of knowing its condition, especially when these positive statements are elsewise corroborated, as stated heretofore, and contradicted by no one speaking of his own knowledge?

We think the plaintiff has failed to prove the essential facts of his case, and can not, therefore, recover.

The judgment below was in favor of defendants, and is, we think, correct, and it is therefore affirmed with costs.

No. 6071.

CITY OF NEW ORLEANS VS. F. P. FOURCHY.

One who claims exemption from an income tax on the ground that his income consists of property not liable to taxation, must affirmatively show that his income does so consist.

The exemptions from taxation of $500 worth of household furniture, and $1000 of income, do not violate article No. 118 of the constitution of this State requiring taxation to be equal, and uniform. It does not appear that unlawful exemptions of property, or omissions to tax certain property, will affect the validity of an entire assessment.

Oral evidence is not admissible to prove the written demand made by a property owner in New Orleans on the Administrator of Assessments, asking for a reduction of the assessment on his property. The written demand itself is the best evidence.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Samuel P. Blanc for plaintiff and appellee.

B. R. Forman, J. D. Hill, and *A. & W. Voorhies* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. One of the questions most elaborately discussed in this case is *dehors* the record, to wit: That the tax on defendant's income is unconstitutional, for the reason that the city had exempted $1000 of income in violation of article 118 of the Constitution. We do not find in defendant's answer any allegation, nor in the record any proof of *the fact* that such an exemption was *in reality* made. True, there was a law of the State authorizing and directing such exemption, but *non constat* that the city did so, especially if the doing so would have been unconstitutional, as argued by defendant.

There is also assigned as error apparent on the face of the record, and by way of peremptory exception filed in this court, that the tax on

defendant's income is in violation of the act of Congress and the public policy of the United States exempting legal tender and national bank notes from State and municipal taxation. The argument is that the income is assessed at $8000, and that we must presume these dollars to have been "legal tender" or "national bank" dollars, and, therefore, not taxable. There are, perhaps, many satisfactory answers which might be made to this proposition. It suffices to say that a court can not *presume* that one falls *within an exception to a general rule.* It must be proved. As there is no proof on the subject, and as *the general* rule is that incomes are taxable, we must hold that defendant falls *within the rule* and not *within the exception.*

In all other respects this case presents the same legal and constitutional questions as were presented in that of the "City of New Orleans vs. J. Davidson and J. D. Hill, et al.," lately decided. We have been pressed in earnest and able arguments to reconsider the grounds of our decision in that case. The questions are grave, and not free from difficulty; but, after much reflection, we are unable to reach any different conclusion from that already announced.

The question is, does article 118 of the Constitution of this State forbid the Legislature's exempting from taxation $500 worth of household furniture? and what effects are produced on the assessment in general by illegal exemptions or omissions? Article 118 reads as follows:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes," etc.

The defendant resists the payment of the taxes claimed of him by the city for the year 1875, for the reasons:

1. That the effect of the exemption of $500 worth of household furniture is to destroy the "equal and uniform" character of the tax.

2. That the Constitution requires "*all property*" to be taxed, and that it must be taxed "in proportion to its value."

3. That the only property susceptible of being exempted is that "actually used for church, school, or charitable purposes," and that household furniture does not fall within these exceptions.

First. As regards the equality and uniformity of taxation: It is manifest that the exemption of $500 worth of household furniture operates equally and uniformly, since all persons, including the defendant, enjoy its benefits. But it is said that under the operation of this rule a man possessing as his only property $500 of household furniture pays no tax at all; while his neighbor, possessing $1000 worth,

pays a tax on the excess over $500. That the *per centum* of tax increases, therefore, as the amount of assessable property increases, and, therefore, the tax is not equal and uniform. This is undoubtedly mathematically true. The effect of every exemption, if we resort to abstract figuring, is, of course, to increase the per centum of tax on what is not exempted. But if we look at the question in the light of public policy, and of political economy, we can readily see that, perhaps, the exact sciences do not furnish absolutely the best rules for its solution. Judge Cooley, in his work on "Constitutional Limitations," says: "As a matter of State policy it might, also, be deemed proper to make general exemption of sufficient of the tools of trade, or other means of support, to enable the poor man, not yet a pauper, to escape becoming a public burden." In other words, that by a judicious system of exemptions the *per centum* of taxation might, *in fact*, be reduced on the property subjected to taxation by preventing the public burdens from being increased. He says again: "There is still ample room for apportionment after all such exemptions have been made. The constitutional requirement of equality and uniformity only extends to such objects of taxation as the Legislature shall determine to be properly subject to the burden. The power to determine the persons and objects to be taxed is trusted exclusively to the legislative department," etc. Burroughs, on Taxation, p. 62, says the rule of uniformity "must extend to all property subject to taxation, so that all property may be taxed alike, equally, which is taxing by a uniform rule." Again he says, p. 65: "The provision of uniformity does not prevent the State from exempting from taxation objects of charity, etc., and tools of mechanics to a limited extent." Judge Cooley says taxes on incomes "may be on all incomes, or on all with such exemption as will enable the taxpayer in a frugal manner to support himself and family." Taxation, p. 20.

These views are in accord with those expressed by this court in "State vs. Poydras," 9 A. 165, where it was said: "To be uniform, taxation need not be universal. Certain objects may be made its subjects, and others may be exempted from its operation; certain occupations may be taxed and others not; but as between the subjects of taxation in *the same class* there must be equality." See, also, 26 A. 493. When we turn to the legislation of the State we find it continually proceeding upon these as the recognized rules of taxation. We find it exempting always "all lands, buildings, etc., and all other property belonging to the United States, to this State, or to any parish, city, or incorporated town in this State." "Colleges, and the lots of land appurtenant thereto, and their apparatus, etc." "Capital stock of literary institutions, and library associations, and public lyceums." "Cemeteries and graveyards," whether public or private. "Household goods, and mechanics'

and laborers' tools, to the amount of $500," and so on, in endless variety.

Second. But if defendant's argument is good, all these exemptions, except those for churches, schools, and charitable purposes, are unconstitutional, for he maintains that by the Constitution of 1868, "*All property" or none must* be taxed; and he cites article 118, which, as seen, declares that "all property shall be taxed in proportion to its value, to be ascertained as directed by law." We do not construe that clause as does the defendant. It simply means that the taxation of all property subject to tax shall be *ad valorem.* That specific taxes shall not be levied on property.

Third. We have seen that the uniform practice of the Legislature in this State has been to exempt many classes of property not embraced within the exception of " church, school, and charitable purposes." We have seen that that practice is sanctioned by the highest authority at home and abroad, as legitimate under similar constitutional provisions. We will only add that the question as to what property falls or shall be embraced within the class designated as for " church, school, or charitable purposes" is, of necessity, largely one of legislative discretion, and that this court would with reluctance interpose its opinions to thwart this legislative discretion, unless there was a manifest and flagrant abuse of it. We are not prepared to say that in any of the exemptions complained of the Legislature has transcended its authority. On the contrary, we think it a wise and beneficent exercise of it to exempt enough of the indispensables of life to save the poor from pauperism, and thus protect property and society from increased burdens.

Holding, therefore, as we do, that none of the exemptions complained of transcend the legislative discretion, it is unnecessary to consider the defendant's bills of exception to the refusal of the court below to allow him to prove the aggregate amount of these exemptions.

Nor is it necessary, perhaps, to express any opinion as to the effect of unlawful exemptions or omissions upon the validity of the entire assessment. But it seems proper to say that in our opinion such exemptions or omissions, whether willful or not, can not have the effect of avoiding the entire assessment. To so hold would be to put it in the power of one man, or of a few men, by misconduct or ignorance, to stop the operations of the State Government itself. For if the principle contended for is correct, it does not admit of degrees, and hence the willful omission or exemption of property to the value of $10,000 from the rolls would as effectually invalidate the whole assessment as that of $1,000,000. Besides, the weight of authority is greatly against the defendant's views. See Cooley on Taxation, p. 155; People vs. McCreevy, 34 Cal. 432; 1 Dill. 536, 542; 17 Penn. 339; see, also, 26 A. p. 702.

The only remaining question is that presented by defendant in his bill of exceptions to the rejection by the court *a qua* of the testimony of sundry witnesses to prove that his property was assessed too high, and that he had made a written demand on the administrator of assessments for its reduction. Defendant's allegation is that "one piece of his property had been assessed at $23,600, when it was not worth over $6000, and that he had in due season made a written demand for its reduction." The defendant seems to have been in error in this, for the tax list sued on enumerates four pieces of property, the highest value of any one piece being only $8000, and their aggregate value only $14,800.

The plaintiff, however, objected to the testimony of the witnesses offered, as not being the best evidence, as irrelevant, etc., and the court sustained the objection. We think the court did not err, as the proper and best evidence would have been the written demand, which the law required as a prerequisite to be made, and which defendant alleged he had made.

The judgment appealed from is affirmed with costs.

DISSENTING OPINIONS.

DEBLANC, J. The Constitution provides—not that all the property which the Legislature shall think proper to tax—but that *all property*, nothing less—and not excluding even property used for church, school and charitable purposes—shall be taxed in proportion to its value. As to property *actually* used for such purposes—and none other—the Constitution empowers the Legislature to exempt it from taxation. To that exception, no exception can be added without violating the letter, and—I believe—the spirit of the constitutional enactment.

For two reasons, the exemption complained of is unconstitutional:

1. It withdraws, from the list of property subject to taxation, a considerable portion of the property, every fraction of which should be taxed.

2. It extends to property not used for church, school and charitable purposes, and—it is evident—not embraced in the constitutional exception.

The exemption—as to the income—is more clearly unconstitutional than that already referred to. The Constitution commands that an income tax shall be levied—not on any restricted class of persons—but upon ALL persons pursuing any occupation, trade or calling—not on *any excess* of their income over one thousand dollars, but *pro rata* on THE AMOUNT of the income. Can we qualify and restrict that unqualified and unrestricted clause, and hold—though the Constitution orders the levy of that tax on ALL persons, and on *the amount*—whatever it may be

—of the income, that the Legislature had or has the power to ordain an exemption repugnant to that clause, and to enact that said tax shall be levied but on one class of persons—those whose income exceed one thousand dollars, and on only the excess of the amount fixed by its enactment? This—I apprehend—can not be done without violating the article of the Constitution, relied upon by the defendants—C. art. 118.

Were taxes imposed, levied and paid in strict accordance with the provisions of that article, they would cease to be a discouraging burden, and would—light and multiplied tributes, almost unfelt by the people, come from every class and every direction.

For these reasons, I respectfully dissent from the opinion and decree read.

EGAN, J. I concur in the views expressed in the dissenting opinion of Mr. Justice DeBlanc; and the more readily because by a comparison of the terms of article 118 of the Constitution of 1868, and those of article 124 of the Constitution of 1864, with those of article 123 of the Constitution of 1852, and article 127 of 1845, it will be perceived that there is a very marked and significant change which could not have been unintentional or without meaning. The Constitution of 1812 was entirely silent in regard to the power, mode, and objects of taxation, so that it furnishes no guide in this inquiry. Article 127 of the Constitution of 1845 reads: "Taxation shall be equal and uniform throughout the State (after the year 1848); all property *on which taxes may be levied* in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value *on which taxes shall be levied.* The Legislature shall have the power to levy an income tax, and to tax all persons pursuing any occupation, trade, or profession." The language of article 123 of the Constitution of 1852 is identically the same, leaving out the words "after the year 1848," while, for the first time in the history of the State, article 124 of the Constitution of 1864 altogether omitted the important qualifying words "on which taxes may be levied," and the words "on which taxes shall be levied," and simply provided that "taxation shall be equal and uniform throughout the State. *All property shall be taxed in proportion to its value,* to be ascertained as directed by law;" followed immediately by the provision: "The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes;" and by the *positive, mandatory* words: "The General Assembly *shall levy an income tax upon all persons* pursuing any occupation, trade, or calling, and "all tax on income shall be *pro rata* on the amount of income or business done." The provisions of article 118 of

the Constitution of 1868 are the same, except that the word "may" instead of "shall" is used in regard to the levy of a tax upon income.

It thus appears that in the two later Constitutions, including the present, *all property* except that specially exempted is required to be taxed, as well as to be taxed *ad valorem;* and that *all incomes*, if any tax on income is imposed, are required to be taxed, as well as to be taxed *pro rata* on their amount. I think that the Constitution contemplates that all property not embraced within the exemptions stated in it shall be taxed, and that the burdens of taxation on the defendants have been increased without warrant of law, and that they have a right to redress through the courts, their only resort. The evidence is more full on all the points in the case of Davidson & Hill. In City vs. Davidson & Hill it is admitted that the exemptions complained of amount to millions of dollars, but it is sufficient in all. I think the rule, and reason of the rule, as announced by Cooley and Burroughs, can not operate in the teeth of the provisions of the Constitution of this State to the contrary. I base my conclusions wholly upon those provisions which are unlike in important particulars those invoked as similar. Were it otherwise, the general principle invoked by the plaintiff might apply.

I therefore conclude that this case, and the others of the same character, are with the defendants, and dissent from the views of a majority of the court, and from its decrees in all of them.

No. 7056.

THE STATE VS. GEORGE SALES ET AL.

Where the jury in a criminal case bring in a verdict not responsive to any charge in the indictment, it is proper for the court to direct them to retire, and bring in a proper verdict.

An indictment which states that one of the accused did "assist and abet" the killing and murdering, and then charges that he was "accessory before the fact to the killing and murdering," is fatally inconsistent.

APPEAL from the Fifth Judicial District Court, parish of St. Tammany. *Kemp*, J.

H. N. Ogden, Attorney General, for the State.

J. M. Thompson and *E. F. Russell* for defendant.

The opinion of the court was delivered by

EGAN, J. George Sales was indicted for the murder of one Taylor. In the same indictment it was also charged "that one Dan Proffit, one William Sales, and one Edward Ryan, with force and arms did feloniously, willfully, and of their malice aforethought (did) *assist* and *abet* the said George Sales in the killing and murdering the said William Taylor

aforesaid, etc." "Therefore (the grand jury) do find and present the said Dan Proffit, William Sales, and Edward Ryan, as aforesaid, being accessory before the fact of the killing and murdering the aforesaid William Taylor." Under this anomalous indictment the accused were jointly tried, and as appears from the agreed statement of facts in the record the jury after deliberating returned into court with a verdict of guilty without capital punishment as to George Sales, and found the other defendants guilty *as accessories after the fact*, a crime with which it is not pretended that they were charged, and which both in its nature and punishment is distinct from either the crime of murder or of being accessory before the fact to murder. R. S. 1870, sections 784, 972, and 973. The judge refused to receive the verdict after it had been read by the clerk, and ordered the jurors back to their room. They finally returned a verdict of guilty without capital punishment as to George Sales, acquitted William Sales and Edward Ryan, and found Dan Proffit "guilty as accessory before the fact, without capital punishment," a qualification unnecessary, as under the law one convicted as accessory before the fact can only suffer the same kind and extent of punishment as the principal offender. R. S. 972. After an ineffectual motion for new trial and in arrest of judgment the parties found guilty were sentenced to the Penitentiary for life. Dan Proffit alone has appealed.

The motion in arrest of judgment is based, first, on the jury having first returned a verdict of guilty of the lesser offense of being *accessory after* the fact, and it being therefore illegal and incompetent for them to reconsider their verdict and convict the defendant Proffit of a greater offense, and on the inconsistency and illegality of the indictment in *first* charging that the accused Proffit did "*assist and abet*" George Sales in the killing and murdering charged, and afterward that he was "accessory before the fact to the killing and murdering."

As to the first ground, it is only necessary to say that the verdict first brought in by the jury was not responsive to any charge contained in the indictment as to the defendant Proffit, and the judge therefore did not err in directing them to retire and bring in a proper verdict.

As to the second ground of the motion in arrest, we think the objection to the indictment fatal. The accused Proffit was evidently intended to be indicted as accessory before the fact, but the statement in the indictment that he did with force and arms willfully and feloniously and with malice aforethought "*assist and abet*" the killing and murdering is wholly inconsistent with the charge of being accessory either before or after the fact, and one so charged can not be indicted as accessory. State vs. White, 7 A. 531; Chitty's Crim. Law, 262, 269; State vs. Maxent, 10 A. 743. An accessory before the fact *is one who being absent* at the time of the commission of the crime (and of course being

unable to "*assist and abet*" in its commission) doth yet procure, counsel, or command its commission. 1st Hale's Pleas of the Crown, p. 616. The indictment is therefore bad for this reason, and as it attempts to charge the accused as accessory before the fact in terms it is also bad as an indictment against Proffit as a principal offender, as he could not be both absent and present at the same time, and without being present could not be a principal in the murder. Besides, the indictment contains but one count, and even if both crimes were consistent and otherwise properly charged, it would be bad for that reason also.

The motion in arrest of judgment must prevail.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are avoided and reversed; that the judgment be arrested, and the appellant Dan Proffit be discharged from custody and further prosecution.

No. 6899.

THE STATE VS. DAVID SIES.

Where the legality of a tax is in dispute this court has jurisdiction irrespective of the amount involved.

Retail grocers who have paid their licenses are not entitled, as such, to sell liquor by the glass, but are entitled to sell it in quantities less than a gallon, to be consumed out of their stores.

APPEAL from the Parish Court of Avoyelles. *Normand*, J.

H. N. Ogden, Attorney General, for the State.

A. & W. Voorhies for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. This suit was brought in the parish Court of Avoyelles, to recover from defendant the sum of three hundred and twelve dollars —for this:

1. That—from the 1st of January 1877, until the institution of this suit—in July last—defendant sold or gave away—as a retail grocer or dealer—distilled liquors in less quantity than a gallon, and—as such—owes the State a license of eighty-five dollars.

2. That—for having failed to procure and exhibit said license, he is subject to a fine which—including the fees of the district attorney—amounts to one hundred and fifty-two dollars.

This action was brought in the name of the State, and defendant enjoined from carrying on his business as a retail grocer until payment of the license, fine and penalties claimed from him.

He excepted to the jurisdiction of the parish Court, on the ground that the amount involved in this suit exceeds five hundred dollars, and

—here—plaintiff moves that the appeal be dismissed, because the matter in dispute is less than that amount.

We have—before us—a case in which the legality of a tax is contested by the party from whom it is claimed, and the Constitution provides—in express terms, that—whatever may be the amount of the disputed tax—the jurisdiction of this Court extends to such a case.

Const. art. 74.

Is defendant liable for a license of $85, as keeper of a coffeehouse, in addition to that of $15, which he has paid as a retail grocer?

He did not sell by the glass, but sold in quantity less than a gallon, and this he had the right to do under the license which he paid.

The law—on this point—is not as clear as it might have been—but it contains a provision which—of itself is sufficient to defeat plaintiff's action. That provision is in these words: "All retail grocers selling *by the glass* shall pay—in addition to the grocery license, that required to keep a coffeehouse."

These expressions leave no doubt that the only grocers from whom that license could have been exacted under the law relied upon by the district attorney, were those alone who sold by the glass, and not those who—as defendant—sold by fractions of a gallon, to be consumed out of their store.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is avoided and reversed, and plaintiff's demand rejected with costs in both Courts.

No. 6955.

THE STATE VS. BEN WEASEL ET AL.

The confession made by one of two persons jointly indicted for the same offense, and tried together by the same jury, is not admissible in evidence against any one but himself, no matter whether that confession be made in the course of his address to the judge, or in the form of a plea of guilty.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

H. N. Ogden, Attorney General, for the State.

John H. Dinkgrave for defendant.

The opinion of the court was delivered by

EGAN, J. The defendants were jointly indicted, tried, and found guilty of larceny of a hog and sentenced each to two years imprisonment in the Penitentiary. Williams alone has appealed. He assigns as error in this court that the record does not disclose that a grand jury was ever impaneled at the term at which the indictment appears to have

been found, nor that the person whose name appears as foreman of the grand jury was ever appointed as such, or that he had any authority as such to *indorse* the indictment a true bill and sign the same. Our attention is also called to a bill of exceptions to the ruling of the court in permitting the other defendant, Weasel, to state upon the trial, and after the evidence had closed and the opening argument of the District Attorney had been made, "that he had been persuaded into the offense by (his co-defendant) Robert Williams, and that he had struck the first lick, and Williams finished the killing." The bill states that this statement was made in obedience to the instruction of Weasel's counsel, who was not the same who represented the defendant, Williams. The court states that permission to make this statement was asked for by the counsel for Weasel and not granted; but the court stated that the accused had the constitutional right to be heard by himself or by counsel, and that if he desired to do so he might address the jury in his own behalf, which he proceeded to do, *and in this* address the statement complained of was made. The defendants were being tried together at the time under a joint indictment for the same offense, and before the same jury which subsequently found them both guilty. The confession was not admissible in evidence against any one but the person making it. Greenleaf's Ev., volume one, third edition, sec. 233; State vs. Fontaine, 26 A. 513. It does not appear to have been so restricted by any instructions from the court, and was no more admissible when made in the form of an address to the jury than if made in the form of a plea of guilty, or an admission of guilt. Indeed, there is good authority for the position that if the accused be represented by counsel on his trial he has not the right to be heard himself, and as a rule it is quite unusual to permit both. We think the judge erred as to this constitutional right where, as in this instance, he was so defended by counsel. At all events, neither under this nor any other pretext, could any statement or confession made by Weasel be heard to affect his co-defendant, Williams. That it was well calculated to do so, and to influence the verdict of the jury subsequently rendered, can not be questioned. The State could not exclude his sworn testimony on the ground of his being "*particeps criminis*," and yet avail itself of this *unsworn* statement against the other defendant, Williams. As to the errors assigned, the trial being in the same court where the bill was found, they might be corrected by *certiorari* if the facts were otherwise. State vs. Gates, 9 A. 94. But as we have concluded to remand the case on the other ground it is unnecessary to pass directiy upon them.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be avoided and set aside, and the case remanded for a new trial as to the defendant, Williams.

No. 6976.

THE STATE VS. JOHN JOHNSON.

The verdict of a jury in a criminal case will not be set aside on the ground that while the jury were deliberating on the case, two of the jurors separated from the others, on a call of nature, when it appears that they were attended by a deputy sheriff and spoke to no one while they were out.

It is not within the province of the judge presiding at a criminal trial to give such instructions to the jury, after they have returned a valid verdict in the case, as shall lead to a change, or modification of the verdict.

When in a prosecution for murder based entirely on circumstantial evidence, the State finds it necessary, as a link in the chain of that evidence, to trace to the accused a motive for the homicide in his previous quarrel with the deceased, it is competent for the defense to prove facts showing similar, or stronger motives in others to do the same act.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Yoist*, J.

H. N. Ogden, Attorney General, for the State.

No counsel for the defendant.

The opinion of the court was delivered by

EGAN, J. The defendant was indicted for murder, and found guilty without capital punishment, and sentenced accordingly to the Penitentiary for life. He has appealed, and is unrepresented by counsel in this court. The errors complained of are presented in bills of exceptions, accompanied by a motion for new trial, referred to in them.

The first objection was to an alleged separation of the jury while deliberating on the case. This separation consisted in two of the jurors being permitted by the court to leave the jury room to attend to a call of nature, under the charge of a deputy sheriff, who testified that they spoke to no one, not even to him, while they were out. It would have been more regular and better had they not been permitted to separate from the other jurors, who should all have retired together. Too much caution can not be exercised in the trial of capital cases, especially to guard against the separation of the jury, and the consequent avoidance of verdict and trial. The court *a qua* refused a new trial, not considering the separation proved to be such as might be supposed to affect the verdict. In the State vs. Truber, 10 A. 501, this court said: "The rule can not be extended to such temporary or necessary separations as may be necessarily anticipated, or must necessarily occur in the course of a protracted trial;" and that, assuming the truth of the statements of the witnesses as to the facts of which the court below was the exclusive judge, it was not prepared to differ with its decision upon these facts as stated in the record, language which we may adopt in the present case.

Second. The jury, after deliberating, brought into court a verdict of guilty, with a recommendation of the accused to the mercy of the

court, whereupon, at the suggestion of the district attorney, the judge told the jury: "If by that verdict they intended to say, "guilty without capital punishment, they should retire again to their room, and bring in a verdict in accordance therewith;" which was objected to by defendant as "illegal, and a dictation to the jury of the guilt of the prisoner." The recommendation to the mercy of the court did not vitiate the verdict of guilty as first brought in by the jury, and the court should have received the verdict, and had it recorded. It is difficult to perceive in what the accused was injured by the qualification of the verdict, without capital punishment, as subsequently made by the jury; nevertheless, it is possible that the change from the original verdict, which was in legal intendment a simple, unqualified verdict of guilty, to guilty without capital punishment, may not have been wholly without moral effect, at least in the subsequent stages of the case, and we think that in so grave a matter if he desired it, even because he preferred death to imprisonment for life, the accused was entitled to have the verdict entered as originally returned into court. Under that verdict the law gave the judge no discretion as to the character of his sentence. The recommendation to mercy could not affect the sentence in a case in which the court had no discretion. Had the jury asked instructions as to the legal effect of the recommendation to the mercy of the court before announcing their verdict, it would have been proper for the judge to give them, but not afterward to permit and invite a change in a legal verdict once rendered. It was the province of the jury, and not of the court, to qualify the verdict, and we must presume that the judge *a quo* had so instructed them in his charge, as it was his duty to do. The power to dictate or cause a change of verdict in a capital case is too dangerous to be sanctioned.

Third. It appears that the case of the prosecution rested at least largely on circumstantial evidence, there being no witnesses to the homicide, and that the State offered evidence of the quarrelsome character of the deceased, and of a quarrel a day or two before his death with the accused, who had, while in liquor, uttered threats against the deceased. Whereupon, on cross-examination of the State's witness, the counsel for the accused offered to prove in rebuttal that the deceased had quarrels with other persons a few days previous to the murder, and that the persons with whom those quarrels were had had "more reason for committing the murder than the accused;" and asked the witness on the stand "what other quarrels the deceased had besides that with the accused a short time previously with other persons;" whereupon, the State objecting that the evidence was irrelevant and inadmissible, the court refused to permit the question asked, or to hear the evidence, and the defendant excepted. It is not our province to consider what

was or what was not proven in the court below, or whether the conviction was justified by the evidence.

From the character of the evidence already offered by the State, as set forth in the bill, and in the absence of direct evidence of the commission of the homicide by the accused, we can very well see how the evidence offered might have had an important bearing upon the question at issue, and while neither the quarrelsome temper of the deceased, nor the fact of his having quarrels with other persons than the accused at other times, would under ordinary circumstances be receivable, or afford ground of defense when it became necessary for the State, as a link in the chain of circumstantial evidence, to trace to the accused a motive for the homicide in this previous quarrel with the deceased, we are not prepared to say how far the evidence rejected might have influenced the verdict, and we think it was competent for the defense to show the fact of the existence of similar or stronger motive in others to do the same act which, when coupled with other facts and circumstances, might point in another direction. At all events, in the absence of any counsel for the accused in this court and by reason of the other rulings already considered, we are disposed to give the accused the benefit of a new trial, and the opportunity to produce his evidence.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are avoided and reversed, and the case remanded for new trial, according to law and the principles of this opinion.

CONCURRING OPINIONS.

MANNING, C. J. I think the two verdicts mean the same thing. When the jury found the prisoner guilty, and recommended him to the mercy of the court, they expressed in their own natural way what the law expresses in the statutory words, 'guilty without capital punishment.' If the first verdict can, or should, be construed as an unqualified one, the recommendation to mercy is senseless and unmeaning, because the court could pass but one sentence on the convicted person. There was no option with the court then. It could show no mercy.

The law, in reverence of the sanctity of human life, and in tender compassion for the frailty of man, has given to a jury a part of the function of a judge, when sitting upon a case involving life. The proper, and generally the sole, function of a jury is to find the fact of guilt or innocence. To the judge is confided the power and the discretion to impose a greater or less punishment, within the range which the law has established as meet for the offense of which the prisoner is convicted. But in a capital case, the jury can assume *pro hac vice* this power of a

judge, and pronounce that the convict shall not suffer the extreme penalty of the law. The statute has provided the jury with a phrase, or form of words, to express their meaning, when they exercise this faculty, but those words are not sacramental, and the use of others, such as those of the first verdict, will serve the same legal purpose.

The judge must have desired only that the jury should put their verdict in the usual and unmistakable language of the statute, and for that purpose sent them back. This has not to me the appearance of a dictation, or even a suggestion, of a verdict.

There was error in the rejection of the testimony, as is shown in the opinion just read by my brother Egan, which compels the remanding of the case, and for that reason, I concur in the decree.

DeBlanc, J. I concur in the opinion of Chief Justice Manning.

Marr, J. I concur in the decree remanding this case, and in the opinion of Chief Justice Manning.

No. 6945.

Succession of François Lacroix.

In a rule to compel the purchaser of property at a succession sale to comply with his bid, he can not put at issue the rightfulness of the recusation of the judge of the court from which the order for the sale issued.

When the father of this probate judge is a creditor of a succession, and joins the administrator in the petition for a sale of the succession property, the judge may properly recuse himself from passing on the application for an order of sale. In such a case the judge *ad hoc* should sign the order of sale.

The probate court has jurisdiction to order the sale of the property of an insolvent succession without convoking a meeting of its creditors.

The fact that the succession property was sold by order of court, one half cash and the balance on a credit of twelve months, will not, of itself, vitiate the title passed by the sale.

APPEAL from the Second District Court, parish of Orleans. *Tully*, Judge *ad hoc*.

W. O. Denegre for the succession and appellee.

Frank Michinard for J. Anglade, adjudicatee.

The opinion of the court was delivered by

Egan, J. The defendant, the purchaser of succession property at succession sale, was regularly put in default on refusing to comply with his bid and the terms of sale, whereupon this rule was taken to compel compliance. But two questions are presented for our consideration: First, the rightfulness of the recusation of the judge of the Second District Court of Orleans, from which the order of sale emanated, through a judge *ad hoc* called to the bench in consequence of the judge's recusa-

tion. Of this it may be remarked that the order of recusation having been entered, it can not be treated as an absolute nullity, and set up by the defendant in this collateral way. The principle "*omnia præsumuntur rite acta sunt*" would come in aid of the title acquired by the defendant at the probate sale, and we can not see what right he who was no party to the succession proceedings or order can have to contest its validity. The recusation was, however, properly entered; the father of the presiding judge was a creditor of the succession, and joined in the petition of the administrator for the sale. There is no force in the position that, although recused, the judge of the court should have signed the order of sale, instead of the judge *ad hoc*. The books are full of cases to the contrary, and the practice has been universally otherwise in this State. Indeed, it often happened that while the system of interchange for the trial of recused cases prevailed the interchanging judges were holding court at the same time in different and distant parishes. The signature of the judge *ad hoc* is the only proper one to be affixed to the orders granted by him. He is *pro hac vice* as much the judge of the court as the regularly elected and presiding judge, and his acts as such are entitled to as full recognition, and afford as full evidence of what is done. Any party in interest may appeal from the order of recusation, but unless it is done suspensively the order will be executed notwithstanding, and any rights acquired by third persons under it will be protected accordingly. The other objection to the validity of the sale is that the succession is insolvent, and that a sale of property could not be legally ordered without the convocation, first, of a meeting of creditors, that they might fix the terms of sale. Of this it may be remarked that the court which issued the order had jurisdiction, beyond question, and that it is too well settled to be now questioned that the purchaser was not required to look beyond that. Besides, the same presumption arises as to this just invoked as to the order of recusation. The fact that the sale was ordered one half for cash, and the remainder on twelve months credit, did not of itself vitiate the title. It is true that the law contemplates an offering first for cash, of succession property sold to pay debts, and then on twelve months credit, if it fails to bring its appraised value, and that such is the usual and regular mode of sale. If the administrator departs from it, and injury is likely to accrue, or is apprehended by the creditors, they may stay his hands by injunction before sale, or may hold him responsible after, upon proof that loss has actually resulted. It by no means follows, however, that titles acquired fairly, in good faith, and in open market under such sale, are to be set aside for that reason only. In the present case the petition of the administrator was joined in by at least a dozen creditors, than whom there is no proof that there are any others. It represents that the sale

is necessary, and that it is to the interest of creditors that it should be made on the terms asked for, and is supported by the affidavit of the attorney that the property would sell for twenty-five per cent more on a credit than for cash. There is no allegation or evidence that the property brought less than its appraised or real value, nor does any one appear to complain of the sale, except the purchaser, a third person as to all of these proceedings, except the sale itself, and this rule to enforce it. We think the defenses set up untenable. The interests of the creditors and of the succession seem to have been well guarded in the order of sale, and no one who has any interest or right to complain is before us for that purpose.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is affirmed, with costs of appeal.

No. 6136.

HILLARY EDWARDS VS. WM. RICKS ET AL.

Neither the heirs of a deceased wrongdoer nor his widow in community, can be held liable in vindictive damages for any wrong committed by him, when no suit for damages has been instituted before his death. The measure of their liability, in such cases, is the actual damage done to the person or property of the sufferer.

The heirs of age of a deceased person are presumed to accept the succession, and his widow to accept the community, unless the heirs renounce the succession, and the widow the community, expressly, and by public act.

When one is sued as heir, or widow in community, or in any other representative capacity, the plea of general denial admits that capacity.

The widow in community is liable for one half, and the heirs of the deceased, each for his virile portion of the other half of the debt due by the deceased on account of a trespass committed by him.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. Trial by jury. *Kemp, J.*

James H. Muse and *E. F. Russell* for plaintiff and appellee.

McEnery, Ellis & Ellis for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. The plaintiff alleges that Wade H. Varnado and William Ricks, in March, 1875, with force and arms, drove his family out of his dwelling, and away from his premises, and lawlessly threw his furniture out of said dwelling, thus dispossessing petitioner of his home, and then nailed the doors and windows, and prevented petitioner's return to his said home; and that, by their "violent, lawless, and criminal conduct," they damaged him in the sum of $5000.

That since said wrong *Wade H. Varnado has departed this life*, leav-

ing his widow, Dicey Varnado, and Celia Varnado, wife of William Ricks, and R. Scott Varnado, children of age; and that said widow and two heirs, Celia and R. Scott Varnado, have taken possession of his property without inventory, and are, therefore, liable for the debts of said deceased wrongdoer and trespasser aforesaid.

He prays for judgment against Ricks for $5000, and against the widow and two heirs of Wade H. Varnado, jointly, for $5000, according to their respective interests in the estate of said Wade H. Varnado.

The defendants pleaded the general denial. The case was tried by a jury, who found a verdict for $5000 damages for plaintiff. The court thereupon rendered judgment against the defendants for that sum, as follows: against Ricks for $5000; against the widow in community for $2500; and against each of the two heirs for $1250, the judgment being *in solido*. Defendants appeal.

1. They urge in this court on behalf of the widow and heirs of Wade H. Varnado, that the action against an offender is personal, and dies with him.

2. That there is no proof that Dicey Varnado is the widow, nor that Celia and R. Scott Varnado are the heirs of Wade H. Varnado, nor that they are possessed of his estate.

3. That the judgment is not in conformity to the verdict.

4. That the damages are excessive.

We will consider these objections in their order.

1. As to the liability of heirs and legal representatives of the wrongdoer for damages resulting from his torts, crimes, and offenses. Under the Roman civil law, except when instituted and put at issue before death, actions for damages resulting from crimes and offenses perished by the death of the wrongdoer, or of the sufferer; with this qualification, however, that the heir of the wrongdoer was not permitted to profit by the wrong, or retain the fruits of it. Inst. Lib. iv. tit. 12, sec. 1; Dig. 50, tit. 17, l. 38.

Both principles have been modified by express provision of our law.

Article 25, C. P., provides: "Heirs and universal legatees may be sued for civil reparation of the injury caused by the crimes or misdemeanors of the deceased whose succession they have accepted, although no action was instituted for that purpose against the deceased during his life, and although neither he nor his heirs have been benefited by such offense." The act of 1855, now part of article 2315, C. C., provides that "the right of this action shall survive in case of death, in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death."

By our law, as by the Roman law, actions for torts do not abate by the death of either of the parties after issue joined. C. P. 21, Vincent vs. Sharp, 9 A. 463.

It will be seen that by article 25, C. P., the liability of the heirs and representatives of the wrongdoer, who has not been sued before his death, is limited to the civil reparation of the injury done by him. This language, we think, clearly excludes their liability for exemplary or punitory damages. The measure of their liability consists in repairing the actual damage done to the person or property of the sufferer. Any thing more is in the nature of punishment, and neither reason nor law would sanction its infliction upon any other than the wrongdoer. The same principle should apply to the liability of the surviving widow who accepts the community. Her liability is for one half the community debts, and should cease when civil reparation ends. Any more would be punitory.

These views are those held by us in the case of "Jones vs. Succession of Hoss," 29 A. 564, where we held in substance that actions for injury done to the feelings and reputation, not affecting person or property, did not survive against the heirs of the wrongdoer. We adhere to that view.

2. The plaintiff sues Dicey Varnado as widow in community, and Celia and R. Scott Varnado as unconditional heirs of Wade H. Varnado. Their answer is a general denial.

It appears from the evidence and pleadings that Dicey is the widow, and R. Scott an heir of the deceased, Wade H. Varnado, but there is no proof as to Celia.

Article 1000, C. C., declares that "the person called to the succession does an act which makes him liable as heir, *if when cited before a court of justice as heir*, for a debt of the deceased, he suffer judgment to be given against him in that capacity, without claiming the benefit of inventory, or renouncing the succession."

Civil Code, article 1017, provides: "The renunciation of a succession is not presumed; it must be made expressly by public act, etc." The same rules are applicable to the wife's acceptance or renunciation of the community, when terminated by death of the husband, except that she can not accept under benefit of inventory. She is presumed to accept if she does not expressly renounce. Ludeling vs. Felton, 29 A. 719.

When a party sues or is sued in a representative capacity conferred by law, such as curator, tutor, heir, etc., a general denial does not put at issue the existence of that capacity. 1 A. 336; 3 M. 378; 2 N. S. 389; 4 N. S. 615; 5 N. S. 343; 1 L. 113, 283; 4 L. 328; 19. L. 429.

We think it clearly results from these principles that the general denial filed by the heirs and widow in community (being capacities cre-

ated by law) did not put plaintiff on proof of such capacities, which, not being specially denied, were admitted.

3. Ricks, and the estate of Varnado, represented by the widow and heirs, are sued as co-trespassers and solidary obligors. To the extent that the estate of Varnado is liable, the judgment against it would be solidary with that against Ricks, but would divide itself as follows: one half against the widow, and one half against the two heirs jointly.

4. It is said the damages awarded are excessive. The evidence discloses a most cruel, unmanly, and wanton outrage, perpetrated by the deceased, Varnado, and Ricks, upon the defenseless wife and children of plaintiff, who were ejected at night from their home, and their household goods thrown out of doors, during plaintiff's absence from home. It is unnecessary to go into particulars. So far as Ricks is concerned, we shall not disturb the verdict of the jury, who awarded $5000 damages against him. But we have seen that the widow and heirs of Varnado are not liable to the infliction of these exemplary and punitive damages, but only for civil reparation. The evidence as to the actual damages done is not very satisfactory or definite, but we think it better that we now decide the whole case. We think that three hundred dollars would cover the actual loss of plaintiff resulting from the wrongful acts complained of, and will give judgment against the widow and heirs of Varnado for that amount.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, as relates to the defendant, Ricks, be affirmed, with costs of both courts. That said judgment, as against the widow and heirs of Varnado, be amended, and reduced to three hundred dollars *(in solido* with the judgment against Ricks). Said three hundred dollars to be paid, one half by Dicey Varnado, and one half by Celia and R. Scott Varnado, jointly. That the costs of the court below be paid by the defendants, and the costs of appeal as to said widow and heirs be paid by plaintiff. That said judgment as thus amended be affirmed.

No. 7033.

LEOPOLD DE PORET VS. A. L. GUSMAN ET AL.

A non-resident debtor sued in this State and personally cited, may have a personal judgment rendered against him for the whole debt due by him.

A power of attorney authorizing an agent to sue for a specific debt, and to do all in the premises that the principal could do, carries with it the power to make the suit effective by attachment.

No act done, or declaration made by an agent in his individual capacity, and unauthorized by his principal, can estop him from doing any thing he is authorized to do as agent.

A creditor's oath to the fact alone of the non-residence of his debtor, gives him the right to attach the latter's property. He need not swear that the debtor "can not be cited."

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Favrot & Lamon and *I. & G. W. Burgess* for plaintiff and appellee.

E. W. & S. M. Robertson for defendants and appellants.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the rehearing by MANNING, C. J.

SPENCER, J. This suit is brought by, and in the name of, Leopold DePoret against A. L. Gusman, Mrs. Zoe Garig, and Mrs. Zulme Hearsey, the simple and unconditional heirs of Gabriel Gusman, deceased. A. L. Gusman is a citizen and resident of New York, but was in East Baton Rouge at the time of the institution of this suit, and was personally cited.

The petition alleges his citizenship in New York, and that he is about to convert his property in Baton Rouge into money, in order to put it beyond the reach of his creditors, and, therefore, prays an attachment. The affidavit for attachment and the bond were made by one of the defendants, Mrs. Hearsey, as the agent and attorney in fact of DePoret, the plaintiff, under a special power of attorney, which is produced.

The plaintiff's claim against Gabriel Gusman, and, therefore, against his said children and heirs, is based upon—

1. An act of partition made August 25, 1866, among the heirs of Esther DePoret, in which Gabriel Gusman appeared as the agent and attorney in fact of plaintiff, one of the heirs, and received for him the sum of $2577 93¾. In this act, Gusman explicitly declares himself the agent and attorney in fact of Leopold DePoret, "by virtue of an act of procuration of record, in book V of notarial acts of the city of Baton Rouge," etc.

2. An act of sale by Gusman, as agent aforesaid, of date January 9, 1871, of certain real estate belonging to his principal, in which he acknowledges to have received $648 in money and notes.

In the face of these acts and the evidence in this record, it is idle to attempt to dispute the receipt of these sums by Gabriel Gusman. The testimony of the defendant, A. L. Gusman, himself, who most strenuously contests this suit, shows that his father's own books disclose its receipt. Nor is there, so far as we can discover, the slightest evidence that he ever paid it over to plaintiff. His books, it seems, contain a statement that he remitted a bill for $2500 to plaintiff at Paris, but it was returned to him, as the plaintiff could not be found. The plaintiff voluntarily remitted all claim for interest on these sums up to 17th February, 1873, the date of Gabriel Gusman's death, because, we presume, no demand had ever been made on him for the money by DePoret.

It is unnecessary to notice defendants' bill of exceptions to the introduction of the power of attorney from plaintiff to Gusman as being the copy of a copy, since the act of partition contains ample proof of the agency, and even specifies the book in which the mandate is recorded.

On the merits of the case, the existence and justice of this debt, there can be not the slightest doubt. In fact, each and every one of these heirs, and especially A. L. Gusman, are estopped from denying it. They over and again, in their transactions about this estate of their father, admitted its existence, and even set apart property to sell to pay it.

But it seems that Mrs. Hearsey, one of the heirs and a defendant herein, in the course of these attempted settlements of the father's estate claimed that she was owner of these claims—that DePoret, the plaintiff, had given them to her—and in certain suits between her and her co-heirs she swore that she owned them, and A. L. Gusman swears that on one occasion she exhibited to him a paper which she said was evidence of the gift, but she did not let him read it. These declarations were made in 1873, and even as late as May, 1874. The present suit was brought by DePoret in September, 1874, and the power of attorney under which Mrs. Hearsey made the oath and gave the bond for attachment bears date in France, November, 1873.

In the present suit, September, 1874, she swears that DePoret is the owner. She has certainly by her conduct, averments, and oaths placed herself in a position that needs explanation. She is a co-defendant in this suit, and yet appears as agent of the plaintiff, in swearing out an attachment against her brother and co-defendant, A. L. Gusman. True, this is a suit against joint heirs, for their *virile shares* of a debt of the ancestor, and might have been brought against each one separately. See Acts of 1871.

If it were made to appear that her co-defendants had been prejudiced in their defense by this conduct of hers, we should be indisposed to tolerate it. But, as we have said, there is no doubt of the correctness of this claim. The only objection ever made to it was to the interest, as

no demand had been made, and Gusman's books showed an effort to pay it, or at least part of it. But this objection has been removed by the remission which has been made of all interest prior to Gusman's death.

It is not for us to reconcile Mrs. Hearsey's inconsistencies. If she were ever the owner—if DePoret ever in fact gave or promised to give her these claims—still it is true that at the time this suit was instituted she disavows it and swears that DePoret was the creditor; and as we do not perceive that the defendants, A. L. Gusman and Mrs. Garig, have any real defense to the claim, in any body's hands, we do not think the question material. At all events, there is no proof binding on DePoret that he ever parted with his undisputed ownership. Mrs. Hearsey's declarations in her own name and interest, and for her own purposes, out of the presence of DePoret, that he had given them to her, certainly can not be held to have divested him of his rights.

We, therefore, hold that so far as this record discloses, DePoret is still the creditor, and is not estopped or barred from asserting his rights by Mrs. Hearsey's declarations and acts. The fact that in November, 1873, DePoret executed a power of attorney to her as his agent to sue for and collect this very debt, is evidence that he then considered himself the creditor, although even after the receipt of this power it seems that Mrs. Hearsey continued for some months to assert her ownership.

We repeat that the debt is fully established against Gabriel Gusman, and as it is admitted that the defendants are his pure and simple heirs judgment was properly rendered *in personam* against each for their virile share. We can not assent to the proposition of defendants' counsel that the suit against A. L. Gusman, being by attachment, the whole proceeding falls as to him, if the attachment be set aside. He was a non-resident of the State, temporarily in Baton Rouge, where the succession of his father was opened, and was personally cited. A party having no residence or domicile in the State may be cited wherever found, and, upon such citation, may be *personally* condemned. C. P. 165, No. 5.

A. L. Gusman, however, contends that the attachment of his property was illegal—

1. Because the power of attorney under which Mrs. Hearsey acted was insufficient.

2. Because Mrs. Hearsey was estopped from making the affidavit, etc., as agent of DePoret, because of her previous contradictory judicial admissions and sworn declarations anterior and subsequent to the date of the said power.

3. Because the allegation that he was about to convert his property, etc., was false, and because the other allegation that he was a citizen of

New York and non-resident of this State was insufficient of itself to warrant the attachment.

4. Because DePoret was not the owner of the claims, etc. This last ground we have already considered in connection with the merits, and it need not be further noticed.

1. As regards the sufficiency of the power. It appoints Mrs. Hearsey agent and attorney in fact "for me and in my name and stead, to ask, demand, sue for, recover, and receive all such sums of money, debts, goods, rents, dues, and accounts, * * * * as shall be due, owing, payable to, belonging to or detained from me, giving and granting unto my said agent my full and whole power, strength, and authority in all matters pertaining to the several successions of Esther Mainville, Esther DePoret, and Gabriel Gusman, deceased, to sue for and receive the amount for me drawn by my representative, Gabriel Gusman, in the lawful partition of August 25, 1866, and to recover the value or possession of the lot, etc., known as "Hall's Row," received and invested by my aforesaid representative, with all interest, etc., * * * and I hereby empower my said agent * * * * to do all and every other act or acts, thing or things, etc., which may be needful and necessary in the premises * * * * as fully to all intents and purposes as I might or could do, if personally present," etc.

We think that this power specially authorizing the agent to sue for these specific debts, and to do all and every act and thing in the premises which the constituent could himself do, carries with it the power to make that suit effective by attachment, if deemed necessary. It is a much stronger case than that of Dwight vs. Weir, 6 A. 706. Upon the authority of that case, and of Fulton vs. Brown, 10 A. 350, as well as upon the terms of the instrument, we think the agent was authorized to sue out the attachment in this case.

2. As to Mrs. Hearsey being estopped from making the oath and giving the bond, etc., in this case, as agent of DePoret, we are unable to see in what way her acts, done in her own name and for her own interests and purposes, can be pleaded as an estoppel of DePoret. This suit is brought by DePoret, who shows by authentic evidence his right to the money sued for. Can the unauthorized assertion by her, out of his presence, of the ownership of his rights, divest him of them?

The case of Gilbert vs. Hollinger, 14 A. 441, was where plaintiff's agent in a suit in the United States court swore out an attachment under allegations that the defendant resided in Louisiana, and then voluntarily abandoned and discontinued the suit, renewing it on same day in the State court under allegation that defendant resided in Alabama. In both cases *he was acting as agent*, and under the rule *qui facit per alium facit per se*, the court properly held that the plaintiff

could not maintain his attachment in the face of these his contradictory allegations. So, in the case of Howell, Tax Collector, vs. The Sheriff, 27 A. 701, had the *second* suit been a contest between the State and the seizing creditor, can any body suppose that Howell's declarations in the *first* suit, wherein he claimed the property in question as his own, would have estopped the State from asserting its ownership and proving it, if need be, by Howell himself? The doctrine of estoppel by the acts or declarations of an agent, must, in the nature of things, find its application only when those acts and declarations were done or made by *the agent as such.* In the case before us the acts and declarations of Mrs. Hearsey pleaded in estoppel were not done or made *as agent of Poret*, but avowedly in her own name, interest, and behalf. We can not see that they prevent her, *as his agent* in this suit, verifying his allegations by her oath. Besides, there is not necessarily any inconsistency in her claiming to be owner of a *chose in action* in January or February, and afterward, in September, swearing that another person was then owner of it. Both statements might be true.

3. Article 240 C. P. enumerates the cases in which attachments will lie. The second one is "when the debtor resides out of the State." The mere fact of non-residence gives the right of attachment, even when the debtor is present in the State. 1 N. S. 412; 18 A. 526, 305. But the counsel contends that article 240 is modified by article 243, and that the words "so that citation can not be served on him," refer to and qualify, not only the preceding words "conceals himself," but also the words "resides out of the State," so that in the counsel's view it is not sufficient to swear that "the debtor resides out of the State," but also that "he can not be cited." This is an error, and will be manifest by a simple comparison of the two articles. Article 243 simply repeats the provisions of article 240, which in its third paragraph gives attachment "when the debtor conceals himself to avoid being cited," etc. Article 243 repeats when the debtor "conceals himself so that citation can not be served on him."

The court below gave judgment for plaintiff for the amounts claimed, with interest, from 17th February, 1873, at five per cent, and maintaining the attachment against A. L. Gusman. We think the judgment is correct, and it is, therefore, affirmed at the costs of appellants.

ON REHEARING.

MANNING, C. J. We are not disposed to change our decree previously made, as upon re-examination we think it correct. Therefore

It is ordered and adjudged that our former decree remain undisturbed.

No. 7008.

J. MAT. WELLS, JR., EXECUTOR, VS. F. M. AND IDA WELLS.

One who holds as owner peaceable, public, and uninterrupted possession for ten years of an immovable which he has acquired from one whom he honestly believed to be the real owner, under a title translative of the property, acquires by prescription the legal ownership of the immovable.

Whoever alleges bad faith in the possessor of property who claims a title to it by prescription, must prove the bad faith.

The universal legatee of a succession who has accepted the same, and who has also qualified as executrix, may, in her capacity as owner, make a valid sale of the property of the succession without any order of court authorizing her to act.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Hunter*, Judge *ad hoc*.

R. J. Bowman for plaintiff and appellant.

James G. White for defendants and appellees.

The opinion of the court was delivered on the original hearing by SPENCER, J., and on the rehearing by MARR, J.

SPENCER, J. Walter O. Winn died in 1860, without ascendants or descendants. By olographic will he left his wife, Mary E. Winn, universal heir and legatee, and appointed her executrix. This will was duly probated, and she qualified as executrix. His estate was worth about half a million of dollars, and his debts about $120,000. The widow took possession of the estate, and seems to have dealt with it pretty much as her own from the death of her husband in 1860 to 1870, when her attorney filed what purports to be an account of her administration.

In the fall of 1862 she sold to E. M. and Jefferson Wells, for $20,000 cash in Confederate money, one fourth interest in the Lodi plantation in Rapides parish. The sale was one by public act, and duly recorded, and the purchaser went into immediate possession. In 1864 E. M. and Jeff. Wells transferred the property so acquired to their wives, the defendants, as a *dation en paiement*, by public act. In 1874 the public buildings and offices of that parish were destroyed by fire, and we have only secondary evidence of the contents and nature of this title from Mrs. Winn to the vendees aforesaid. The present suit is brought by the plaintiff as public administrator and dative executor of Walter O. Winn, the widow having been destituted by decree of court. The object of the suit is to recover and restore to the estate of Winn the fourth of said plantation so sold, and to annul the act of sale thereof, as having been made by the executrix without authority of law.

The defense is that Mrs. Winn was the universal heir and legatee; that she accepted the succession unconditionally, disposed of its effects as owner, and that thereby the estate of Winn ceased to exist and was

lost by confusion in that of the heir. Finally, the defendants plead the prescription of ten years.

Under the view we have taken of the case it will be unnecessary to decide the question whether a sole heir or universal legatee, who has been named, appointed, and qualified as executor, can by extra judicial acts of unconditional heirship, and without having previously provoked his discharge as executor, terminate the existence of the succession of which he is heir and executor.

We think that under the proofs in this record the plea of prescription must prevail. In determining this question it is matter of no moment whether Mrs. Winn was or not owner in law or fact; nor whether in law or fact she had a right to sell this property. If prescription could only be pleaded in favor of a party who had acquired from the *true* owner, or one having legal authority to sell, it would be a very useless right. The very object of this prescription is to quiet the titles of those who may have acquired from persons not owners, and having no right to sell; "as happens to him," says article 3451, C. C., "who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." Again, article 3450 says: "By the term *just title* in cases of prescription we do not understand that which the possessor may have derived from the real owner, for then no prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property." Article 3485: "By the phrase *transfer the property* we understand not such a title as shall have really transferred the property, but a title which by its nature would have been sufficient to transfer the property, provided it had been derived from the real owner, such as a sale, exchange, etc." So that the questions in this case are not whether Mrs. Winn was the owner, and had the right to sell the property, but whether the purchasers at the time of buying believed that she was owner, and whether the attempted transfer was sufficient *in terms and of nature* to transfer the property had it emanated from the true owner? If so, and if the defendants have possessed as owners under such transfer, peaceably, publicly, continuously, and unequivocally, for ten years before this suit was brought, the prescriptive title is complete. See C. C. 3453.

There is no doubt that Mrs. Winn did in 1862, by public act duly recorded, sell and deliver to the defendants, E. M. and J. Wells, the land in controversy, at the price of $20,000 cash. Both vendees swear that they *bona fide* believed her to be absolute owner, and knew nothing of her holding the position as executrix of the deceased husband, of whom she was heir. That she treated the property as her own, and sold it to them as her own, and that they and their vendees have had

peaceable, public, continuous possession as owners ever since. Their evidence is, we think, in the main corroborated by that of Judge Ryan, who has for years, in fact since Winn's death, been the attorney of the succession. There is no proof to the contrary of these statements. There is no evidence to show that E. M. and J. Wells at the time of their purchase knew that Mrs. Winn was executrix. It matters not what they knew afterward, since "it is sufficient if possession has commenced in good faith." C. C. 3448. "Good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor must prove it." C. C. 3447.

Citations were issued and served in this suit in April, 1876, more than thirteen years after the date of the sale in question. The judgment below maintained the defendants' title, and is, we think, correct.

It is therefore ordered and decreed that the judgment appealed from be affirmed with costs.

The Chief Justice declined taking any part in the decision of this cause.

On Rehearing.

Marr, J. The testimony in the record satisfied us that the title under which defendants hold the real property in question was protected by the prescription of ten years; and we affirmed the judgment of the district court in their favor, on that ground alone, pretermitting the expression of any opinion as to the right of Mrs. Winn, as executrix and universal legatee under the will of her husband, to dispose of the property belonging to his succession by private sale.

It seems that we were in error as to date of the death of Walter O. Winn, which actually occurred in 1861, instead of 1860. This is not material, because the sale under which defendants claim was made in 1862; and they were cited in this case in April, 1876. We do not propose to re-examine the question of prescription; because no suggestion has been made which induces us to doubt the good faith of the authors of the title of defendants: and for the additional reason that we think their title is not dependent on the lapse of time.

The will on which the rights of Mrs. Winn depend is as follows:

"I, Walter O. Winn, make this my last will and testament; I appoint my beloved wife, Mary E. Winn, my executrix and universal legatee. I leave to her all the property, real and personal, of which I may die possessed, or own."

There were no forced heirs, and no particular legatees; and by the terms of the Civil Code, in such case "the universal legatee by the death of the testator is seized of right of the effects of the succession,

without being bound to demand the delivery thereof." Article 1609 (1602).

It is true one can not be held as heir, whether legal, *ab intestato*, or instituted by will, without having accepted that quality; but it is equally true that this acceptance may be either express or tacit. It is equally obligatory and effectual in the one case as in the other.

"It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

"It is tacit when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." R. C. C. article 988.

Shortly after the death of her husband, Mrs. Winn disposed of certain slaves of the succession by exchanging them for others. As heir, universal legatee, she had a perfect right to do this; as executrix, she could have done no such thing. In 1862 she sold the real property in question by notarial act to the authors of the title of defendants. As heir, universal legatee, absolute owner under the will, she had a perfect right, full power to do this; as executrix, she had no such power. During the war Mrs. Winn removed from Rapides parish to the State of Texas, with the slaves and movable effects of the succession, and did not return to Louisiana until after the close of the war. As executrix, she could not have been permitted to take any part of the property beyond the limits of the jurisdiction of the probate court, certainly not beyond the limits of the State; as heir, owner, she could do what she pleased with her property.

On the return of Mrs. Winn from Texas suits were brought against her, in one of which, at least, that of Gasquet, she was charged as heir, universal legatee, and as having accepted, purely and simply; and in that quality judgment was rendered against her. This was the acceptance of the quality of heir in a judicial proceeding. In 1867 Mrs. Winn made a donation to her mother of a plantation which belonged to the succession; and about that time she married, and removed to another State with her husband.

In his reasons for judgment, the judge *ad hoc* states that the only voluntary appearance of Mrs. Winn, and acknowledgment of her capacity as executrix, was in 1870, when a petition was presented by her, or in her behalf, for the sale of certain lands of the succession in Madison parish.

In 1869 her attorneys filed a tableau of debts, at the instance of a creditor; and in 1874 proceedings were instituted to destitute her. She was destituted of her office as executrix by decree of this court in 1875, upon the grounds that she had sold the property in question in the

year 1862; and that she had ceased to be a resident of the State. She was represented in that case by a curator *ad hoc;* and it does not appear from the report that the court considered or passed upon the fact that she was universal legatee.

The acts of Mrs. Winn are not equivocal; but when we consider that the succession of her husband was estimated at over $500,000, and the debts amounted to only about $125,000, there can be no doubt as to her intention. All her dealing with this succession shows, beyond doubt, that she had unqualifiedly, in authentic acts, and in judicial proceedings, accepted the quality of heir; and she could not have resisted the demand of any creditor against her personally as heir.

In Duplessis vs. White, 6 A. 514, the executrix, who was also sole heir of the testator, sold real property of the succession at private sale. The court said: "Nothing prevented her from accepting the succession purely and simply, and at once taking possession as heir. The fact of her selling the property in that capacity amounts to such an acceptance; and the mention in the act that she was executrix was immaterial, and affected neither her rights nor her obligations as heir, pure and simple."

The case of Bird vs. Succession of Jones, 5 A. 643, is wholly different. By her will Mrs. Jones directed: 1. That all her just debts be paid, "and if any thing be left, I desire it to be disposed of as follows: 2. I give and bequeath to Boswell Henderson Jones all the property which by law I have a right to dispose of, and make him my universal legatee. 3. I appoint Boswell Henderson Jones my executor * * * and give him seizin of my estate; and request him to see that the intentions herein expressed be carried out."

Jones qualified, and he compromised with the forced heirs. One of his creditors sought to subject the property of the succession to the payment of the debt. Jones answered that he had taken possession as executor, and held the property with the intention of paying the debts, and well knowing that only the residue after such payment belongs to him.

It is clear that he did not intend to accept as universal legatee; that he intended to administer as executor, and to pay the debts of the succession as he was charged by the will to do; and that he could not have acquired any right or title as universal legatee except to such residuum as might be left after paying the debts of the succession, the first charge imposed upon him by the will, the injunction with which it closes.

It is therefore ordered that our decree heretofore pronounced in this case on the seventh March, 1878, remain undisturbed; and it is affirmed.

The Chief Justice recuses himself.

No. 6785.

HENRY BARTH VS. MRS. LOUISA KASA.

Even in cases when a married woman has executed her note and mortgage on her property to secure it, under the authorization of the judge, she may prove by parol evidence that the note and mortgage were obtained by fraud, and that their consideration was a debt of her husband.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

H. D. & Chas. G. Ogden for plaintiff and appellee.

Cotton & Levy for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The defendant is sued upon a promissory note and mortgage given to the plaintiff, as stated in the public act of mortgage, for the "amount of a loan in lawful current money of the United States, now made to her." The necessary authorization of the judge to her, as a married woman, to make the loan and mortgage was procured and appears in evidence annexed to the copy of mortgage. The defense is that no loan was in fact made as stated in the mortgage or under the authorization, but that defendant was induced in error of fact and through the fraud and misrepresentation of her deceased husband, and of the plaintiff, Barth, to sign the note and mortgage without knowing what they contained till long afterward, during the last illness of her husband. That in fact they were without consideration as to her. That she received no money as stated in the mortgage, and that the real consideration for the note and mortgage was an antecedent debt of her husband to Barth, and that they were, therefore, given "*in fraudem legis*," and are null and void and without obligation upon the defendant. She offered to prove the facts set up in the answer on the trial by her own testimony and that of several other witnesses, all of which was objected to by the plaintiff's counsel upon the ground that the statutory authorization of the judge had been obtained, whereby the act of mortgage had *the same effect as if made* by a "*feme sole*," and made full proof against her, and that no parol evidence could be received to contradict or vary the act of mortgage, or of what might have been said before or at the time or since the signing of the act. The objections were sustained and defendant's counsel excepted.

This presents the sole question necessary for our consideration in the case. It is conceded by both counsel that prior to the act of 1855, now embodied in the Revised Statutes and Revised Civil Code of 1870, the burden of proof to bind the wife would have been upon the plaintiff, and it is further conceded by defendant's counsel that under that statute where the judge's authorization has been obtained as required by the

statute, the burden of proof rests on the wife to show that she is not bound for some legal reason. We think this view of the law is correct. In Conrad and Husband vs. LeBlanc, Sheriff, et al., 29 A. 123, we held that where the judge's authorization was had authorizing the wife to execute a mortgage for a certain sum and purpose, and it was executed for a different sum and for some other purpose, it did not come within the statute nor relieve the creditor from the burden of proof when the facts appeared on the face of the mortgage. In a more recent case of Claverie vs. Gerodias and Husband, 30 A. 291, where the authorization was obtained and the mortgage on its face executed in accordance with it, we held the wife not bound by the note and the mortgage upon proof of fraud and collusion, and that the purpose of the mortgage was really to secure a debt of the husband or of the community, and the mortgage note so given was null and void in the hands of the mortgagee. It will hardly be pretended that a "*feme sole*" would not be allowed to avoid the effect of a similar note and mortgage to those here sued on on the ground of error and fraud, or that she would not be allowed to make proof of the fraud "by simple presumptions, by legal presumptions, as well as by other evidence," to use the language of the law, C. C. art. 1848, (formerly 1842). It would be indeed singular if a married woman, who by the terms of the statute is placed upon the same footing as a *feme sole*, should not be allowed to make similar proof. The terms "full proof" in the statute must be construed with reference to its objects and other provisions and language, and when the judge's authorization has been obtained it does make that proof, so far as to place her as a *feme sole* and to hold her bound like any other person, but no more and no farther. Fraud vitiates the most solemn contracts, and when directly attacked on that ground, parol or other evidence may be received to prove it, as has often been decided, otherwise there would be no relief. See 5 R. 354; 4 L. page 348; 2 A. 93; 5 A. 572; 16 L. 311, as to parol evidence to prove error. See, also, 10 A. 515; 13 A. 207, Montgomery vs. Chaney, to the effect that under a charge of fraud all the facts and surrounding circumstances attending the transaction may be proved by parol evidence. It may be that the defendant might be able to show that the note and mortgage sued on were not given in accordance with the judge's authorization, and if so, we know of no law or principle to prevent it as against the mortgagee. The books are full of cases in which married women, prior to the statute of 1855, and since when it was not invoked, have been allowed to prove that obligations contracted by them in the most solemn form and with the fullest acknowledgment of separate benefit from the debt or obligation, were in fact for the debts of the husband or of the community, and to be consequently discharged. It is not then the form of the evidence of the debt which controls the

matter of proof and the means of evidence. It is the disability of the party, the wife, under the law to enter into the contract "*in fraudem legis.*" The legal effect of the statute under consideration is to shift the burden of proof where it is complied with, and not the means or character of evidence. If, indeed, the debt for which the note and mortgage were given was that of the husband, it was "*in fraudem legis,*" and may be shown by any competent evidence. If it was so, it is not protected by the statute, because not contracted in accordance with it. The fraud may have been perpetrated even after the authorization in the passage of the act itself for another and different purpose, as we have already seen was done in two cases cited. The defendant should have been permitted to prove the allegations of her answer. The evidence was improperly rejected.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and the case remanded to be proceeded with according to law and this opinion, and that plaintiff and appellee pay costs of appeal.

No. 7106.

THE STATE VS. WILLIAM VON SACHS ET AL.

The statement made by an accused, while in prison on the charge of larceny, to the officer in charge of him, that "if you, (the officer), will take me out of jail, I'll turn up the money," is not admissible in evidence against the accused.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, for the State.

Simeon Belden for defendant.

The opinion of the court was delivered by

EGAN, J. This is a prosecution for grand larceny. The accused, Von Sachs, was found guilty and sentenced to seven years imprisonment in the Penitentiary. The only question for our consideration is presented by a bill of exceptions to the reception in evidence of a statement or confession made by the accused while in prison under this charge, to one of the officers, to this effect, "If you will take me out of jail, I'll turn up the money." The bill states that this was "part of a confession made by the accused, drawn out by the hope and offer on the part of the witness to assist him if the money could be found through him," which had been ruled out by the court. The judge states "that he refused to consider this statement as a confession implicating the accused under the charge for which he was being tried—grand larceny—as it was possible that the accused might have knowledge as to the

whereabouts of the stolen property without having had any connection with the theft, and that his statement was no admission by the accused that he had committed the theft." It may be very true that the statement of itself was not a *direct* and circumstantial admission that the accused had committed the theft, but when we consider that he was then confined under a direct charge of having committed it, the admission would necessarily be viewed very differently from the same statement made by one not suspected or charged with the larceny. That it was considered as having an important bearing upon the guilt of the accused is manifest from the State having offered it in evidence on the trial, and that it may have been so considered by the jury and therefore have had an important bearing on the question of the guilt or innocence of the accused, who was charged with the larceny, among other things, of two hundred and fifty dollars in United States currency, is not only probable, but very natural. We think that the statement or confession made under such circumstances should not have been received, as it comes within the prohibitions of the law. 1 Greenleaf's Ev. § 219, *et seq.*, title Confessions; State vs. Garvey and Earle, 25 A. 191.

It is therefore ordered and decreed that the verdict and sentence appealed from be and they are set aside and avoided, and the case remanded to the court *a qua* to be further proceeded with according to law and this opinion.

No. 6694.

THOS. E. HELM ET AL. VS. MEYER, WEIS & CO.

A consignee who has made advances on cotton shipped to him has a right of pledge on it, and its proceeds, for the re-imbursement of those advances; and until the debt due for those advances is paid, he is not bound to accept, or pay any drafts drawn on him by the consignor against said cotton, at, or about the time it was shipped, in favor of a third person who had discounted the drafts for the consignor, and thus enabled the latter to buy the cotton shipped to the consignee.

In the absence of any express or implied agreement, a party is not compelled to pay a draft drawn on him merely because he has been in the habit of paying similar drafts.

It is not necessary to record a pledge to make it effective as to third persons, where the object of pledge comes into the actual possession of the pledgee before any conflicting lien has attached to it.

APPEAL from the Fourth District Court, parish of Orleans. *Houston*, J.

Merrick, Race & Foster for plaintiff and appellee.

B. F. Jonas for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. In the spring or early summer of 1876 the firm of D.

Hiller & Co., of Canton, Miss., being largely in debt to Meyer, Weis & Co., of New Orleans, sent an agent or partner to New Orleans with instructions to negotiate a further advance of $2000 by Meyer, Weis & Co., to enable said firm of Hiller & Co. to go on with its business. This agent or partner, Levy, effected an arrangement with Meyer, Weis & Co. to this effect, to wit: That Meyer, Weis & Co. would advance D. Hiller & Co. $2000 additional, taking their note, due December 4, following, and secured by the note of one Keiffer, due in February following, for same amount, as collateral; said D. Hiller & Co. promising to ship cotton to sufficient amount on or before maturity of said note, and during the season, to cover it, they having the privilege of drawing for cotton purchases on Meyer, Weis & Co. from time to time, against the cotton shipped, but to leave margins sufficient to meet the said advance of $2000 on or before its maturity, December 4, 1876. From August, 1876, to January, 1877, many shipments were made, and many drafts drawn by Hiller & Co. on Meyer, Weis & Co. These drafts were fifty-seven in number, and were all drawn in favor of Helm's Bank, of Canton, which was induced, as its cashier swears, to cash all these drafts of Hiller & Co. upon their representation that Meyer, Weis & Co. had agreed to pay all drafts drawn by them in favor of said bank for cotton bought and consigned to Meyer, Weis & Co.

On January 11, 1877, Hiller & Co. shipped from Forrest, Miss., eight bales of cotton; on January 12, from same place, one bale cotton, and on January 16, from same place, seventeen bales of cotton; in all twenty-six bales. These shipments were for account of the shippers, and consigned to Meyer, Weis & Co. On January 11, Hiller & Co. by letter advised Meyer, Weis & Co. of the shipment of the first nine bales, and on the sixteenth January by another letter they advised the shipment of the seventeen bales. In these letters there is nothing said of any draft being drawn against said shipments. But on the eighteenth January, Hiller & Co. drew a draft on Meyer, Weis & Co. in favor of Helm's Bank for $1540, and in a letter of that date say they inclose bills lading for the twenty-six bales shipped from Forrest for their own account, and advise that they have drawn said draft against said shipment.

Meyer, Weis & Co. received and sold the cotton, but refused to pay the draft drawn against it. Thereupon, plaintiff brings this suit, alleging in substance, first, that there was an express agreement between Meyer, Weis & Co., Hiller & Co., and the bank that the former would pay all drafts drawn by Hiller & Co. in favor of the bank for purchase of cotton. Second, that having been advised by letter of January 18, inclosing the bills of lading, of the drawing of said draft on the proceeds of said cotton, the receipt and sale of the cotton was an implied acceptance of and promise to pay the draft. Third, that Hiller & Co.

having paid for the cotton with the money received on the draft, Meyer, Weis & Co. are liable for money had and received for their use, etc., and, fourth, that the bank took the draft entirely on the faith and credit of Meyer, Weis & Co., who had always paid promptly the drafts of Hiller & Co. for like purposes.

The defense is a general denial, and that defendants had the privilege of factor and consignee upon said cotton, to secure the advances made upon it as well as the amount due as balance on previous account.

As regards the first proposition of plaintiff, that there was an express agreement between Meyer, Weis & Co., Hiller & Co., and the bank, it is certainly not sustained by the evidence, which conclusively shows that Meyer, Weis & Co. knew nothing about Helm's Bank; that in the arrangement with Hiller & Co. nothing was said about it, or concerning it. We are satisfied that Meyer, Weis & Co. made no such agreement. Levy, the agent of Hiller & Co. in effecting this arrangement with Meyer, Weis & Co., swears there was no mention of Helm's Bank. Keiffer, the surety of Hiller & Co., states the same; Meyer and Weis the same. The only witness who swears that there was such an agreement is Daniel Hiller, who was not present when the arrangement was made with Meyer, Weis & Co. by Levy, and is evidently swearing recklessly. The cashier of the bank swears that Hiller *told him* there was such an agreement, but knows nothing of his own knowledge. There is no doubt that Hiller so informed the cashier, but that does not bind Meyer, Weis & Co.

Second. As to the implied promise resulting from the acceptance of the consignment, and the sale of the cotton.

There can be no doubt of the correctness of the general proposition that a consignee who accepts a consignment, with the advice and notice that the consignor had drawn on him for a stated amount against the goods consigned, impliedly promises to accept and pay the draft, and on refusal may be sued as for breach of contract. But that is not the case here presented. There are other circumstances which we think render that rule inapplicable.

In the first place, Meyer, Weis & Co. had advanced $2000 to Hiller & Co. on the promise of re-imbursement by those shipments of cotton during the season. In the second place, those shipments were made "for account of the consignor," without qualification. In the third place, the shipments were made on the eleventh, twelfth, and sixteenth January, and *letters of advice* of these shipments, dated January 11 and 16, were forwarded, and still no mention of any drafts against them. It was only on the eighteenth of January that the draft was drawn, and a letter written advising it, and inclosing bills lading (which for aught that

appears may have been duplicate bills). In the fourth place, article 3247 of the R. C. C. provides that "every consignee or commission agent who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of these advances * * * on the value of the goods if they are at his disposal in his store, or in a public warehouse, or if before their arrival he can show by a bill of lading, or *letter of advice*, that they have been despatched to him." Meyer, Weis & Co. had advanced $2000 on these promised shipments; that advance was wholly unpaid; they had received letters of advice of the shipment before they had any knowledge of the draft. We think, too, that it fairly results from Meyer's testimony, and other circumstances, that they had received, also, duplicate bills of lading by railroad before those mentioned in Hiller & Co.'s letter of January 18. He says they received these bills of lading before the draft came to hand, and that the letters of advice of January 11 and 16 were the first received relating to twenty-six bales of cotton.

The privilege of Meyer, Weis & Co. as consignees and factors had, therefore, fully attached to this cotton, and Hiller & Co. could not thereafter defeat it by drawing drafts against the same. This view of the case renders unnecessary any discussion of the question as to how far a consignor who is indebted to consignee for advances on promised shipments of goods can while shipping *for his own account* encumber the goods by notice of drafts drawn against them. It is easy to see that this question is a very different one from that where this previous relation of debtor and creditor does not exist. It may well be doubted whether any thing short of negotiation of the bills of lading with the draft, or a designation in the bill that the shipment is for account of the holder of the draft, would defeat the privilege of the consignee for advances. But we do not find it necessary to pass upon this point, and, therefore, express no opinion upon it.

Third. Under the view we have taken it is matter of no moment whether Hiller & Co. paid for the cotton with money obtained from plaintiff or not. That fact, if true, gives no claim either upon the cotton itself, its proceeds, or upon Meyer, Weis & Co. If the cotton were in Hiller & Co.'s hands, it would not even give plaintiff a privilege upon it.

Fourth. As to the plaintiff's bank taking the draft upon the faith and credit of Meyer, Weis & Co., it is enough to say that that firm is not responsible for Hiller's misrepresentations, and that there is outside of Hiller's own testimony (which we do not credit) no evidence whatever of any act or declaration of Meyer, Weis & Co. to justify such faith and credit being given. The fact that they were in the habit of

paying similar drafts for Hiller & Co. could not, in the absence of an express or implied agreement, compel them to continue to do so.

In conclusion, it is manifest that there is no question here as to the necessity of Meyer, Weis & Co. recording their privilege; first, because plaintiff is not claiming the cotton itself, or any privilege upon it or its proceeds. Second, because Meyer, Weis & Co. have the cotton or its proceeds in their own possession, and if there is any claim against them, it is simply for an ordinary money debt.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that there be judgment for defendant, rejecting plaintiff's demands, with costs of both courts.

No. 6579.

SUCCESSION OF P. G. QUIN.

A judgment rendered by a court of competent jurisdiction, and where the proper parties have been duly cited, can not be attacked in any collateral way, even by third persons not parties to it.

A parish court is not competent to review, or reverse a judgment of the district court.

The proceeds arising from the sale of property belonging to the wife, collected by the administrator of the deceased husband, belong exclusively to her, and do not enter into the husband's succession.

APPEAL from the Parish Court of St. Helena. *Duncan*, Judge *ad hoc*.

H. M. Wright and *W. F. Kernan* for opponent and appellant.

Jas. H. Muse for Mrs. Quin, appellee.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by MARR, J.

EGAN, J. The opponents are both ordinary judgment creditors of the succession. Their oppositions are on several grounds, most of which relate to the management of the property of the succession by the administrator, and moneys paid by him, which the court *a qua* considered no longer open to inquiry or opposition, because protected by a judgment homologating a former account of the administrator, unappealed and unreversed. The opinion of the judge *a quo* shows an unusually careful and intelligent consideration of the whole case, and we are not prepared to differ from his conclusions in regard to the grounds of opposition referred to.

The principal ground of opposition by Mrs. Quin was that the administrator had failed to place her upon the account and tableau as a judgment creditor to the amount of $2946 44, besides interest and

costs, to be paid concurrently with other judgment creditors. Harrell, himself a judgment creditor, opposes the allowance of this claim, invites the parish court in this proceeding to review the action of the district court which rendered the judgment, and seeks to contest in the parish court the right of Mrs. Quin to be allowed the amount claimed. It is not disputed that the court which rendered the judgment had jurisdiction, nor that there was a regular *contestatio litis* resulting in a judgment. It is, however, claimed that the debt was not due, and that the judgment against the administrator does not bind other creditors who may oppose its allowance in the probate court. The judge *a quo* overruled this ground of opposition, and in so doing, in our opinion, did not err.

In the Succession of Neal, 25 A. 125, the court held that a judgment not absolutely void can not be attacked collaterally—that the parish court can not review or reverse a judgment of the district court, and that it is without jurisdiction *ratione materiæ* when the matter in dispute exceeds five hundred dollars. If the judgment of Mrs. Quin was liable to attack or reversal, it was in another *forum*, where proceedings should have been instituted, and those in the probate court stayed to await their determination. No such allegation or attempt is shown in this case. See Succession of Bernard, 24 A. 402. Mrs. Quin's judgment should have been recognized, and placed as such upon the tableau and account, and the judge below correctly so ordered. Harrell alone appealed.

Mrs. Quin asked in the court *a qua* that she be allowed by privilege and preference one hundred and sixty dollars, the price of a horse, her separate property, sold by her deceased husband. This sum was not reduced into possession by the husband while living, but was collected from the purchaser by the administrator after the death of the husband. It formed properly, therefore, no part of the succession, but belonged to the wife individually. It should not go to swell the sum applicable to the payment of other creditors, but should pass, undiminished, directly to Mrs. Quin, whose fund it was.

In her answer to the appeal she so asks, and that the judgment of the court below be so amended, and in other respects affirmed, and it is so ordered, and that the costs be paid by the succession, except the costs of the opposition of S. S. Harrell, which are decreed to be paid by him.

ON REHEARING.

MARR, J. A re-examination of this case has only served to confirm us in the opinion heretofore pronounced. Our former decree, therefore, remains undisturbed.

No. 5623.

PEET, YALE & BOWLING VS. NALLE & CAMMACK.

A suit against a party for an amount due by a vacant succession, on the ground that the defendant had made himself liable by taking unauthorized possession of the effects of the succession with intent to convert them to his own use, is not a suit against the succession, and hence, none but a court of ordinary jurisdiction can take cognizance of it.

When there is any conflict between the provisions of the Revised Statutes of 1870, and those of the Civil Code, as revised that year, the latter shall prevail.

It is not necessary that the person who has taken unauthorized possession of the effects of a vacant succession, or a part thereof, with intent to convert the same to his own use, should be criminally prosecuted, and convicted of the offense, before a creditor of the succession can institute suit to hold the offender liable for the debt due him by the succession.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

Thos. J. Semmes for plaintiffs and appellants.

James and *Joseph Brewer* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs sue to compel the defendants to pay them an alleged debt of Edward Day of a little over one thousand dollars, the liability to pay which is charged to arise from the defendants having taken possession of Day's vacant succession, with the intent to convert it to their own use, and without being authorized to that effect.

A peremptory exception was filed for this;—that an action will not lie to render a party liable for payment of the debts of a deceased person, until such party shall have been convicted of having taken possession of the vacant estate of the deceased, without authorization, and with the intent to convert it to his own use. Another ground of exception, not made in the pleadings, but orally argued by the counsel on both sides, is that the Fifth Court has not jurisdiction because the claim is against a succession.

The purpose of the suit is certainly not the enforcement against a succession of an alleged claim. Its object is to compel living persons to pay the debt of one deceased, because they have taken possession of and appropriated to themselves, without leave of the court, all that would otherwise have been answerable to plaintiffs' claim. No court but one of ordinary jurisdiction could have cognisance of such a demand.

It will not do to say, that the plaintiff must establish his claim contradictorily with a succession, duly represented, before he can be said to have a valid one. If the defendant has, by his own act, unauthorizedly appropriated the vacant succession to himself, that act dispenses a creditor of the deceased from looking to the succession any longer for payment. His claim is now converted into a personal one against the

party appropriating the estate unlawfully, or rather, he has the option of thus converting it.

On the point of the necessity of a criminal prosecution and conviction preceding the civil suit, we are referred to three express adjudications and to the law in the latest revisal of the statutes. Our decision must depend upon the effect we shall give to a very remarkable change in the Civil Code made by the interpolation of a new article in 1870.

Prior to 1820, the liability of a person, who should convert to his own use the effects of a deceased person, was confined to the succession, which could sue the intermeddler in an action for damages for the injury to it. An Act of that year added another remedy by providing that the party, thus taking possession of a vacant estate, without authority, should be prosecuted, and on conviction should be fined, and moreover should be liable to pay all the debts of the estate, besides the damages suffered by parties. The language of this law is reproduced exactly in the Revised Statutes of 1856, p. 541, and in those of 1870, sec. 3685. And under that law, it has been uniformly held, that the criminal prosecution and conviction must precede the suit to enforce the civil liability. McMasters v. Place, 8 Annual, 431. Walworth v. Ballard, 12 Annual, 245. Carl v. Poelman, *Idem*, 344.

If the law had remained the same, we should adhere to that construction, although there can be no good reason why a party should be precluded from enforcing a civil liability, incurred by another because of an act, not criminal in its nature or essence, until those, who have in charge the administration of the criminal law, shall choose to prosecute him. The sections of the two revisals cited are under the head of successions, and do not appear among the crimes and offences.

But the decisive feature is that the Civil Code, as revised, contains a new article, manifestly designed to alter the law upon this very point, and wisely altering it, as it had been construed by this court. It enacts; —in case any person shall take possession of a vacant succession, or a part thereof, without being duly authorized to that effect, with the intent of converting the same to his own use, he shall be liable to pay the debts of said estate, exclusive of the damages to be claimed by the parties who may have suffered thereby. art. 1100.

Whenever there is any conflict between the provisions of the Revised Statutes of 1870, and those of the Civil Code, as revised in that year, the latter shall prevail. Rev. Stats. sec. 3990. The new article of the Code is an exact copy of the law of 1820, as reproduced in the revised statutes of 1870, except that the word 'succession' is substituted to 'estate,' and the provision subjecting the intermeddler to a criminal prosecution is wholly omitted.

The counsel of the defendants insist that these two enactments are

not in conflict. They are in error. If it had been argued that the material change in the phraseology as it appears in the Code, does not necessarily repeal that part of the statutes which creates the criminal offence, there would have been good reason for that construction. The criminal offence may very well continue to exist. The statutes attach to its commission a two fold punishment, viz a fine, and a liability to pay debts and damages. The Code on the other hand retains the declaration of civil liability on the part of the intermeddler, and relieves it from the hampering restriction of a criminal conviction as a pre-requisite to its enforcement, which in truth had practically operated as an immunity to the intermeddler.

Whether on trial, the plaintiffs shall be able to sustain their allegations, so as to fix liability upon the defendants, is for future investigation. The exception is to the prematurity of the action, and should not have been sustained. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that the cause is remanded, with instructions to the judge below to overrule and dismiss the exception of the defendants, and proceed to the hearing of the case, and that the defendants pay the costs of appeal.

No. 6670.

THE STATE VS. PAUL CLIFTON.

In an information charging burglary, and entering a house at night with intent to steal, it is not necessary to give the ownership of the house.

Evidence that the accused was seen in the immediate vicinity of the scene of the offense at about the hour he is charged to have committed it, is admissible.

The proper question to put, in order to elicit the reputation for honesty of an accused, is, what is the *general* reputation of the accused for honesty, etc.; not what is his reputation with those among whom he dwelt.

When the jury in a criminal case return a defective verdict, the judge may properly so state to the jury, and thereupon instruct them as to the form in which they should clothe their verdict. But to ask them the question whether it was their intention to find the accused guilty of the crime charged in the information, and to have recorded as their verdict the answer thus elicited, is so grave an interference with the functions of the jury, as will warrant the setting aside of the verdict.

APPEAL from the Superior District Court, parish of Orleans. *Whitaker*, J.

H. N. Ogden, Attorney General, for plaintiff.

Robert Dalton for defendant.

The opinion of the court was delivered by

EGAN, J. The defendant was accused, found guilty, and sentenced

for the crime of breaking and entering a dwelling-house in the night-time with intent to steal. From this sentence he has appealed. He objects that the information does not state the ownership of the dwelling-house. This was not necessary nor of the essence of the charge. The dwelling-house was sufficiently described as situated at and designated as No. 148 Canal street, and known as the New-Orleans Club-House and occupied by some person or persons to the district attorney unknown, "the said person or persons being lawfully therein at the time." This was sufficient description under the law, even if it be considered matter of substance and not of form or "description of something described in the information." The accused excepted to the reception of the evidence of a witness, Knapp, to the effect that about the hour of the night when the crime is charged to have been committed "he saw the accused in his own back premises." The judge states that the back premises of the witness immediately adjoin those of the New-Orleans Club-House, and that other witnesses had testified to the escape of the burglar from the rear of the Club-House premises to the rear of those of the witness, who had testified to hearing shots fired near by at the time, and that said witness was at the time of the objection about to testify to the arrest of the accused after the shooting (and at the hour the burglary was committed as stated by other witnesses) upon witness's premises or in the alley adjoining. The evidence was pertinent and properly received. On the trial the counsel for the accused asked a witness, Adeline Smith, with whom he boarded (and also another witness), "what was the reputation of the accused for honesty among those he dwelt with in her house." The proper question, if the foundation had been laid, which is not shown by the bill, would have been "what was the *general reputation* of the accused for honesty among his neighbors," and not what particular persons thought of him. The court did not err in excluding the testimony; a much more serious question is presented by the next and last bill of exceptions, which states that after the jury had deliberated upon the case for about two hours and a half they returned into court with their verdict—that they were asked by the judge if they had agreed upon their verdict, to which the foreman answered that they had, and handed it to the clerk, who was ordered to record it; when the counsel for the accused asked that the jury be polled, and while that was being done and before its completion the judge directed the sheriff to stop, and stated "that the verdict was defective, and would have to be changed," and then asked the jury through their foreman "if it was their intention to find the prisoner guilty of burglary with intent to steal, as charged. The jury, through their foreman, answering in the affirmative, *the court ordered the verdict to be changed and to be so recorded*," and the judge then had the jury polled the second time; they, the jury,

then answered that was their verdict, and the court ordered the verdict to be recorded as so amended, to all of which the counsel for the accused excepted. The verdict of the jury as originally returned into court is not before us, and we can not, therefore, pass upon its sufficiency or responsiveness. The judge pronounced it defective, and we must assume that he was correct. We can not, however, go further and assume what was the character of the verdict. The verdict as it appears of record is "Guilty of burglary as charged, with intent to steal." While if the verdict as originally returned was defective it was perfectly proper for the judge so to state to the jury, and to instruct them anew as to the form in which they should clothe their verdict, it was not proper for him to ask the jury the direct question "if it was their intention to find the prisoner guilty of burglary with the intent to steal, as charged," *and to have recorded as their verdict the answer thus elicited.* Whatever the motive, and we have no doubt it was the best, this was trenching upon the province of the jury and in effect dictating to them their verdict, which in a matter so delicate and important to the liberty of the accused the law does not permit. We think, as before stated, that the proper course under the circumstances in an important criminal trial was for the judge to have informed the jury that their verdict as originally returned was defective or informal, and as to the proper form of verdict, just as though nothing had been returned into court by them as a verdict, and that after so instructing them they should have been directed and allowed to make up and return their own verdict, whatever it might be. A defective or informal verdict is no verdict, and the case stood in law just as it did when the jury originally retired to make up their verdict, and no other or different charge was permissible than would have been originally, save only that the judge *should* as before stated *have renewed* his instructions as to the form or language in which to clothe the verdict *in case the jury* should find the accused guilty or innocent. Such instructions are very different from a direct question from the court, "Do you intend to find the prisoner guilty of burglary with intent to steal, as charged?" and *especially it was not proper to have recorded as their verdict the answer so elicited.* However praiseworthy the intention of the judge, the language and spirit of our law guards too sacredly against any interference by the judge with the facts in a criminal case or any interference with the finding of the jury to permit the matter under consideration to be passed over as a simple irregularity and to grow into a precedent which in some other case may be abused and lead to the most serious ill consequences. Courts of trial can not too strictly observe the line of demarcation between their province and that of the jury in criminal cases arising under our law. We think that as was said in the State vs. Shields, 11 A. 395, the course pursued by the

court *a qua* in this case was "not only calculated to secure the unqualified verdict elicited by the question of the judge, but that it might well have been construed by the jury into an intimation of the court as to the guilt or innocence of the prisoner," and that "the discretion of the jury should not have been so trammeled." See, also, the case of the State vs. John Johnson, recently decided. 30 An. 921. The grounds for the motion in arrest of judgment have already been considered, and are insufficient.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are avoided and set aside, and the case remanded to be further proceeded with according to law and the principles of this opinion.

No. 6872.

THE STATE EX REL. MARTIN LANNES ET AL. VS. THE ATTORNEY GENERAL OF THE STATE.

Section 2593 *et seq.* of the Revised Statutes of 1870 does not provide for the forfeiture of the charters of corporations at the instance of private persons, even when they are parties interested.

It is discretionary with the Attorney General of the State to proceed, on his own motion, to bring suit for the forfeiture of the charter of a corporation, and hence he can not be compelled by mandamus to institute such a suit.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

E. K. Washington for relator and appellee.

H. N. Ogden, Attorney General, for defendant.

The opinion of the court was delivered by

MARR, J. Martin Lannes and other private citizens, butchers, desired to bring suit against the "Crescent City Live Stock Landing and Slaughter House Company," a corporation created by act No. 118 of 1869, for a forfeiture of charter, and for ten thousand dollars damages, for failure to comply with the terms and conditions of the charter.

Recognizing the fact that a proceeding for forfeiture of charter must be in the name of the State, the plaintiffs applied to the Attorney General to make the State a party, and to sign the petition in the name and behalf of the State. The Attorney General declined to do this; and plaintiffs applied for a mandamus to compel him to perform his alleged duty in this respect.

The Attorney General answered that the act No. 156, of 1868, relied on by relators, was not applicable to their case; and that the appearance of the Attorney General in the cases contemplated by that act is merely formal.

The District Court was of opinion that the case made by plaintiffs was one coming within the act in question: and the Attorney General is appellant from the judgment making the mandamus peremptory.

Act No. 156, of 1868, is entitled "An act to amend and re-enact an act entitled 'An act providing a remedy against usurpations, intrusions into, or the unlawful holding or exercising a public office or franchise in this State,' approved September 8, 1868."

The act thus amended and re-enacted is No. 58, of 1868; but it is not necessary to refer to it more specially, because the amendatory act superseded it; and was incorporated and re-enacted in the Revised Statutes of 1870. Sec. 2593 *et seq.* This is the law by which the issues involved in this appeal must be determined.

The first section of this act authorizes suit to be brought by the district attorney, or district attorney *pro tempore*, in the country parishes, and by the Attorney General in the city of New Orleans, "or other person interested," in the name of the State, upon his own information, "or upon the information of any private party," against the party or parties offending in the following cases:

"FIRST. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office or franchise within this State; or

"SECOND. When any public officer shall have done, or suffered to be done, an act which by the provisions of law shall work a forfeiture of his office; or

"THIRD. When any association or number of persons shall act within this State as a corporation without being duly incorporated."

The second section makes it the duty of the district attorneys, and the Attorney General in the cases mentioned in the first section, to bring suit against the offending parties, "when so required to do."

The fourth section provides that when such suit is brought, "on the relation or information of any person interested," the name of such person shall be joined with the State as plaintiff.

Section ten declares that "when defendant, whether a person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant, and such damages as are proven to have been sustained."

These sections are the only parts of the act in question which have any bearing upon this controversy; and we shall consider them *seriatim*.

1. Every act of the Legislature must conform to the constitution of the State, under pain of nullity.

The constitution, article 114, declares that "every law shall express

its object or objects in its title;" and if it had been the design of the Legislature, by this act, to provide for the forfeiture of the charters of corporations, at the instance of private persons, "parties interested," the law would be amenable to the grave objection that no such object or purpose is expressed in the title.

The introductory part of the first section of the act provides how such suits as it authorizes may be brought, and against whom; and it differs from the original act No. 58, in that this latter act authorizes the Attorney General alone to bring such suit, in the proper district court, "in the name of the people of this State, upon his own information, or upon the complaint of any private party."

This language betrays the paternity of the act; and the act No. 156 was passed to adapt the imported law to our mode of procedure, and to the courts in which the litigation might be had. The suit must be in the name of the State, by the Attorney General in the parish of Orleans, by the district attorney or district attorney *pro tempore* in other parishes, upon his own information or upon the information of any private party.

The *first* alinea seems, by its terms, to relate, exclusively, to acts which may be done by a single individual. It contemplates the violation of a right which by law has been conferred upon and belongs to some other person, a public office or franchise, which the person offending has usurped or intruded into, or holds or exercises unlawfully, not because the office or franchise may not be lawfully held or exercised, but because the offending party is not the person who is by law entitled to hold or exercise it.

The *second* alinea relates, exclusively, to public officers, legally elected or appointed, and installed, who, while lawfully entitled to hold the office, have done, or suffered to be done, some act which by law works a forfeiture, not the destruction of the office, but of the right of the offending officer to hold and exercise the functions of that office.

The *third* alinea does not deal with single individuals, as the first and second manifestly do. It relates exclusively to aggregations of individuals, associations, or a number of persons, who have assumed to act as a corporation without having been duly incorporated.

The *first* alinea deals with an individual, any person, who violates the rights of some other person by unlawfully holding or exercising an office or franchise which such other person is by law entitled to hold or exercise; and the second alinea deals with the individual public officer, holding by a legal tenure, who has incurred the penalty of forfeiture by some act done by himself, or which he has suffered to be done. The third alinea alone has any reference whatever to corporations; and it is limited to such associations as assume to be corporations, without hav-

ing been duly incorporated. Corporations established by law are not even remotely, or by implication, included in this first section.

All the succeeding sections of this act refer to and are limited to the suits which the first section authorizes to be brought. The meaning of sections two and four seems plain enough. When the district attorney, or district attorney *pro tempore* in the country parishes, or the Attorney General in the parish of Orleans, knows, or when he has been informed by any private party, of the existence of any one of the causes of action mentioned in the first section, the usurpation, or intrusion into, or the unlawful holding or exercising of a public office or franchise, or that some public officer has done or suffered to be done some act that works a forfeiture of his right, or that an association of individuals or a number of persons pretend to be a corporation, without having been duly incorporated, the law requires him to proceed, and to bring suit against the offending parties. If the offense is such that it interests an individual, and the suit is brought on his relation or information, it must still be brought in the name of the State, but his name must be joined with the State as plaintiff.

By section ten, when a person or a corporation is defendant in such suit, that is, such suit as may be brought under section one, the judgment shall be exclusion from such office, franchise, or privilege, costs, and such damages as are proven to have been sustained. Not one word about the forfeiture of the charter granted to a corporation. The word corporation in this section would seem to be used in reference to the associations of individuals, pretending to be corporations, without having been duly incorporated, mentioned in the third alinea of section one.

If a person intrudes into, or usurps, or holds, or exercises a public office or franchise which some other person is entitled to hold or exercise, the State is offended, and is interested in ousting the wrongdoer; and the person unlawfully excluded is also interested in obtaining possession and enjoyment of the office or franchise. He may require suit to be brought; and the Attorney General or district attorney is bound to bring the suit, on the information or relation of the injured individual, who must be joined as plaintiff in the suit brought in the name of the State.

If the suit be to remove a public officer, who has done or suffered to be done an act which works a forfeiture, every citizen is interested; and the proceeding may well be on the relation of any citizen or number of citizens, joined with the State as plaintiffs. And so, if any number of persons associate themselves, and pretend to be a corporation, without having been duly incorporated, a citizen, or a number of citizens, might well be joined with the State as plaintiffs; and in all such cases the law officer of the State seems to have no discretion, and he

may be compelled by mandamus to perform the duty plainly prescribed by law.

The cases relied upon by the relators in this case, 21 An. 655; 21 An. 710; 22 An. 547; 23 An. 787; 24 An. 149, were contests for office; and the court held, and it is not to be questioned, that in such cases the suit must be in the name of the State; and that the law officer of the State may be compelled by mandamus to allow the use of the name of the State in the suit to oust the intruder or usurper, and to put into office the person complaining and claiming to be legally entitled.

The case in 22 An., State ex rel. Attorney General vs. Fagan and Others, was a proceeding under the third alinea of the first section of this act, against a number of persons associated under the name of the Live Stock Dealers' and Butchers' Association of New Orleans, styled a pretended corporation, organized for the purpose of doing and performing the acts which, by the act 118 of 1869, the Crescent City Live Stock Landing and Slaughterhouse Company was alone by law authorized to do. In such a case there is no doubt it would be the duty of the Attorney General, in behalf of the State, to protect the corporation lawfully chartered, and solely vested with the rights granted to it by the State, by the act of incorporation, against the attempt of another body or organization to exercise the same rights.

In the Atchafalaya Bank vs. Dousin, 13 Louisiana, 497, the doctrine is plainly laid down, that the government "creating a corporation can alone institute a proceeding for a forfeiture of charter, since it may waive a broken condition of a contract made with it, as well as an individual."

Charters of incorporation are treated as contracts; and if one of the terms of the charter be violated, the other contracting party, the State, may demand the forfeiture by suit, just as in a contract between two individuals. But article 2047 of R. C. C. declares that when the resolutory condition is an event not depending on the will of either party, the contract is dissolved of right; but where the condition is something to be done or performed by one of the parties, the dissolution must be sued for.

In the case of the Atchafalaya Bank, 13 Louisiana, Judge Martin stated that in 1813, when he was Attorney General, the banks suspended specie payments, and thereby incurred the penalty of forfeiture; that it devolved upon him to determine whether to waive or to proceed by suit for the forfeiture; that he chose not to sue; and the Legislature soon after placed him on the bench of the Supreme Court; and that his successor, Mazureau, who was Attorney General when the banks suspended the second time, had, in the exercise of his discretion, chosen not to sue.

The authorities cited in 13 La. 497, and in Abbott on Corporations, 339, show that it is discretionary with the sovereign power by which an act of incorporation has been granted to waive the forfeiture which has been incurred; and the waiver may be as well by inaction, the failure to demand it by suit, as by positive act.

In 1877 the Legislature amended the charter of this corporation; and this was necessarily a legislative recognition of the then legal existence of the corporation, and of the intention of the State not to demand the forfeiture. See act No. 144 of 1877, p. 220.

The Attorney General might, if he deemed it proper in the public interest, demand by suit, the forfeiture of the charter of a corporation; but he might be restrained by the action of the Legislature, as he might be instructed by the Legislature to proceed. In the silence of the Legislature the discretion is vested in him; and discretionary power can not be controlled by mandamus. It is only where the duty is imposed by law absolutely that its performance can be enforced by mandamus; and no individual or individuals can interfere with the State in the exercise of its sovereign power, nor compel the State to proceed for the forfeiture of a charter, which the State, in the exercise of its sovereignty, may not choose to demand.

The judgment appealed from is therefore annulled, avoided, and reversed; and the application of relators for mandamus is dismissed at their costs in both courts.

No. 6738.

W. P. O'HERN VS. HIBERNIA INSURANCE COMPANY.

The deed from a tax collector, of property sold at a tax sale, is received *prima facie*, as a valid title. Until the tax sale is set aside by a revocatory, or other proper action, contradictorily with the parties in interest, the title from the tax collector is presumed to be valid.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Horace E. Upton for plaintiff and appellant.

Thos. Gilmore & Sons for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The Hibernia Insurance Company obtained an order of seizure and sale of an improved lot in this city, in foreclosure of its mortgage, and had caused advertisement of its sale to be made, when the plaintiff injoined the sale by the proceedings in this suit.

The defendant moved to dissolve the injunction "upon the ground that it had issued improvidently and illegally, the allegations of the petition and the exhibits thereunto annexed being insufficient to authorize the issuance of the writ."

It is nowhere stated wherein is the insufficiency, or in what particular the allegations are deficient. Upon hearing, the motion or rule to dissolve was made absolute, and again the record fails to acquaint us with the reasons therefor. We do not wish to be understood as intimating that it is necessary or desirable in all cases that the judge of a lower court should assign the reasons of his judgment at length. We only note the absence of them here, because we are unable to perceive why the allegations of the petition were supposed not to be sufficient on their face to authorize an injunction.

These allegations are;—that the plaintiff is the owner of the lot advertised for sale, under a title translative of property, (derived from a tax sale superior to the defendant's mortgage), and that the defendant is attempting to sell it. This sale is to satisfy a mortgage of a previous owner.

True, the plaintiff's title may not prove good upon examination. He alleges that he bought at a tax sale, and received a deed from the tax collector, and after six months interval, that he obtained a confirmatory deed from George B. Johnson, Auditor of Public Accounts, on February 24, 1877. We know that this last deed, confirming the previous title, is wholly invalid, because Johnson was not the Auditor at that time, but the deed from the tax collector is received by the courts as a *prima facie* valid title, Constitution, art. 118. Acts 1871, p. 120. Until that sale is set aside by a revocatory or other proper action, contradictorily with the parties in interest, the title from the State's officer is presumed to be valid until the contrary is shown. Lannes v. Work. Bank, 29 Annual, 112.

But it is not necessary to resort to those principles in order to dispose of this motion. The objection to the petition is that the allegations are on their face insufficient to warrant an injunction. Now if it be true that the plaintiff bought at the tax sale and therefore under the first and highest privilege, and that all the requisite formalities had been observed prior to it, and at it, and no redemption has been made or offered, it may very well be that his title will prevail to the detriment of the mortgage creditor of the previous owner. But if it should be discovered that these formalities have not been complied with, or that the plaintiff and purchaser at the tax sale is merely the mortgage debtor in disguise, who is helping him to evade the operation of the mortgage, and the payment of the debt, the reverse result would most certainly be produced.

These matters were not inquired into, and could not be, in the trial of a rule to dissolve on the face of the papers. The allegations of the petition are taken as true on that trial, and if true, do warrant an injunction. Therefore,

It is ordered and decreed that the judgment of the lower court is reversed, and the cause is remanded to be proceeded with according to law, the appellee paying costs of appeal.

No. 7048.

THOMAS LACHAMBRE & CO. VS. HENRIETTA AND J. L. COLE.

A suit to revive the judgment in a probate case, rendered by a district court before the creation of parish courts by the constitution of 1868, must be brought in the district court that rendered the judgment. Probate suits in which judgments had been rendered, were not transferred from the district to the parish courts.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *McVea*, J.

Hewes & Parlange for plaintiffs and appellees.

Barrow & Pope for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The object of this suit is the revival of a judgment under the act of 1853.

One Cropper obtained a judgment against the defendants in the fifth judicial district court for Iberville on May 10, 1867. The plaintiffs, claiming to be the owners of this judgment, which is not disputed by Cropper, instituted this suit in the fifth judicial district court for Iberville for the revival of the former judgment, and had citation issued thereon, which was served April 18, 1877. The service was therefore within ten years from the rendition of the judgment.

It is contended by the defendants that citation has issued from the wrong court, and an exception was filed by them to the jurisdiction of the district court, which can not be understood without an explanation of the original suit.

Cropper is the son of the defendant Mrs. Cole by her first husband. She was his tutrix, her second and present husband was co-tutor, and the suit was for an account, and for judgment for such sum as should be found to be due, and it was had for over fourteen thousand dollars. This was under the Constitution of 1852, whereby district courts had jurisdiction of all matters affecting successions, and minors.

The constitution of 1868 followed, creating parish courts with jurisdiction of those subjects, and the defendants contend that the suit for

revival should have been instituted in the parish court of Iberville, because that court alone had now jurisdiction of such matters as are embraced in the original suit, and further because by the act organizing the parish courts, the clerks of the district courts are required to transfer to the parish courts "all causes now pending and on file" which fall under the jurisdiction of the latter. Acts 1868, p. 60.

It would be a strained construction to hold that the clerks, under this mandate, must transfer to the parish courts all causes, complete and ended, as well as those pending. A great mass of records is in the clerk's office of causes which are ended. If that officer be required to transfer to the parish courts all of these that should have been brought in a parish court, had one existed from 1852 to 1868, who is to say what records he shall thus transfer? Experience has taught us that it was not an easy matter for courts to determine correctly where was the dividing line between the two jurisdictions, and the clerks would surely have been unable to do it. The phraseology of the act does not leave this question doubtful. All causes now pending and on file which fall under the jurisdiction of the parish courts must be transferred to them, and the parish court shall try and determine the same, and make all orders therein that may be legal and proper. It is not all causes which would have fallen under the jurisdiction of the parish court, but those which fall under that jurisdiction according to the constitution and that Act, which must be transferred. And for what purpose? That the parish court may try and determine the same, and make orders therein. And to make the meaning of the act certain, it is added—the clerk of the district court shall issue all executions and writs, or orders of any kind, in all cases previously decided in those courts for any purpose whatever. *Idem*, p. 62.

The suit, or contestation, which was terminated by the judgment of May 1867, properly remained among the records of the district courts, because it was not pending. But it may be that some would consider the expression 'pending and on file,' to mean two classes of causes, viz those pending which are undecided, and those on file which means every cause among the records which falls within the description of the Act. There is no comma after 'pending.' The two expressions refer to the same class of causes, as the other expressions in the same clause plainly indicate. How is the district court to issue executions or orders upon judgments already rendered, if the suits or records containing the judgments are transferred to another court?

It would not matter however if the clerk of the Iberville court had transferred this record to the parish court. The court which has jurisdiction of suits for revival of judgments is distinctly pointed out in the act of 1853 which provided for their revival. The citation must issue

from, and the suit must necessarily be addressed to the 'court which rendered the judgment.' Rev. Stats. sec. 2813.

The district court for Iberville rendered the judgment, and in that court was properly instituted the proceeding for its revival.

It is not necessary to examine the bills of exception, which have no reference to the points on which we have rested our decision. There was testimony shewing the inscription and reinscription of the judgment of 1867, offered doubtless to shew the continued vitality of the judicial mortgage, but it is wholly out of place in such suit as this, the sole object of which is to keep alive the original judgment by a revival. The suit of revivor having been instituted before the proper court, and the citation having been served within ten years from the date of the original judgment, it was held below that the plaintiff was entitled to its revival.

Judgment affirmed.

ON REHEARING.

Upon reconsideration of our former opinion, we see no reason to make any change, and therefore

It is ordered that our former decree remain undisturbed.

No. 2925.

DAVID G. COOKE VS. HUGH AND ANDREW ALLISON.

Where a loan is made by two members of a commercial firm, in a matter foreign to the business of the firm, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont*, J.

Thomas Gilmore & Sons for plaintiff and appellant.

E. N. Huntington for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. On the 25th of July 1865, plaintiff and defendants formed a commercial partnership for the transaction of a cotton factorage and general commission business, which expired on the 1st of June 1868.

On the 15th of February 1866, Hugh Allison alone was at the office of the partnership, his brother Andrew was absent from the City and Cooke at home and sick.

One James R. Howard, wishing to obtain an advance of money went —on that day—to Cooke's house, and Cooke—by a written note—referred him to Hugh Allison.

What became of that note? One of the bookkeepers said that, some time after the transaction, he himself handed it to Hugh Allison, and at the latter's request. A subpœna *duces tecum* was issued commanding its production by Hugh Allison, who answered: "I have not the note referred to, do not know any thing about it."

David Cook testified that—to the best of his recollection—the purport of the note was that Howard wanted some money and to see what he could do for him: no amount was therein mentioned, nor was it an order to pay the money. This statement is corroborated by the bookkeeper, who read the note and testified further that he thought that, by the terms of said note, the matter was left at Allison's discretion.

Whether it was or not, Hugh Allison requested the bookkeeper to fill a check for $12,500, signed and handed it to Howard, who acknowledged, in writing, that he had received that sum from the firm. The amount of the check was paid and debited to Howard.

Andrew Allison returned to the City, heard of the transaction, protested against it as having no connection with their legitimate business and insisted that it should be charged to Cooke's account. According to Andrew's declaration, Cooke—when informed of his determination—objected to it at first, and thereafter consented, remarking "that it was a good thing and that his partners would have none of the profits to arise therefrom." Cooke admits that he then made a remark of that kind, and told his partners that—if they were dissatisfied with the transaction, he would take it for his own account: that they did not assent to his proposition, and Hugh Allison replied that if there was any thing to be made by it, he was entitled to his share.

The bookkeeper was directed by the brothers Allison to transfer to Cooke's account the amount of the check, and it was done. Cooke swore that he had not authorized that transfer, and his declaration as to this fact is supported by those of the bookkeepers, who testified that he always objected to it, and—for that reason—would not allow the books of the firm to be balanced.

Hugh Allison's statement is that he paid the $12,500 on an order from Cooke, believing that—on Cooke's return to the office, he would explain why this money was given to Howard: he failed to explain and —at his own request—the amount was charged against him. To the knowledge of Hugh, Cooke never objected to that charge. His declaration, on this point, is contradicted by, and contradicts that of plaintiff and of the bookkeepers. The note, or—as he calls it—the order which he took from the files of the office, might have sustained his assertion

and neutralized that of his partner and employees, but—when ordered to produce it—his answer was "that he knew nothing about it."

When the advance of $12,500 was made to Howard, he was indebted to the firm for $1256, and had then shipped to it only six bales of cotton. It seems strange that—under such circumstances—Hugh Allison, who was not bound to do it, concluded to first pay him so large an amount, and then await his partner's return to ascertain why it was that the money had been given to Howard.

On the trial, Cooke objected to that part of Hugh and Andrew's deposition and to the questions put to and answered by himself, tending to show that he had agreed to the transfer—from the firm's account to his own—of the charge of $12,500, on the ground that it was an attempt to prove—by parol evidence—that he had assumed to pay the debt of Howard. His exception was properly overruled. The object of the evidence thus admitted was to prove, and did establish that it was two of the partners and not the partnership who made a loan to Howard, and that the transfer of the charge from one account to the other was but the correction of a previous and erroneous entry. That correction was incomplete: the amount of the check should have been charged to Cooke, who—it appears—advised the making of the loan and approved it after it was made, and to Hugh Allison who, on a mere suggestion of Cooke, paid the money to Howard.

Andrew Allison's statement is that said money was invested in Mexican Gulf Rail Road stock: that the intention to so invest was mentioned before he left the City, and that he opposed the transaction as having no connection with their legitimate business: that, when he returned to the City, and found that the loan had been made, he informed Cooke of his determination that said loan should be charged to his account: Cooke agreed to it and it was done.

Plaintiff denied that the money was advanced to Howard to invest in the stock of the Mexican Gulf Rail Road, and testified that the transaction was simply a loan on interest and commission. He, however, confessed that he had told the two brothers: "it is a good thing and if you are dissatisfied, I will take it myself," and Hugh Allison alone replied, in substance, that if any profit came from it, he was entitled to his share.

It is difficult not to conclude that said loan was the transaction opposed by Andrew Allison and disapproved by the advisers of the firm, before Andrew's departure from the City, one which took place during his absence, and against which he protested from the day on which it was proposed, as not being connected with the legitimate business of the partnership. The lower court so believed, and its judgment is affirmed with costs.

No. 6913.

J. N. BROWN, ADMINISTRATOR, vs. E. A. R. BROWN.

The allegations in a petition that a certain transfer of property is a simulation, and that it is a donation in disguise, are inconsistent.

When an actual consideration, no matter how inadequate, has been paid by the purchaser in an alleged sale, the transaction is not a simulated one.

The delivery of immovables, where they are disposed of by public act, is always considered as accompanying the act, whether that act be a sale, or a *dation en paiement*.

Even when it is shown that the expressed consideration of a transfer does not exist, the contract can not on that account be invalidated, if the transferee proves that there was another legal, and sufficient consideration.

APPEAL from the Seventeenth Judicial District Court, parish of Red River. *Robertson*, Judge *ad hoc*.

W. H. Jack, *J. F. Pierson*, and *Edward D. White* for plaintiff and appellee.

L. B. Watkins and *Egan & Ogden* for defendant and appellant.

The opinion of the court on the merits was delivered by SPENCER, J., and on the application for a rehearing by MANNING, C. J.

SPENCER, J. In August, 1876, the plaintiff, alleging himself administrator, and a forced heir of John W. and Mary H. Brown, deceased, filed this suit against his sister, the defendant, and prays that a certain tract of land on the west side of Red river in the parish of Red River, in defendant's possession, be decreed to belong to the successions of said decedents; that the act of transfer thereof made by John W. Brown to the defendant on February 13, 1868, be declared a simulation made in fraud of creditors, "and a *donation in disguise*, and null and void." Defendant, alleging that the plaintiff's demands were inconsistent, moved that he be required to elect between them. The district judge overruled the motion, on the ground that the action was, in substance, one *en declaration de simulation*. We think that it is inconsistent to allege that an act is a pure simulation and a donation in disguise. A simulated act is nothing. It is "*vox, et præterea nihil*," while a disguised donation is a reality, and may be and often is a good and valid contract.

But we think the subsequent proceedings in the case show that both parties limited the contest to the single issue of simulation *vel non*. The defendant put at issue "the question of simulation alone," and plaintiff confined his case to that issue, and the value of rents and revenues after the death of John W. Brown, in 1873.

This is a family quarrel, and, as might be expected, there is much contradictory swearing, the family being about equally divided between the contestants. Some of the witnesses, especially the plaintiff and his

brother, W. W. Brown, can hardly be said to have testified. They delivered set orations and elaborate arguments, instead of depositions. The protestations of defendant's counsel,and a record bristling with exceptions to the admissibility of this argumentation, seem to have been unavailing to stop this torrent of declamation. It would be an endless task to attempt a detailed notice of all these objections and exceptions, running through several hundred pages of closely written record. We have gone carefully through it all, and will state the facts as they impress us.

On the thirteenth February, 1868, John W. Brown by authentic act conveyed to his daughter, Elizabeth A. R. Brown, the land in question, for the price and sum, as declared in the act, of $1617, cash in hands paid. The daughter lived in the house on the east side of Red river, with her father and mother, the latter being very infirm and paralyzed. The father after the sale continued to manage and control the place sold on the west side, rented it out to tenants, and collected the rents, and disposed of them about as he pleased. The leases were usually made by him in the name of his daughter, but until his death in 1873 she seems to have taken no active control, at least no ostensible control. It is shown that at the date of this transfer John W. Brown owed a debt to Chaffe & Brother of some $2000, and another small debt of about $150. There is no pretense that he was then insolvent. In fact, if plaintiff and his witnesses are credible, he was five-fold solvent. In October, 1870, Chaffe & Brother brought suit against Brown and Sherrod for $1050, balance due them, and obtained judgment therefor in January, 1871, against the defendants *in solido*.

Plaintiff and his brother, W. W. Brown, and his sister, Mrs. Turner, and her husband swear that it was well understood in the family that this transfer was a simulation, and they repeat many conversations of their father to that effect; and J. N. Brown details one which he says took place in the presence of Elizabeth, the defendant. The defendant and her brother, T. C. Brown, and sister, Mrs. Giddens, swear to the verity and reality of the sale, and the defendant flatly denies the plaintiff's statement as to her ever being present when her father said the sale was simulated.

The evidence shows that the consideration of this transfer was not cash, as declared by the act, but consisted of three notes, two for $400 each, with six or eight years interest thereon, and one for $176. This last note is shown to have been held by plaintiff, J. N. Brown, against his father, who requested him to let him have it for Elizabeth, in order to make up a more ample price for the property. The two notes for $400 each were predicated on a sum of $600, which John W. Brown collected and received in 1860 and 1861, on account of salaries due Elizabeth as a public school teacher. Shortly before the transfer he delivered her

his said two notes for $400 each, in settlement of this debt. There is no doubt or dispute about the fact that he received and collected this sum of $600, as stated, and that she was at the time *sui juris;* but her brothers, J. N. and W. W. Brown, *argue* that when she graduated some years before her father bought her a fine piano, and that this $600 must be considered as a payment for that. That she lived with her father, and was maintained by him like the other children, etc. *Per contra,* the defendant shows that her services in the household, and her constant attention to her infirm mother were worth far more than her support. Suffice it to say that her father seems to have taken the same view, and gave his notes for an undoubted debt due her. If he saw proper to offset her support by her services he had a right to do so, and from the evidence we think he acted justly in so doing.

There was then a real and valid consideration for this transfer, to the extent of this $600 and interest, evidenced by these notes. The transaction was, therefore, *not a simulation.* It may have been intended to defraud creditors. We rather think it was. The plaintiff and his witnesses declare that his purpose was to put his property out of their reach ; and J. N. Brown, plaintiff, and his brother, W. W. Brown, swear in effect that they *counseled and consented to his doing so.* It is not clear but that J. N. Brown and W. W. Brown, under these facts, were parties to this transaction, and are estopped from disputing its verity. "*Nemo allegans suam turpitudinem est audiendus.*"

The possession of the vendor after the sale creates, as to third persons, a presumption of simulation, unless the verity of the transaction be shown. C. C. 2480, 1921. That presumption has been rebutted in this case by showing that there was a consideration, perhaps inadequate, yet real and actual.

Plaintiff contends that this was not a sale, but a *dation en paiement,* and without effect for want of delivery. C. C. 2656.

The reason of this rule is not at first glance very apparent, but we take it to be that a payment is never complete until the thing to be paid is delivered. But the *delivery of immovables is always* considered as accompanying the *public* acts by which they are transferred. C. C. 2479.

We are aware that in the case of Shultz vs. Morgan, Chaffe & Bro., intervenors, reported in 27 An. 618, Justice Taliaferro, as the organ of the court, seems to deny the application of this rule to transfers of immovables by authentic act by way of *dation en paiement.* He says that "it is of the very essence of the *dation en paiement* that delivery should be *actually* made," and cites as authority 3 M. 226, 269 ; 12 L. 375 ; 3 A. 280, and 20 A. 282.

Article 2656 is as follows : "The giving in payment differs from the

ordinary contract of sale in this, that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made only by delivery." Justice Taliaferro interpolates the word "*actual*," which is not found in the text of the article. What constitutes delivery must be determined by reference to other provisions of the Code. The language of the court in 27 A. would be substantially correct when applied to immovables transferred by *private* act or to movables; but we have seen that "the *delivery of immovables is always* considered as accompanying *the public* act *transferring them*, whether *that act* be a sale or *dation en paiement*. By reference to the cases cited as authority by the court, to wit: 3 M. 226, 269; 12 L. 375, and 20 A. 282, it will be seen that they were all cases relating to movables. The case in 3 A. 280 is not in point. It may be added that it is not very apparent whether the acts in question in the case in 27 A. above referred to were *public* or *sous seign privée*. But so far as the *dictum* of that case is applicable to *public acts transferring immovables*, whether they be sales or *dations en paiement*, we can not give it our assent.

Under this rule of article 2479, and in view of the fact that the transferee was a female living with her father, who attended to the leasing of the lands transferred, which lay across Red river, we think it clear that John W. Brown could not, without being a trespasser, have disputed her possession, or denied the delivery. C. C. 2479. If *he* could not, it follows that the rule of article 2656 requiring delivery in *dations en paiement* had been complied with, since that rule applies as well between the parties as others. Moreover, the plaintiff's petition alleges without qualification that the "said Elizabeth A. R. Brown is in possession of, and claims to be the owner of said lands, by virtue of said act of sale, etc." Besides, the transfer is not attacked in the petition as *a dation en paiement* inoperative for want of delivery, but as a *simulated sale*.

The plaintiff's objection that defendant could not prove what was the real consideration of the transfer; that the act declared the consideration to be cash, and that it was not competent to show that it was notes of the vendor, is not well taken. C. C. 1900. "If the cause expressed in the contract should be one that does not exist, yet the contract can not be invalidated if the party can show the existence of a true and sufficient consideration."

When a contract, therefore, *is attacked* on the ground that the expressed consideration does not exist, or that there was no consideration for it, the party may show other consideration than that expressed in the contract. The court below improperly sustained said objection, and we have given effect to said evidence, which is in the record. Under the view we have taken it is unnecessary to notice the other bills of

exception in the record, as the matters to which they relate do not affect the grounds of our decision.

While, therefore, we hold that the transfer by John W. Brown to the defendant was not a simulation, it may have been intended as a fraud on his creditors, or it may have been to a large extent a gratuity to her, and prejudicial to the reserves of his forced heirs. The action of the creditors to annul is doubtless barred, but the forced heirs may have right to proceed against defendant for reduction and collation, in so far as the transfer may have been gratuitous.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now decreed that plaintiff's demands be rejected at his costs in both courts.

ON REHEARING.

MANNING, C. J. Upon a re-examination of the grounds of our opinion, we see no reason to change our decree.

It is therefore ordered that our former decree remain undisturbed.

No. 7074.

THE JEFFERSON AND LAKE PONTCHARTRAIN RAILWAY COMPANY VS. THE CITY OF NEW ORLEANS.

Under the present charter of the city of New Orleans, the city may obtain the dissolution of an injunction against it, without furnishing the bond and security required of other litigants by article 307 of the Code of Practice.

A defendant in injunction, on complying with the law, may have the injunction set aside in every case where its dissolution will not work irreparable injury to the plaintiff.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Geo. L. Bright for plaintiff and appellant.

B. F. Jonas, City Attorney, for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. The city was enjoined from using and maintaining on the land of the plaintiff, a canal running from North Line Street to Lake Pontchartrain, and from draining into said canal, and over the property of the plaintiff, and from entering upon the land of the plaintiff and from trespassing thereon, and from preventing the plaintiff's damming said canal so as to prevent the city's draining therein.

The district court permitted the city to bond the injunction, and dispensed the city from giving security.

From this order the plaintiff appealed.

The right to bond is claimed under article 307, C. P., and to bond without security, under sec. 33, City Charter. E. S. acts 1870, page 44.

Art. C. P. 307 provides: Whenever the act prohibited by the injunction is not such as may work an *irreparable* injury to the plaintiff, the court may in their discretion dissolve the same: provided the defendant execute his obligation in favor of the plaintiff, with the surety of one good and solvent person residing within the jurisdiction of the court, for such sum as the court may determine, according to the nature of the case, as security that he will deliver the property in dispute in the same state in which it was at the moment of issuing the injunction, and that he will pay besides to the plaintiff all damages he may have sustained by this act, if a definitive judgment be rendered against him in the suit pending.

Two questions are presented for determination: First—Is this a case in which the City can be dispensed from furnishing the bond required by art 307 of the C. P.? Second—Is the act prohibited by the injunction such as may work an irreparable injury?

I.

Plaintiff's action is a judicial proceeding, in which one of the litigants is the City of New Orleans, and the City's Charter provides: that it shall be dispensed from furnishing bond or security in all judicial proceedings where—by law—bond and security are required from litigants—The Judge of the lower court properly held that—under the provisions of its charter, the City could obtain a dissolution of the injunction issued against it, without furnishing bond and security. For the damages which may result from that dissolution, every one of the inhabitants who reside within the limits of this vast corporation is answerable, and when and where all are bound, it would have been mere surplusage to add a separate and individual obligation, to a collective and corporate responsibility.

II.

Is the act prohibited by the injunction one which may cause an irreparable injury to plaintiff? What is the act complained of? Does it involve a change of any one of the parties' possession, or a change of their respective positions, as they existed at the date of, and immediately preceding the issuance of the injunction?

Plaintiff alleges that in August 1871—more than six years ago—the commissioners of the second drainage district forcibly, wrongfully and illegally entered upon its land, and—then and there—begun to dig a canal, afterwards completed by the city—which extends from North line Street, and through the entire length of said land, to lake Pontchartrain, a distance of 16,459 feet. That, by means of that canal, the waters and

filth of the City have been carried over the property of plaintiff, which—for this and the other causes it alleges—claims from the City the sum of one hundred thousand dollars, and asks that it be perpetually enjoined from draining into said canal.

Had the court refused to dissolve the injunction, it is manifest that, during the approaching summer and fall, a considerable portion of the City would have suffered from an inevitable accumulation of rain water, the stagnancy of which might have caused material injury and endangered the public health—whilst, so far as plaintiff is concerned, the injury it apprehends is not of an irreparable character, and can hardly be compared to that which might result from the unexpected suspension of a legitimate or usurped privilege, the exercise of which plaintiff appears to have silently tolerated from 1871 to 1877. Its prolonged tolerance may not amount to a renunciation of its alleged rights, but it justifies the action of the lower Court. The dissolution of the injunction did not—in the least—reduce the extent of plaintiff's possession, as enjoyed by it at and before the date of the injunction. That dissolution merely reinstated the parties in the position which they had previously occupied, and provisionally continued a state of things abruptly repressed and which—before the repression—had openly existed for upwards of six years. In this there is no error.

The judgment appealed from is—therefore—affirmed with costs.

Mr. Justice EGAN took no part in the decision of this case.

No. 6805.

F. A. LULING vs. LABRANCHE, TAX COLLECTOR.

A planter or manufacturer who keeps such articles of merchandise only as are needed by laborers on his plantation, and sells them only to those laborers, and not to the general public, is not a retail dealer within the meaning of the revenue act, and hence is not subject to the license, or tax imposed on retail dealers.

APPEAL from the Parish Court of St. Charles. *Harper*, J.

James D. Augustin for plaintiff and appellant.

H. N. Ogden, Attorney General, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff was required to pay the State and parish licenses for keeping a retail store, wherein goods, wares, and merchandise were sold. The process sued out here is an injunction restraining the tax collector from enforcing the payment of the sums

demanded for licenses, and is grounded on the alleged fact that the plaintiff is not a retail dealer or storekeeper, in the proper and statutory sense, but keeps such articles of merchandise only as are needed by the labourers on his sugar plantation, and sells them to those labourers alone, and not to the general public.

The proof is, that the plaintiff is not a merchant or 'storekeeper,' as these words are used in common parlance, but a planter, and manufacturer, on a large scale, employing over a hundred laborers—that he does not traffic as a merchant, and does not sell to, nor invite the public to buy from him—that he did make the experiment in 1876 of keeping an open and licensed store, but found it prejudicial to his employees, and destructive of order and discipline, and consequently abandoned it—that he has since supplied himself with the wares the labourers usually need, and these are delivered to them when needed, and the cost price with some small per centage added, is charged to the labourer and deducted from his wages, and that no one but the employees on the place are permitted to buy, or do buy.

On the other hand it may be urged, that selling to any one by retail brings the party thus selling within the meaning of the term, retail dealer, and that at two sessions of the General Assembly there has been a legislative interpretation of the meaning of that designation—first in 1866, when that body deemed necessary a special exemption of planters from paying the license of a retail merchant when they sold exclusively to their employees, (Acts 1866, p. 236) and again in 1868 when that exemption was repealed. Acts 1868, p. 119.

No doubt the first act was intended as a legislative declaration that planters, who sold to none but their employees, were not legitimately included within the designation, 'retail dealers', and the second act was intended to deprive the planters, who thus sold, of the benefit of that declaration. But the question is a judicial one now, that the designation of a class appears in the revenue act, without any explanatory or qualifying interpretation elsewhere.

The ordinance of the police jury uses the words 'each and every trade store, wherein goods, etc. are sold at wholesale and retail', and the tax collector exacts the license as due from a storekeeper selling general merchandise.

A person whose business or avocation is that of planter or manufacturer, and who keeps in store only such goods and wares as his employees require, and who sells to them alone and not to the general public and who sells, not as a retail dealer does, exclusively for the profit, but only as an advance to his labourers and an incident to his main business, and to promote its better administration, is not a retail dealer within the meaning of the revenue act, and the tax or license

imposed upon that class of persons by that act is not legally demandable from him.

It is in proof in this case that the plaintiff pays taxes upon an assessment of valuable property, including the sum employed as capital in trade, and under the proof before us in this record, he is not liable to the tax, the payment of which was refused.

The judgment is erroneous, and it is ordered and decreed that it is reversed, and the injunction is perpetuated at defendant's costs.

No. 7080.

JULES MAYRONNE, TUTOR, ET AL. VS. EUGENE WAGGAMAN ET AL.

Before an immovable, of which the widow in community and her minor children are the owners in indivision, can be legally sold, or mortgaged, it is necessary that a family meeting, legally constituted, shall set forth in its report that the sale, or mortgage, is of absolute necessity, or of evident advantage to the minors, and give its reasons for its determination.

A family meeting, partly composed of one or more persons who have interests in conflict with those of the minors, is not legally constituted.

APPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

Bentick Egan for plaintiff and appellant.

Alfred Grima for defendants and appellees.

The opinion of the court was delivered by

MARR, J. Eugene Hacker died in April, 1871, intestate, leaving a widow, Mrs. Agathe Leromain Hacker, and eight children, one of them wife of Numa P. Hacker, and seven minors. The widow was confirmed as natural tutrix of the minors, and Numa P. Hacker, their brother-in-law, was appointed under tutor. In April, 1872, about a year after the death of her husband, Widow Hacker, on her petition and prayer to that effect, was judicially recognized as widow in community, entitled in full ownership to one half and as usufructuary to the other half of the property inventoried in the succession, and was put into possession of the whole. The succession of Hacker was thus closed.

In June, 1872, Widow Hacker presented a petition in which she stated that the property of the succession consisted of real estate, with the buildings and improvements, some shares of stock in the People's Bank, and a hardware store, the business of which she had continued. "That in order to provide for the means to carry on her business properly for her wants and those of the minors, and for the purpose of paying the debts of the succession, it is necessary that she should

mortgage the real estate to the amount of six thousand dollars, and sell said shares, but she can not do this without the advice of a family meeting."

The family meeting was convened, and without assigning any reason for it, declared unanimously that it was "to the interest of said minors that the shares in the People's Bank be sold and that the immovable property * * * be mortgaged for the amount of ten thousand dollars."

It does not appear whether the members of this meeting were relations or merely friends of the minors, except that Hamilton N. Gautier, one of them, had married one of the minors, and Numa P. Hacker, the husband of another one of the daughters, in his capacity as under tutor approved the deliberations. The proceedings were homologated and the widow was authorized to sell the shares of stock and to mortgage the real estate; but, like the deliberations of the family meeting, this order is silent as to the terms or conditions of the sale and of the mortgage.

The widow, in her own right and as natural tutrix of her six minor children, Mrs. Eugenie Hacker, assisted by her husband, Numa P. Hacker, and Mrs. Léocadie Hacker, assisted by her husband, Hamilton N. Gautier, executed a promissory note at one year for $5000, and granted a mortgage in favor of Aimé Gautier to secure the payment, binding themselves jointly and *in solido*.

Referring to 28 A. 446, it will be seen that in January, 1873, Joseph Duvigneaud was appointed administrator of the succession of Hacker: that in July he filed a statement of debts, and obtained an order to sell the real property at one third cash, balance in one and two years: that Gautier intervened and obtained a modification of the order so as to require the sale to be for cash; and that, on appeal, this court held and decided in April, 1876, that the succession of Hacker was closed by the putting of the widow into possession as owner of one half and usufructuary of the other half: that the succession was no longer under the jurisdiction of the Second District Court; and that the entire proceeding was void.

In May, 1876, soon after this decision, Aimé Gautier, the mortgagee, obtained executory process on the note and mortgage. The execution of the writ was delayed by the opposition of Widow Hacker, then by her death, by the death of her daughter, Mrs. Numa P. Hacker, by the alleged refusal of Numa P. Hacker to qualify as natural tutor of his two children, minors, and by the marriage of one of the daughters, Malvina Hacker, to Jules Mayronne.

Mayronne qualified as tutor of the minors; and in his capacity and to authorize and assist his wife, he obtained an injunction, alleging sub-

stantially that the mother had no authority to borrow money and to bind them by note and mortgage, and that they received and she received no consideration for the same. They also prayed for damages for the wrongful seizure of the property.

Gautier answered by general denial, and prayed for the dissolution of the injunction with damages. The judgment appealed from dissolved the injunction with $500 damages, and two per cent additional interest, which latter was remitted.

The whole proceeding in this case is extraordinary. The appraised value of the succession of Hacker was $65,526. When the mortgage was granted by the widow, in July, 1872, the certificate of mortgages showed that there were no incumbrances on the property, except for the drainage tax; the vendor's mortgage to secure $2800 represented by two notes, which were exhibited to the notary and parties present, paid, cancelled and defaced; the recording of two bonds in 1868, the other in 1869, given by Hacker as treasurer of a fire company, and the general mortgage against Mrs. Hacker as tutrix.

The statement in Mrs. Hacker's petition, that she had continued the hardware business and that at the end of the first year it was necessary to sell the bank stock and to mortgage the real estate of the succession to provide means to carry on her business, ought to have alarmed the family meeting. Instead of refusing to consent to the extraordinary demand of the widow, this meeting was unanimously of opinion that she ought to be allowed, not only to sell the bank stock, but to mortgage all the real property for four thousand dollars more than she had had the courage to ask for in her petition. It is strange that the judge did not unqualifiedly refuse to approve and homologate these proceedings, which seem to have been conducted in utter disregard of the rights and interests of the minors.

When it becomes necessary to call a family meeting, it must be composed of relations of the minor, if there be a sufficient number in the parish, or in an adjoining parish, within thirty miles. In her petition Mrs. Hacker gave the names of seven persons without reference to their relations to the minors, nor are they in the judge's order appointing them, nor in any part of the proceedings, as far as we have discovered, styled "friends." It appeared on the trial of this case that one of them was a clerk in the hardware store in which Mrs. Hacker and Gautier were partners. The mortgage shows that Gautier, one of the members, was the brother-in-law of the minors, but, as we shall presently see, he was incompetent by reason of his interest conflicting with that of the minors: R. C. C. 283; and Numa P. Hacker, the under tutor who assisted and who approved the deliberations of the meeting, occupied a position equally disqualifying.

Put into possession as absolute owner of one half and as usufructuary of the other half of property inventoried at more than sixty-five thousand dollars, Mrs. Hacker found it necessary, within about a year after the death of her husband, to ask for a loan of six thousand dollars, on mortgage, and for an order to sell the most available of the personal property, the bank stock, to enable her to carry on properly her hardware business which she had continued without interruption from the death of her husband. Of course, it did not long survive under such management, and was bankrupt within a few months after this temporary relief.

The law declares that the immovables of the minor can not be alienated nor mortgaged, unless, on the representation of the tutor that it is for the interest of the minor, a family meeting shall declare that the sale or mortgage is of absolute necessity, or of evident advantage to the minor. R. C. C. 339. How could any one imagine that it was either absolutely necessary or of evident advantage to these minors that their property should be incumbered to provide their tutrix with means to carry on her mercantile business, which was hastening, under her management, to its ruin?

In case the family meeting shall consider the sale or mortgage to be advantageous to the minor, "it shall set forth the reasons of its determination in order that the judge may decide whether he ought to cause it to be homologated, and shall fix the terms of credit on which the property shall be sold, and the other conditions of the sale, if the case requires it." R. C. C. 340.

There is not one word in the deliberations of this meeting approximating a reason for its determination, nor as to when or how the stock shall be sold, whether for cash or on credit, whether by public or private sale, whether with or without notice by publication or otherwise; nor is there any thing said about the stipulations in the mortgage, nor the rate of interest to be paid, nor on what credit the mortgage debt is to be contracted.

Several witnesses were examined on the trial, among them Hamilton N. Gautier, and the book-keeper and other employees of the hardware concern. These witnesses say that the debts of the succession were $20,000; but not one of them could give the name of a single creditor. The style of the business was Hacker & Co., and Numa P. Hacker was a partner with Mrs. Hacker at one time; but it does not appear when he became or when he ceased to be a partner. Hamilton N. Gautier was a partner at the time the mortgage was granted; but whether he and Numa P. Hacker were partners at the same time it does not appear.

Aimé Gautier, in whose favor the mortgage was made, was the

father of Hamilton N. Gautier. It is not pretended that he lent Mrs. Hacker $5000. The testimony, very unsatisfactory in this respect, tends to show that he discounted the $5000 note at eight per cent, and that, at different times, he handed to his son the proceeds, $4600, part of it before the execution of the mortgage. Hamilton N. Gautier says the debts of the store, contracted after the death of Hacker, amounted to some thirty to forty thousand dollars. Whatever money Aimé Gautier advanced, the whole of it was deposited in bank to the credit of the account of Hacker & Co., and it was checked out like any other money belonging to that account. Nothing shows that Mrs. Hacker ever touched or had personally the benefit of a single dollar of this pretended loan, except, as Gautier says, it was carried to her credit on the books of the concern, and though the witnesses were pressed, one and all, they could not give the name of a single creditor of the succession of Eugene Hacker, nor the amount of a single debt of that succession, to which any part of the money was applied. It fully appears that Hamilton N. Gautier was actively managing the business at the time of this pretended loan, as one of the partners; and it is most extraordinary that he could not give the name of any creditor nor the amount of any debt of the succession paid out of this loan.

In July, 1873, when Duvigneaud, in his capacity as administrator, presented a statement which he said contained all the debts which he had been able to ascertain at the end of six months after his appointment, the whole consisted of a judgment in favor of the attorney who represented Mrs. Hacker in the early stages of the proceeding up to her confirmation as natural tutrix, say for $876 50, about $120 due to three insurance companies, the taxes for 1871 and 1872, and the costs and expenses of the administration. If the succession was so largely indebted, how can the silence of the creditors for more than two years after the death of Hacker be accounted for? This record does not disclose even the name of a creditor, except as stated by Duvigneaud; and we have seen that Hacker left his property virtually unincumbered.

The whole case indicates the utter want of consideration for the note and mortgage, so far as the heirs of Eugene Hacker are concerned. As to the minors, the note and mortgage are absolutely void. As to the two major heirs who joined their mother in these contracts, the testimony makes it more than probable that they were deceived and were in error; that the pretended loan was exclusively for the benefit of the partnership of which their husbands were members, debts of the respective communities for which they could not lawfully make themselves liable; but we will not conclude the mortgagee with respect to these major heirs, because he may have rights against them which can be established under proper issues by additional proof.

Mrs. Numa P. Hacker left two children, minors. Their father, natural tutor, did not appear to represent them, and a tutor *ad hoc* was named by the court to represent them in the executory proceeding.

It seems more than probable, from the mismanagement of the hardware business, that the minors, for whom their mother was tutrix, will have mortgage rights against her succession which will exceed in amount the entire value of her interest in the remnant of the succession, the real estate, and that they would be preferred to the mortgagee, Gautier. Enough appears to warrant the perpetuation of the injunction, and to compel Gautier to proceed *via ordinaria* to establish his rights, whatever they may be, against the succession of Mrs. Agathe Leromain Hacker, against the succession of Eugenie Hacker, late wife of Numa P. Hacker, and against Mrs. Léocadie Hacker, wife of Hamilton N. Gautier, on the note and mortgage in question.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the note at twelve months for $5000, dated 29th July, 1872, and the mortgage executed by Mrs. Agathe Leromain Hacker, in her own right, and as natural tutrix of her minor children, and by Mrs. Eugenie Hacker, wife of Numa P. Hacker, authorized and assisted by her husband, and by Mrs. Léocadie Hacker, wife of Hamilton N. Gautier, authorized and assisted by her husband, in favor of Aimé Gautier, to secure the payment of said note, passed before Armand Pitot, Jr., notary public, on the thirtieth of July, 1872, be and the same are hereby declared and decreed to be null, void, and of no effect so far as are concerned the minor heirs of Eugenie Hacker and Agathe Leromain Hacker, for which minors the said Agathe Leromain Hacker acted as natural tutrix in the granting of said mortgage, as to whom and their property the claim and demand of Aimé Gautier are rejected; that the rights of said Aimé Gautier, whatever they may be, against the successions of Mrs. Agathe Leromain Hacker and the deceased daughter, Mrs. Eugenie Hacker, and against Mrs. Léocadie Hacker, wife of Hamilton N. Gautier, be and the same are hereby reserved; that the injunction herein granted against the executory proceeding by Aimé Gautier be and it is hereby reinstated and made perpetual; and that Aimé Gautier, appellee, pay all the costs of this proceeding in the district court, and in this court. The claim of the plaintiffs in injunction for damages for the alleged wrongful seizure of the mortgaged property is dismissed as in case of nonsuit.

No. 7128.

THE STATE EX REL. NEW-ORLEANS PACIFIC RAILWAY COMPANY VS. FRANCIS T. NICHOLLS, GOVERNOR, ET AL.

The Funding Act of the Legislature, approved January 24, 1874, contemplated in its purpose, and embraced in its provisions, only the actual debt of the State. It excluded the contingent liability of the State embodied in the bonds loaned to the Citizens' Bank, and the Consolidated Planters' Association.

In the interpretation of a law the motive of the lawmaker, and the meaning and scope of the law, may be sought for in contemporaneous history, in the discussions attendant on the progress of the legislation, and in subsequent legislation on the same, or on cognate matters.

The constitutional amendment limiting the debt of the State to fifteen millions of dollars only restrains the Legislature from increasing the actual, or present debt of the State beyond that sum. It does not inhibit any increase of the contingent liability of the State.

Until the actual debt of the State has reached the limit of $15,000,000, it is competent for the Legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided that in the act creating the debt, adequate ways and means are provided for the payment of the current interest, and of the principal when it shall become due.

The act of the Legislature of March 11, 1878, authorizing the issue of bonds of the State in aid of the New-Orleans Pacific Railway Company is not repugnant to the constitutional provision prohibiting aid to a private purpose.

APPEAL from the Fifth District Court, parish of Orleans. *Rogers*, J.

Kennard, Howe & Prentiss, Thomas J. Semmes, John Finney, and *Henry C. Miller* for relators and appellants.

H. N. Ogden, Attorney General, for the defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. The General Assembly at its last session passed an act authorizing the loan to the relator of the bonds of the State to an amount not exceeding two millions of dollars, the first issue of which should be for the sum of two hundred and fifty thousand dollars only, and providing for subsequent issues upon certain conditions being complied with. Acts 1878, p. 105.

The Governor, in approving the act, signified his intention to provoke a judicial decision upon the constitutional questions involved, and accordingly refused to sign and issue the bonds, whereupon the relator took this proceeding by mandamus to compel the Governor, the Auditor of Public Accounts, and the Secretary of State, to issue two hundred and fifty thousand dollars of bonds of the State in accordance with, and for the purposes expressed in, the act.

The respondents aver that the act is unconstitutional, in that it violates the amendment of the constitution which limits the State debt to fifteen millions of dollars; and because the constitution prohibits the

legislature to contract a debt exceeding one hundred thousand dollars, except in certain specified emergencies, of which this is not one, without at the same time providing adequate means for the payment of the current interest, and of the principal when it shall become due; and further because it is an attempt to use the taxing power of the State to aid a private enterprise.

The Funding Act was approved January 24, 1874. Its object and purpose was to reduce the floating and bonded debt of the State, and to consolidate it by authorizing the issue of bonds, which should be exchanged for all valid outstanding bonds theretofore issued, and for all valid warrants drawn previous to its passage, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and valid warrants. The 13th section enacted, that the entire State debt prior to the year 1914, shall never be increased beyond fifteen millions of dollars, the intent and object of this reduction and consolidation being to restrict the whole indebtedness of the State to a sum not exceeding that sum, and to agree with the holders of the consolidated bonds that this indebtedness shall not be increased beyond that sum during the period mentioned in the act. On the same day an amendment to the constitution was approved, to be thereafter submitted to the people for ratification, declaring that the consolidated bonds, to be issued by authority of, and in conformity to the legislative act of same date, created a valid contract between the State and the holders of them, which the State should in no wise impair; and that whenever the debt of the State shall have been reduced below twenty-five millions of dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased, and that this rule shall continue in force until the debt is reduced to fifteen millions, beyond which it shall not be increased. Acts 1874, pp. 39–43. This amendment has become a part of the constitution by its subsequent ratification by the voters at the polls.

This legislation—the funding bill, and the act proposing the constitutional amendment—followed immediately upon the submission to the General Assembly of the Auditor's report, dated January 1, 1874, wherein is this statement and information.

"The present market value of the actual debt of the State, funded and floating, is about fourteen and a half millions. I have the assurance of large bondholders, at home and in Europe, that if the limit of our debt by constitutional amendment, should be fixed at fifteen millions of dollars, they would accept a new consolidated bond at its face value, and surrender in exchange their old obligations (bonds of all classes and outstanding warrants) at their market value, say about sixty cents on the dollar. The plan of this funding of the State debt is being pre-

pared in detail, and will be submitted for action at an early day during the present session."

The sequence of the events, and the conformity of the legislation to the idea of the report, shew that the 'plan' thus referred to is the Act, shortly afterwards passed.

The same Report states the debt of the State at that time to be,

Bonds outstanding January 1, 1874	$22,433,800.00
Auditor's warrants (old)	1,565,702.08
Auditor's warrants (new)	225,051.22
Certificates of indebtedness	131,785.42
	$24,356,338.72

In a tabulated statement appended to the Report, and forming one of the exhibits, the "total amount of the bonded debt of the State for which the State is actually liable," is fixed at the figures above set forth, and there are then itemized other bonds for which the State is contingently liable, amounting to $4,803,683.33, which with a sum stated as the 'miscellaneous debts' of the State, make up a sum total of thirty millions of dollars. In exact figures, it is that sum, less eight thousand two hundred and seventeen dollars and seventeen cents.

The funding of that sum at the rate suggested by the Auditor, and adopted by the legislature, will create a consolidated debt of eighteen millions of dollars. The funding of the sum, stated by the Auditor as the actual debt of the State, will create a consolidated debt of a little less than fifteen millions.

It is obvious that the 'plan' both of the Auditor, and of the legislature, embraced only the latter sum, or in other words, that it excluded the bonds loaned to the Citizens' Bank and the Consolidated Planters' Association, which amounted in round numbers to the sum above stated, as debt for which the State was only contingently liable. We have therefore to consider whether the expression in the Act of 1874, which restricts the whole indebtedness of the State to a sum not exceeding fifteen millions of dollars, and the expression in the constitutional amendment, which declares that when the debt has been reduced to that sum, it shall not be increased beyond it, so control and define the meaning of the legislature in passing the one, and of the people in adopting the other, as to constitute an unqualified inhibition of any increase of the debt of the State, after the whole, both actual and contingent, has reached the prescribed limit.

A rule of statutory construction, the soundness of which is attested by long use, and the frequent and continuing approbation of judicial tribunals, is that the intent of the law-maker is to be ascertained by inquiring what was his motive in legislating—what was the mischief sought to be avoided or remedied, and what the object or good to be

attained. Contemporaneous history may be resorted to, and the discussions attendant upon the progress of the legislation through its various stages, as well as the *projet* of the law, in order to discover the meaning and scope of the law itself. Subsequent legislation also upon the same subject, or upon cognate matters, is useful as furnishing an interpretation of previous words, and in fixing their import.

Now if we separate the expressions referred to from the act, and ignore the general tenour of the law, and disregard, or refuse to consider, its history and the circumstances attendant upon, and which provoked its birth, so to speak, there could be given but one construction of the phraseology of the thirteenth section of the Funding Act. And that construction is opposed by the history of the legislation, by the intent of its framers as disclosed at every anterior stage of its progress, by the reasons and motives which were assigned as inducements for its adoption, and by arithmetical demonstrations of the basis upon which the consolidated debt was calculated.

It is impossible that the contingent liability of the State, upon the bonds loaned to the Citizens' and Consolidated Banks, should have entered into the 'plan', because funding them with the other liabilities will produce a sum-total, greatly exceeding that fixed by the act and the amendment. It is equally impossible that the State should have contemplated and provided for the compulsory funding of bonds, upon which her liability had not attached, but which must necessarily be contingent for many years after the whole process of funding should have been completed. And we shall advert to this feature further on. In addition to this, we know the exact figures, taken as a basis, upon which new bonds, issued at the rate adopted by the funding bill, will produce the debt-limit, also adopted. You can not reach the end, set in view by the funding legislation, by any other road than that mapped out in the programme of its originators. Diverge from it in search of contingent liabilities at the extremity of one of its by-paths, and you can never reach the end, because you get back into it, burthened with a load which can not be constitutionally put off, and which inexorably stays further progress.

An examination of the action of the bondholders, and of the funding Board, will exhibit a conformity of view as to their understanding of the funding act. This is a summary of the State debt on the first day of the present year, exclusive of the bonds styled 'not fundable', as compiled by the present Auditor.

Consolidated debt January 1, 1878	$11,279,780.66
Outstanding old bonds when funded	392,280.00
Outstanding general warrants when funded...	113,232.55
	$11,785,293.21

and this is the total amount of Consols, after every bond and warrant has been funded, the funding of which was contemplated under the theory we have adopted.

But it is said one of the holders of the bonds loaned to the consolidated Planters Association has not acted on this theory, and we have encouraged others to follow his example. Lesassier & Binder have obtained a decree, authorizing the funding at sixty cents on the dollar of three thousand dollars of those bonds. The questions presented in the present case were not considered by us in that case. But suppose all the holders of those bonds should apply to have them funded. The whole amount of them thus loaned, and outstanding, including those in the Lesassier case, is $506,350.00. Exchange these for consols at the funding rate, and the total debt of the State, exclusive of the loan to the Citizens Bank, is when funded, twelve millions and eighty nine thousand one hundred and three dollars and twenty one cents. ($12,089,103.21)

If the whole of the two millions, contemplated by the Act of 1878, shall be issued, the debt will be below the constitutional limit, unless the figures and tabulated statements of the auditing officers of the government are incorrect.

It is urged upon the part of the respondents that the question, whether the bonds loaned to the property banks are to be considered as a part of the indebtedness of the State, has been already answered adverse to the theory of the relator, in the opinion read by our immediate predecessors in Salomon v. Graham, 23 Annual, 402. But that case was decided in 1871, before the project of funding was conceived—before the 'plan', which eliminated these bonds from the debt to be funded, was formed or considered, and of course before that plan was perfected by legislative and constitutional enactment.

The limit then prescribed to the debt was twenty-five millions, and manifestly the word was there used, and was then construed, to include all that could be included in that designation, present or prospective. There had not then been any suggestion or scheme to separate the public debt into two classes, one of which was to be funded, and the other not. The constitutional amendment containing that limitation was not preceded by any act or legislative declaration, shewing that what was meant by the debt of the State was other than its whole indebtedness, however created or arising. The inhibition then was that no future debt should be created that would increase the sum total beyond twenty-five millions. The later inhibition was that no present debt should be funded which would increase the debt, intended to be consolidated, beyond fifteen millions.

So far from that decision militating against the position of the relator, it goes to confirm the idea, that the later amendment had that in

view, and in adopting, as a basis for calculation, the actual debt, to the exclusion of the contingent debt, had in mind the fact that the latter had been judicially construed to be a part of the general debt, and did not provide for it to be funded, because it was contingent.

The Funding Act came under the review of the Supreme Court of the United States in 1875, when the court said;—"it is contended that the State has deprived itself of the right to issue any bonds at all, except the consolidated bonds created by the Funding Act, to be exchanged for outstanding debts already existing," and this proposition was not mentioned approvingly, although it was not ruled on, being unnecessary in that case, but in the concluding part of the same opinion, the court say in reference to the disposition to be made of the unissued portion of consols;—"it may be objected to this view, that the bondholders of the State may refuse to come in and make the sacrifice required by the act; and in such case, the State ought not to be for ever precluded from making such other disposition of the unissued consolidated bonds as may be beneficial to it, without being injurious to those who have accepted such bonds. If such a state of things should arise, after due time and opportunity shall have been given to test the practicability of carrying out the scheme, it will undoubtedly furnish proper ground for modified legislation, having due regard to the rights already vested." Board of Liquidation v. McComb, 2 Otto, 531.

Due time has now been given to test the practicability of carrying out the scheme. Four years have passed since the funding bill became a law, and we now know that nearly all the holders of the State's bonds have not refused to come in, but have consented to the sacrifice, and sufficient time has been given to the holders of the residue of the fundable bonds and warrants for them to come in, and share the advantages of the scheme. We also know that the holders of the bonds loaned to the Citizens Bank will not come in, since their bonds are not a part of the debt fundable in consols. Shall the State be forever precluded from making any other disposition of the unissued consolidated bonds that may be deemed beneficial to it by the legislature?

There is not wanting legislation evincing an animus to prevent any part of the fundable debt, which shall remain unexchanged for consols, from being redeemed or the interest upon it paid. It would be difficult to devise an enactment, more stringent or more comprehensive, than that which deprived any officer of the State of the power to assess, collect, or enforce the payment of any tax for the payment of any of the bonds, or the interest thereon, which were contemplated to be funded by the Act of 1874—which prohibited to all courts and judges, or any tribunals, to entertain or take jurisdiction of suits to enforce the payment of such tax—which declared that such tax shall not be recorded by any

officer so as to operate a lien, and if recorded, that it should not operate a lien—which abrogated all penalties for the non-payment of such tax, and declared that the bonds of tax collectors should not cover such tax, and if they collected it, neither themselves nor their sureties should be liable to pay it to any person. And in the same act, to ensure the payment of the new consolidated bonds, principal and interest, and to attract the confidence of the old bondholders to them, they were exempted from the provisions of these copious and all embracing prohibitions. Acts 1874, p. 94.

We have before said that controversy of the policy or impolicy, the good or bad faith, of the Funding Act is closed, because of the numerous and grave complications that would arise upon, and from, the opening of that question. Lord Cecil vs. Board of Liquidation, *ante* 35. We regard the faith of the State as irrevocably pledged to the payment of her consolidated bonds, issued under authority of that act, and to the payment of such other bonds as may be issued under the sanction of the decree we shall make herein. The contract with the holders of these bonds, is one which, in the language of the constitutional amendment, the State can by no means and in no wise impair. This utterance, fortified by judicial sanction, contains the double assurance to the bondholders, that their securities shall not be impaired or imperilled, and to the tax payers, that their burthens shall not be augmented beyond the constitutional limit. Until the actual debt of the State has reached the limit of fifteen millions of dollars, exclusive of the contingent liabilities which were not embraced within the Funding Act, and the constitutional amendment, it is competent for the legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided other requirements are complied with, and we shall now proceed to the inquiry whether these requirements have been complied with in the present instance.

Has the legislature complied with the constitutional requirement of providing in the law creating this debt adequate ways and means for the payment of the current interest, and of the principal when it shall have become due. The relator is required by the Act to deposit its own first mortgage bonds with the Auditor, and to pledge them to the State, for the guarantee of the payment of the State bonds which shall be issued, to an amount exceeding by one fourth the amount of the State bonds delivered to the Company. The whole amount of bonds to be issued by the company is restricted to five millions, one half of which will be thus pledged for the redemption of the State bonds, in the event the full issue of the latter authorized by the Act is made, and this restriction is evidently made to prevent the weakening the security which the State has required for her protection. Fifty thousand dollars of the State bonds

are to be extinguished annually by the company, commencing five years after the completion of its line to Shreveport, and this annual rate of extinguishment is to continue until the near approach of the maturity of the State bonds, when they are to be extinguished in such annual proportion as shall ensure the payment and cancellation of the whole of them by their maturity.

It may be that these salutary precautions will not completely ensure the object for which they are made. Human affairs depend upon too many contingencies to enable the wisest individual, or the most prudent public Body to concert a scheme, which is to be practically worked out in the future, and provide with unerring certainty for the attainment of specific results. The legislature has provided the 'adequate means' in the constitutional sense.

The third and last objection to the constitutionality of the Act is, that the State has not the right to assume or create a debt, which must eventually be met by the use of her taxing power, in aid of an enterprise of this kind.

The argument is that this enterprise is *private*, as contradistinguished from *public*, and hence that the public money cannot be rightfully appropriated to its aid. The discussion of this question was at one time practically useful, as well as theoretically interesting. Nearly all the States, if not quite all, have been at one time or another violently agitated by this controversy, and when the arena of conflict was transferred from the hustings to the courts, each side found ample grounds to fortify it in its opinions. There was rarely an unanimous court in pronouncing a judgment for or against the power, and opinions are yet divided between the disputants as to what should have been the judgment pronounced. But as a practical question, it no longer has any interest. The battle over it has been fought, and has been lost by those who denied the possession of the power. A judge, who took pains to collate the information, says the legislation has been sustained in nineteen out of twenty-one States. Swayne, J. in Talcott's case, 19 Wall. 666.

It may now be regarded as settled doctrine in this country that no tax can be legally authorized for a purpose which is private, or to put it in another form, for a purpose which is not public. It is not however quite plain always what is a public purpose, but the great preponderance of judicial judgments is in favor of the competency of a legislature, in the absence of constitutional restraint, to authorize loans to railway companies, and to provide for their payment by the issue and sale of bonds. But a statute which authorizes the issue of bonds, to be redeemed by taxation, in aid of classes or individuals, or in aid of manufacturing enterprises of individuals or private corporations is void, because it falls within the meaning of the rule which prohibits aid to a

private, as contradistinguished from a public purpose, although the local public might be benefitted thereby in a collateral way. Dillon, Munic. Corp. §586-591. Monograph Munic. Bonds, 2 South. Law Rev. 438.

The bonds authorized by the Act of March 11, 1878, fall within the former class, and the provision for issuing them, under the conditions therein imposed, is not repugnant to the constitution. Therefore,

It is ordered, adjudged, and decreed, that the judgment of the lower court is avoided and reversed, and that the mandamus be made peremptory, ordering the signing of bonds of the State to the amount of two hundred and fifty thousand dollars, and their delivery, to the relator, upon compliance by the relator with the conditions of the above named Act, and that the respondents pay the costs hereof.

DISSENTING OPINIONS.

EGAN, J. However important the interests to be advanced by the decree in this case, as manifested by legislative action, I am unable to agree with the conclusions arrived at by a majority of the court. In my opinion the fact that the property bank bonds are secured collaterally to their full amount does not make them any less a part of the debt of the State nor their obligation upon the State any less binding. It may be that those securities may prove ample for their redemption, or they may not. In this day of wonderful reduction of values, whereby fortunes heretofore deemed large disappear as if by magic, and contrary to all reasonable human calculation, we are daily taught the instability of all securities. In what situation, let me ask, will the State be placed if to-day we authorize and decree the issuance of two millions of new bonds of the State, and to-morrow, or a few years hence, she is called upon to redeem her solemn unconditional promises to pay the property bank bonds. What barrier and what defense is to be interposed? Surely not the existence of these new obligations of the State which swell its liabilities beyond the constitutional limit; and if not, then the practical consequences of the violation of its contract and of the constitutional amendment will have to be met by the State amid many embarrassments. Should a contest arise between the holders of the consolidated bonds and those of this new issue, notwithstanding the present decree, what must be its inevitable result? But however much these considerations might induce us to pause at the possibility of the State and the holders of its obligations being placed in such embarrassing position, this is not the question now. The sole question is whether the contemplated issue in favor of the relator will be in excess of the limit placed upon the State debt by the constitutional amendment of 1874.

In my opinion the reasoning of the court and its decision in the

case of the State ex rel. Salomon & Simpson vs. Graham, Auditor, 23 An. 402, is as applicable to-day as when it was rendered *as to what constitutes "the State debt,"* and is unaffected by the fact that the late amendment has reduced the limit of that debt below that then existing. It was then held that the property bank bonds constituted and must be counted and considered as part of the debt of which they have all the characteristics, form, and obligations. The opinion and decree even of the present bench in the case of Lesassier & Binder vs. the Board of Liquidation is in accordance with the same view. That suit was brought under the provisions of the funding bill upon some of these very property bank bonds, and by our decree we declared them to be debts of the State possessed of all the qualities and characteristics which entitle them to be funded, and it was not even attempted to be urged as a defense that they were not fundable, for the reasons now urged. In point of fact, we know from current history that the same view is taken by the Funding Board itself since the last quoted decision. If so, then what becomes of the argument derived from the amount of consols provided for by the funding bill and the amount of the State debt as estimated at the time of its adoption? Whatever the errors in those estimates, the terms of the amendment were made no less absolute, and the interests of those dealing with the State can not be affected by such error in the motive for the self-imposed curb on its power to incur debts. If argument is to be drawn from that source and from the acts and motives of the Legislature and the circumstances which gave birth to and attended the legislation on this subject, why should we shut our eyes to the historic and important fact that in that unhappy period in the history of the State which originated the necessity and led to adoption of the funding scheme many and large issues of bonds were made which were known to be outstanding and included in the estimates of the amount of the State debt which were more than suspected of having been fraudulently or illegally issued, and many of which were contested by the Attorney General and Auditor, and that large classes and amounts of bonds were in the opinion of the Legislature itself, as declared in the supplemental funding bill, proscribed and prohibited from being funded without prior judicial inquiry and sifting of their character and basis. From these facts it is evident that the Legislature expected and had good reason to expect that enough of what was estimated as forming part of the State debt would be rejected on such judicial inquiry to reduce it when funded within the fifteen million limit, or even below it, but which possessing on their face all the characteristics of obligations of the State, and being supported by the form of legislation, are and must continue to be included in all estimates of State liabilities until the contrary is decided.

Again, what was the funding bill but a new contract tendered by the State to its creditors, which they might or might not accept for reasons satisfactory to themselves; as for instance in the case of the holders of the property bank bonds, because they might consider the existing security sufficient for their ultimate redemption to their full amount. That this was a reasonable and probable view of the matter is made the more manifest by the fact that up to this time after the offer and opportunity has remained open for several years, less than twelve millions of the consolidated bonds have been applied for or issued. This then disposes of the argument drawn from the relative inequality of the estimated State debt with the addition of the property bank bonds and the amount of consolidated bonds provided for. But aside from the foregoing considerations, the language of the constitutional amendment placing a limit upon the amount of the State debt is plain and unambiguous, and its letter can not be disregarded under the pretext of pursuing its spirit. C. C. art. 13. The amount of issue was however under legislative control should that provided for be found insufficient.

I can not, therefore, assent to the force of the arguments arrayed in the opinion of the majority of the court drawn from their view of what was the legislative intention in proposing or that of the people in adopting the constitutional amendment. In point of fact, however, it is well known that the relative amount of debt and new issue of bonds provided for was little known or considered by the people at large in adopting the amendment, and that they were readily inclined to place a check in the form of a constitutional amendment upon the spoliations to which under the forms of law they had been of late so freely subjected. They accepted the amendment according to its plain letter and the evident meaning of its language. Is it then surprising if the large class of foreign and non-resident holders of the State bonds have accepted or should interpret the funding bill and the constitutional amendment to mean what it says? That "the whole State debt" should not be increased beyond fifteen millions before the time fixed in the amendment? This view alone seems to me consistent with the preservation of the public faith, upon which the whole credit of the State rests, and which it is all important to keep sacred. I am, however, consoled by the reasoning by which a majority of the court have reached their conclusions, and by the consequence of that reasoning and view of the question, that it manifests careful regard for the public faith and obligations, and only determines that the limit of fifteen millions of State debt, as contemplated by the amendment, *has not been reached*, and *not* that it shall be overstepped; and also by the fact that the bonds to be issued to the relator *do not and can not participate* in the benefits secured to the consolidated bonds issued or to be issued under the funding bill, as they are themselves not fundable.

It has been argued that the State has the power and right to withdraw its offer to fund, which can not be required to remain always open. Concede that this is so, it is sufficient answer to say that the State has not withdrawn its offer, but on the contrary still continues the functions of the funding board, and makes appropriation for its expenses; and that so far from the discontinuance of funding, it has gone on since the passage of the act relied on by the relator, and is going on as we write. The fact then still remains that the consolidated bonds are so secured and guarded that they should, and no doubt will, with a reviving prosperity, to which it is hoped the project of relator will largely contribute, soon be ranked among the best of public securities. Believing, however, as I do and as the court has decided, that the property bank bonds are absolute and unconditional, and not, as argued, mere *contingent* obligations of the State, and the amount of the (it being conceded counting them outstanding) State debt at the time of the passage of the act providing for the issuance of the bonds for the benefit of relator was or would thereby be made in excess of the constitutional limit, I dissent from the decree in this case.

DEBLANC, J. I concur in the dissenting opinion of Mr. Justice EGAN.

No. 6831.

THE STATE VS. CHARLES ROLLE.

The law imposing a smaller license tax on proprietors of bars, or drinking saloons, kept on steamboats owned and registered in this State, than on the owners of bars kept on land, does not violate the clause of the constitution prescribing equality, and uniformity of taxation.

APPEAL from the Fourth Justice of the Peace, parish of Orleans. *Hernandez*, J.

Jas. C. Egan, Assistant Attorney General, for plaintiff and appellee.

Frank D. Cretien for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant has appealed from a judgment condemning him to pay to the State, as keeper of a bar-room a license of $85—as a grocer one of $15. The first mentioned of these licenses—that of $85—is claimed under section ten of act No. 14 of 1872, which reads as follows:

"From the proprietors of all coffee-houses, bar-rooms, beer-saloons or gardens $85: from the proprietors of *all bars kept on steamboats, owned and registered in this State* $50."

Defendant resists the payment of the license of $85, on the ground that the section of the act of 1872, under which it is levied, discriminates between those who carry on land and those who pursue on water what he considers as being but one and the identical occupation.

In his book on Taxation, Burroughs says: that—except in only one of the States—the provisions as to equality and uniformity do not apply to taxes on licenses, whether those provisions be mentioned in the constitution or not, p. 167. The license is granted by the State under its police power: it is a personal privilege—not a contract: the tax paid is not regarded as the consideration which moves the granting of the privilege, which may be revoked, annulled or amended at the pleasure of the Legislature. Burroughs—p. 148, 392, 393.

It is true that, whether pursued on land or on water, the calling itself is the same; but, that in its exercise and results, one is different from the other, there can be no doubt: on water, the bar is entirely under the control of the officers of the boat, they can—according to circumstances—prevent or forbid the keeper from opening it, regulate or order its closing. Their interest is to check intoxication, restrain extravagant drinking and preserve quiet on the boat: on land it is otherwise; every one enters the coffee-house, and—far from restraining—the bar-keeper is generally disposed to encourage the abuse of intoxicating liquors, and often that abuse breeds disorder, violence and crime. Burroughs, 392, 393.

In its form, and in many of its effects, the bar-room on a steamboat is distinct from the bar-room on land, and—as the State has the power of dividing into classes the objects of taxation, the distinction which exists between those bars, justifies the difference made in the price of the licenses. 29 A. 283; 30 A.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Burroughs on Taxation, page 69.

No. 5964.

LOUIS SCHWARTZ VS. GEORGE CRONAN ET AL. GEO. A. FOSDICK & CO., INTERVENORS.

A contractor who furnishes materials for a building and fails to record his contract, acquires no lien on the building, and the lot on which it is erected, and hence, no creditor of his can acquire such a lien from him, either by subrogation, or in any other way.

No amendment of the judgment below will be made in favor of the appellee which he has not specially asked for.

One who sells to a contractor the raw materials which are actually used by the contractor, in a manufactured form, in constructing certain portions of a building, and who has served on the owner of the building an attested account of the amount due him by the contractor, is only entitled to recover from the owner such an amount of the sum due by the owner to the contractor, as has been adjusted, ascertained, and fixed, in some one of the modes pointed out by sections *two* and *three* of article 2772 of the Civil Code. Such a furnisher of raw materials can acquire no lien, or privilege, except as subrogee to such privilege as the contractor may have acquired and preserved.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins*, J.

Chas. S. Rice for plaintiff and appellee.

Thos. Gilmore & Sons for defendants and appellants.

Singleton & Browne for intervenors and appellants.

The opinion of the court was delivered by

MARR, J. This suit was brought to recover the balance of an account alleged to be due for materials furnished to Cronan, and used in the construction of St. Patrick's Hall.

The petition charges that the St. Patrick's Hall Association is indebted to Cronan under the contract with him in an amount exceeding plaintiff's demand; and that plaintiff served on the association a duly certified statement of the materials furnished by him, and caused registry of the same to be made in the office of the recorder of mortgages. The prayer is for judgment against Cronan and the association, *in solido*, with lien and privilege on the building known as St. Patrick's Hall, and the ground on which it stands.

Cronan admits that he purchased the materials, but denies that he is indebted for them; and he specially denies that plaintiff has any privilege or preference. The association pleads a general denial; and specially denies that plaintiff has any privilege as claimed by him.

Fosdick & Co., by intervention and third opposition, claim to be paid by preference the balance of an order given by Cronan to them, on the tenth June, 1874, payable out of the money coming to him for work done and materials furnished for the building, alleged to have been accepted by the association, verbally, on the day of its date, payable

whenever Cronan should be entitled to the amount free from any privilege or lien claims against him on the funds.

To this petition Cronan and the association answered by general denial. Schwartz in his answer alleges that the order relied upon by intervenors has no legal existence; that it was given without valid consideration; that it has not been accepted by the association; and that intervenors ought not to be paid out of the money in the hands of the association in preference to him.

There was judgment in favor of Schwartz, against Cronan, for $801 38, and against the association for $500, with privilege on the funds in the hands of the association on the 8th August, 1874, due to Cronan; and the residue in the hands of the association was reserved for ulterior adjudication. Fosdick & Co. and the association appealed separately; and Schwartz, in answer to the appeal, prays that the judgment may be so amended as to decree in his favor against the association the full amount of his demand, with lien and privilege on the funds belonging to Cronan, under his contract, in the hands of the association on the eighth August, 1874; and that "in other respects the judgment of the lower court be affirmed."

The account sued on was sufficiently proven as against Cronan; and the order relied upon by intervenors was shown to have been given in settlement of a judgment in their favor, rendered against Cronan in January, 1874. This order was given to the attorneys of intervenors. It was presented by them to John Henderson, the vice-president, who represented and acted for the association in all that pertained to the building of the hall. Henderson verbally accepted the order in the terms alleged, and it was left with him for payment; and he afterward made the two payments on account of it, as stated in the petition.

Cronan undertook to furnish certain iron work for the building, to put up the railing of the galleries, and to furnish mechanics to bolt and secure his cast iron work on Camp street, whatever that may have been, for the gross sum of $5070, without specification of the price of the several parts, except, so much for the cast-iron work, and so much for the wrought-iron work. There was no agreement as to when any part of this work was to be commenced or completed, nor as to when or how the payment was to be made. His agreement, such as it was, was not registered in the office of the recorder of mortgages; and, therefore, he was entitled to no privilege, and Schwartz could derive none from him by subrogation, or otherwise.

The privilege which the law grants to undertakers, workmen, and the furnishers of materials is, specifically, on the building and the lot of ground, not exceeding one acre, on which it is erected, R. C. C. 2772, 3249; and this is precisely the privilege which plaintiff asserted, and

sought to have enforced. We are relieved of the necessity of inquiring whether plaintiff had acquired and preserved this privilege in his own right, under articles 3249, 3272, of the R. C. C., because the judgment of the district court did not allow him this privilege, but accorded him a privilege on the money due Cronan, in the hands of the association, on the eighth August, 1874, the date at which plaintiff's claim seems to have been registered in the office of the recorder of mortgages, and at which he delivered a statement of his account to the president of the association. Plaintiff did not appeal from this judgment; and in his prayer for amendment of the judgment he asks that he may be allowed the same privilege on the money for the whole amount, instead of for part only of his demand; and that the judgment appealed from be in other respects affirmed. This is an acquiescence in the judgment disallowing the specific privilege asserted and demanded in the petition; and, while we incline to the opinion that he had no privilege on the building and lot of ground on which it is erected, we go no further now than to say that we have no power to review the judgment in so far as it disallows that privilege, because plaintiff did not appeal; and because of his prayer for the affirmance of the entire judgment, except as to the amount allowed him against the association.

Cronan was not an undertaker, in the ordinary sense of the term. St. Patrick's Hall was not built by an undertaker of the entire work. The different parts were done by persons whose bids or offers were accepted; and Cronan's bid for cast and wrought iron work to be used in the construction of the building, and for putting up the railings of the galleries, was accepted. In great part his undertaking was to furnish materials which those who constructed the building were to use and put in place.

Schwartz did not deal with the association. He sold to Cronan, at different times, in April and May of 1874, sundry lots of old iron, principally cast iron, which was not in a condition to be used in the building. The testimony makes it quite uncertain as to what part of the iron sold by him to Cronan was used in the building; but so much of it as was applied to that purpose was melted at Cronan's works, just as if it had been pig iron, and was cast into the shapes and patterns required in the construction of the building. He is to be dealt with, therefore, as the furnisher of raw material to a manufacturer who wrought and fashioned it into the perfected material which he, the manufacturer, had undertaken to furnish to the owner, to be used in the construction of the building.

Under the Code, the person who has contracted with the undertaker, and not with the owner of the building, has these remedies:

1. By art. 2770 of the R. C. C. masons, carpenters, and other work-

men, those who, in the language of Troplong, have done *un travail manuel* in the construction of a building, may bring a direct action against the owner, and may recover of him up to the amount which may be due by him to the undertaker at the time of the commencement of their action.

This article was copied into the Code of 1808, page 386, article 78, from the Code Napoleon, article 1798; and it was incorporated in the Civil Code of 1825, as article 2741, and in the R. C. C. as article 2770, without change. By its terms it does not include the furnisher of materials; and the French commentators and jurisprudence agree that he is excluded from its benefits. Troplong, *Échange et Louage*, 3, p. 260, number 1052; Marcadé, 6, p. 545; Guesdon c. Nannet, Sirey & Villeneuve, 1846, part 2, p. 262. It is a remarkable fact that neither the Code Napoleon nor the Louisiana Code of 1808 granted any privilege to the furnisher of materials. The Code of 1825 granted him a privilege only where he supplied the owner with materials which were actually used in the work. C. C. article 3216, number 3. It would seem from a comparison of this article with article 2743, R. C. C. article 2772, that a privilege on the building was allowed only to those who were employed directly by the owner, who contracted with him.

2. By article 2773, which is copied from the Code of 1825, article 2744, workmen, and those furnishing materials, who have contracted with the undertaker, may cause the moneys due him by the owner to be seized; and they are, of right, subrogated to his privilege on the building. By article 2774, this right of seizure extends to payments which the owner may have made to the undertaker by anticipation, that is, in advance of the time of payment fixed by the contract between the owner and the undertaker. See Baldwin's case, 11 La. 453.

3. As the furnisher of materials is not included in the terms of article 2770, Schwartz could not have brought suit under that article; and as Cronan, with whom alone he dealt and contracted, had no privilege, Schwartz acquired none from him by subrogation; and, therefore, he could have proceeded under article 2773 only by seizing in the hands of the association the moneys due to Cronan, including any payments the association may have made to Cronan in anticipation. As Schwartz did not proceed under this article, he is remitted to the act originally passed in 1844, re-enacted in 1855, and in the Revised Statutes of 1870, and incorporated in the R. C. C. as an addendum to art. 2772.

This Act was entitled originally "An Act to amend article 2744 of the Civil Code, to promote the better security of mechanics and others erecting buildings or furnishing materials, in the State of Louisiana." 1844, page 34. In 1855, page 327, it was re-enacted under the title, "An Act relative to mechanics' lien." In the Revised Statutes, it is placed in the title "privilege," under the heading, "enforcement of mechanics'

lien," p. 561, sec. 2879 *et seq.;* and in the R. C. C. it is inserted between article 2772, which was article 2743, and article 2773, which was article 2744. This whole matter would have been greatly simplified if the original design of the Legislature had been carried out, and this act had been accepted and treated as an amendment to article 2744; and if articles 2741, now 2770, and 2745, now 2774, had been stricken out and omitted in the Revised Civil Code. We must take the law as we find it, not as we think it ought to have been, and endeavor to ascertain the rights of litigants, in accordance with its terms and provisions.

The first section of this act authorizes workmen, etc., employed by a contractor, to deliver to the owner an attested account of the work they have done, and for which they have not been paid; and, thereupon, such owner shall retain, out of his subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing, etc.;" and section five extends all the provisions of the act to the furnisher of materials.

Section two makes it the duty of the owner to furnish his contractor with a copy of such attested accounts, in order that, if there be any disagreement between the contractor and these workmen and furnishers of materials, his employees and creditors, it may be adjusted amicably between them, or by arbitration. In case of failure of the contractor within ten days after the receipt by him of such copies to give the owner notice that he intends to dispute the claim, or if, in ten days after giving such notice, he shall refuse or neglect to have the matter adjusted, he shall be considered as assenting to the demand and the owner shall pay the same when it becomes due.

Section three provides for the adjustment of these accounts, and the ascertaining and fixing of the amount due, in case of dispute, by arbitration, on the agreement of the parties to submit the matter: the award of the arbitrators, in writing, to be final and conclusive.

Section four provides that, whenever the amount due shall be adjusted, as provided in sections two and three, if the contractor shall not within ten days after it has been so adjusted and ascertained pay the sum due to the creditor, with the costs incurred, the owner shall pay the same out of the funds, as provided; and the amount due may be recovered from the owner by the creditor of the contractor, and the creditor shall be entitled to the same privileges as the contractor, to whose rights the creditor "shall have been subrogated," to the extent in value of any balance due by the owner to the contractor, under the contract with him, at the time of the first giving of the notice, or subsequently accruing to the contractor, if such amount shall be less than the sum due from the contractor to his creditor.

Section six defines the payment by anticipation to be that which is

made by the owner to the contractor in advance of the sum due on the contract; and if the amount still due the contractor after such payment shall be insufficient to satisfy the demand made for work and labor done, or materials furnished, the owner sl all be liable to the amount that would have been due at the time of his receiving the account, in the same manner as if no such payment had been made.

There is some difficulty in construing this act, and in applying it to the case under consideration:

1. By the terms of section one it seems to be limited to those cases in which the building is constructed under a contract between the owner and the builder, or other person undertaking the whole work. As this is a remedial statute it should be construed liberally; and it would be but reasonable to apply it to all building contracts, whether the different parts are undertaken by different contractors, or the whole work is undertaken by a single contractor. St. Patrick's Hall was not undertaken by a single contractor; and the claim of Schwartz is for raw material sold by him to a person who had contracted to furnish a large amount of manufactured, perfected material, and to do but a very small part of the work of construction. In a letter addressed to the president of the association by Cronan, April 8, 1874, containing his entire proposition, which was accepted, and became the contract between him and the association, he says:

"In my bid I propose to put up the railing of the galleries, and to furnish mechanics to bolt and secure my cast-iron work on Camp street front. The balance of the work can be placed as they progress."

He then gives a detail of the cast-iron work, without any mention of the prices, or reference to any labor to be done, ending with a statement of the gross sum, total price, $3144 95. This is followed by a detail of the wrought-iron work, without mention of prices, or reference to work or labor to be done, closing thus: "Total, $2455 05. Cast-iron, $3144 95; wrought-iron, $2455 05; total, $5600. Less estimated deduction in size, etc., of above mentioned wrought-iron work, etc., details of which I left with Mr. Freret, $530. Bid now stands $5070, with alterations and amendments above stated.

"Accepted.

"(Signed) GEORGE CRONAN,
JOHN HENDERSON."

The price or value of the work and labor to be done was manifestly small, and was included in the gross price of the material; so that it can not be ascertained from the contract.

The testimony shows that Cronan used some part of the iron purchased of Schwartz in work for other persons: that he purchased $500 worth of iron at one time from Schwartz, for which he paid cash; and

that this iron was used for St. Patrick's Hall. That he purchased iron from other persons; that the raw material was dumped at his foundry confusedly, and put into the furnace and cast confusedly; that no account was kept at the foundry by which it could be shown what part of each purchase of raw material was used for any special work; and that it could not be stated otherwise than approximately what part of the iron mentioned in the account or statement of Schwartz was used for the perfected material furnished by Cronan to St. Patrick's Hall.

It also appears that Cronan paid Schwartz $200, credited in the account under date May 16. Cronan says this payment was for material used by him for the hall; and, according to his estimate, not more than $300 to $400 worth of the iron charged in the account of Schwartz was used for the work on the hall, on account of which he paid the $200.

If it be conceded that Cronan was such a contractor, and that Schwartz was such a furnisher of materials as the act contemplates, it seems clear that the statement, or "attested account," to be delivered to the owner of the building must be limited to the materials furnished to be used and actually used in the work done on the building; and that it is not a compliance with the law to deliver to the owner an account the greater part of which is for materials used for other purposes.

2. Sections 2, 3, 4, of the act, contemplate and provide for those cases only in which the owner of the building, having received the attested account, furnishes a copy to the contractor; and the amount due by the contractor is adjusted, ascertained, and fixed, either by the failure of the contractor to give the owner notice of his intention to dispute the claim; or by amicable arrangement; or by arbitration; or by the neglect or refusal of the contractor to have the matter adjusted. It is evident from the mere reading of section four that the action which it authorizes the creditor of the contractor to bring against the owner is for the recovery of the amount, as it has been adjusted, ascertained, and fixed, in some one of the modes pointed out with so much precision in sections two and three. It does not authorize or enable the creditor to sue the owner for any other sum or amount, nor for this precise sum, until, by this preliminary adjustment and final and conclusive fixing of the amount, as between the contractor and his creditor, the contractor shall be in default by failing to pay the sum due within ten days.

In the erection and finishing of a large building, under a contract with an undertaker of the whole work, there might be several hundred persons, many of them creditors for small amounts, who would come within the comprehensive terms of the act, furnishers of materials, mechanics, workmen, journeymen, laborers, cartmen, sub-contractors, and other persons doing or performing any work toward the erection, construction, and finishing of any building, etc., all of whom might deliver

attested accounts to the owner; and it would require no small amount of clerical labor and of time to make copies of such accounts, and to furnish them to the undertaker. This labor would be increased in case there were several different contracts for the different parts of the work. If, from any cause, the owner should fail or not choose to take upon himself this burden, the act has made no provision for any other means of effecting a compulsory adjustment, or of putting the undertaker or contractor in default. It might have been well for the Legislature to have required the creditors themselves to deliver copies of their attested accounts to the undertaker, and thus to have enabled them to compel a speedy adjustment, as between the undertaker and themselves, and to recover, with the least delay practicable, the money due them for wages or materials, with or without suit.

As the act itself has not provided for the failure or refusal of the owner to assist these creditors of the undertaker in the adjustment and recovery of the amounts due them, the only consequence is that they can not avail themselves of the remedy, because the prescribed conditions upon which depends the right to resort to that remedy have not been realized; and they must seek redress by some other means.

Articles 2741 and 2744 of the Civil Code were in force at the time the act of 1844 was passed; and they figure in the Revised Code, without change or amendment, as articles 2770 and 2773. Article 2770 is limited to "masons, carpenters, and other workmen; but article 2773 includes "workmen, and persons furnishing materials." These articles and the act of 1844 all relate to persons employed by and contracting with undertakers. The act of 1844 instead of appearing as an amendment to article 2773, corresponding with article 2744 of the Civil Code, is a part of article 2772, which was 2743 of the Civil Code.

The first clause of article 2772 gives the undertaker a privilege on the building; and the second clause gives the same privilege to workmen employed immediately by the owner. Then follow the six sections of the act of 1844, as clauses of this article which relate exclusively to those who have contracted with the undertaker. No privilege is given them on the building, except as subrogees of the undertaker. They may acquire a right of action against the owner directly; but only, *ex vi termini*, when the conditions prescribed by that act have been fulfilled.

Then follows article 2773, which was 2744 of the Civil Code, which declares that "workmen, and persons contracting with the undertaker, have no action against the owner who has paid him. If the undertaker be not paid, they may cause the moneys due him to be seized; and they are of right subrogated to his privileges."

The compilers of the Code probably foresaw that cases would arise in which workmen and furnishers of materials would not be able to

avail themselves of the right of action conferred by section four of the act of 1844, clause six of article 2772 of the R. C. C., by reason of the failure to have an adjustment and fixing of the amount due by the contractor, and the consequent inability to put him in default, a pre-requisite to suit against the owner; and they, therefore, retained article 2770, which gives the right of action to "masons, carpenters, and other workmen," which is limited to the amount due by the owner to the undertaker at the time of the commencement of the suit. This article would afford no relief to the furnisher of materials; and so they retained article 2773, which includes "workmen, and persons furnishing materials."

The action which is authorized by article 2770 is against the owner: the action authorized by the act of 1844 is against the owner; but the action authorized by article 2773 is against the undertaker, and the owner is made party by the seizure in his hands. Neither article 2773 nor the act of 1844 gives to the person who has contracted with the undertaker any lien or privilege, except as subrogee to such privilege as the undertaker may have acquired and preserved. The act of 1844, section four, gives the creditor the same privilege as the contractor is entitled to, and none other. The whole theory of this act is that where the workman, etc., has brought himself within its terms, the owner of the building becomes his debtor, and may be sued directly, and compelled to pay the amount ascertained, as provided in sections two and three, to be due to him by the contractor, up to the amount due and to become due by the owner to the contractor. If the contractor has taken the precaution to preserve the privilege accorded to him by law on the building, the workman, etc., will be secured by that privilege as legal subrogee; but, otherwise, that act gives him no privilege. The act entitles the creditor, workman, or furnisher of materials to be paid out of the money due and owing to the undertaker; but neither the act nor any article of the Code gives any privilege on the funds in the hands of the owner, except where the creditor, by the adjusting of his account, is entitled to sue and to recover of the owner.

Plaintiff has not brought himself within any law authorizing him to proceed by direct action against the association; nor conferring on him any privilege on the funds of or money due to Cronan in the hands of the association.

Precisely at what time the draft of Cronan, sued on by intervenors, became exigible we are not informed; but it operated a transfer of so much of the money in the hands of the association due to Cronan, from the date of the acceptance. Two payments, one of $350, September 12, 1874, the other of $450, May 10, 1875, have reduced the amount to sixteen hundred and sixty-one dollars and thirty-two cents ($1661 32).

There is no prayer for interest in the petition; and we think substantial justice will be done by allowing interest from judicial demand, under the prayer for general relief.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court, except that part of it which is in favor of Louis Schwartz against George Cronan, which was not appealed from and is not to be disturbed by this decree, be annulled, avoided, and reversed; that the demand of Louis Schwartz against St. Patrick's Hall Association be rejected with costs; that George A. Fosdick & Co., intervenors, do have and recover of and from the St. Patrick's Hall Association the sum of sixteen hundred and sixty-one dollars and thirty-two cents ($1661 32), with interest at the rate of five per cent per annum from the tenth of June, 1875, until paid, to be paid out of the funds or money in the hands of the association due and owing to George Cronan for work and labor done and materials furnished by him toward the building of St. Patrick's Hall; and that Louis Schwartz pay the costs of defendant, the St. Patrick's Hall Association, and of the intervenors, George A. Fosdick & Co., in the District Court, and all the costs in this court.

No. 6848.

SUCCESSION OF R. H. WOODS. ON OPPOSITION OF CHUBBUCK ET AL.

Where, in consequence of an agreement between the attorneys of a succession, and of its opposing creditors, entered into to prevent the record of appeal from being too bulky, certain necessary papers have been accidentally omitted, a writ of *certiorari* will be allowed to supply them.

No loss suffered by a stockholder, in consequence of a call authorized by the charter of the corporation, made upon each stockholder to pay a proportion of the price due on his stock, will give rise to a claim for damages against the directors of the corporation.

The contents of a written promise, or admission can not be proved by parol, until its destruction, or its loss, and proper efforts to recover it, have been shown.

A stale demand for unliquidated damages on the succession of a deceased, on account of an alleged tort of the deceased, and never made during his life, will not be allowed, except on the strictest proof of its justice.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

E. C. Kelly and *Chas. S. Rice* for administratrix and appellee.

T. A. Bartlette for opponents and appellants.

The opinion of the court on the motion to dismiss and on the application for a rehearing was delivered by MANNING, C. J., and on the merits by EGAN, J.

ON MOTION TO DISMISS.

MANNING, C. J. Hornor & Benedict, acknowledged creditors on the account of the representative of this succession, move to dismiss this appeal for the absence from the record of certain papers which they allege constitute a part of the record, and that they were not parties to the agreement between the attorneys of the succession and of the opponents specifying what papers should constitute the record.

The papers specified as necessary to make a proper and intelligible record have been supplied since by a writ of certiorari. The agreement to select such papers out of the mass as would be necessary to present the issue between the opponents and the succession was evidently made to save costs, and to save this court the useless labor of reading numerous documents and proceedings, irrelevant to the issue, and not necessary to a comprehension of the matters for decision. We should be sorry to thwart or discourage so laudable a purpose by inflicting a punishment upon those who conceived it.

The representative of the succession, who had judgment below, does not move the dismissal, and the grounds upon which it is asked by the movers are insufficient.

The motion to dismiss can not prevail.

ON THE MERITS.

The opinion of the court was delivered by

EGAN, J. The opposition of Chubbuck is not in the record, although opportunity to perfect it in this and other respects has been afforded. As, however, the substance and nature of it is set forth by the counsel on both sides, and the record affords the means of passing upon it intelligently, we will proceed to do so. It appears that decedent was bookkeeper and cashier of the Loan and Pledge Association, and by virtue of the latter office a director, also. One Mahan was a stockholder, who, it is alleged, desired several years ago to transfer his stock, and was prevented or not allowed to do so by the president and by the deceased, who, as a director or other officer, also joined in a call of ten per cent on all outstanding stock, whereby it is alleged the stock was greatly depreciated, and heavy loss resulted to the said Mahan, whose stock was afterward bought up by the association or its president, Benton, at greatly reduced price. Subsequently, in 1874, the opponent purchased at sheriff's sale for the price of *twelve dollars* all the rights and claim of F. C. Mahan, of whatever nature, against said Loan and Pledge Association or Accommodation Bank (as it was sometimes called), and against any and all of the directors thereof, in either their official or

individual capacity, in consequence of any of their acts in connection with him and with said company, and now wages this opposition, and claims unliquidated damages against the succession of Woods, as the transferee of Mahan by virtue of his purchase at the sheriff's sale. The demand is, to say the least of it, a stale one, and when urged in this form after the death of Woods requires to be supported by strict proof. The district judge thought, and we agree with him, that such evidence was not offered or given. We have recited the precise description given in the sheriff's deed, or *procès verbal*, of what was acquired, from which it appears that the particular claim now relied on was not named or described. It is very questionable if a claim for damages in the nature of a tort would pass under such description, even if more minute, and whether it would not be confined at most to claims and obligations growing out of some *legal* act or pact, and not from "*délits or quasi délits.*" Were it, however, otherwise, it is by no means clear from the evidence that Mahan himself could at the time of his application transfer stock which was at the time pledged by him for a loan from another person, and it does not appear that the certificates were in his possession, or exhibited to the president or deceased at the time of the application to transfer, as required by the rules of the association, and by ordinary prudence in its officers. Neither is the evidence satisfactory that loss resulted from the call for stock. Indeed, ordinary experience would teach us that compliance with the call would have enhanced its value to that extent, and at all events that any loaner or pledger interested, or Mahan himself, might have paid the call if need be out of the loan. At all events, his contract with the company as a stockholder was to pay the amount of his stock as called for under the charter until fully paid up, and if injury or loss resulted from such call, it was "*damnum absque injuriæ*," and affords no basis for a claim for damages which are never recoverable for the mere enforcement of a legal right or obligation.

The Loan and Pledge Association would seem from the evidence to be a corporation of very questionable vitality, and affording its president and chief manager an opportunity to ply his avocation of manufacturer at Baton Rouge, away from its domicile and place of business in New Orleans, if, indeed, it has any at all. This opposition is based upon an attempt to alter the entries in and books of the company, as kept by the deceased, subsequent to his death, and with his widow and administratrix necessarily at great disadvantage. To do this reliance is had upon parol evidence of a very loose and unsatisfactory character, which, taken even for all its worth, leaves both facts and amounts in great uncertainty. The chief witness is Benton, the president of the association, who swears in general terms that the deceased must have

made improper entries and charges against the company for money loaned and interest collected on account of the loans, when in point of fact he had not the means to make such loans. He does not pretend to have any knowledge of the particular acts or facts of these entries, which it seems were going on for a long time, and always open to the inspection of the president and directors. The former confesses that he had so much confidence in the deceased that he did not examine the books as he ought to have done. He, however, swears that Woods subsequently admitted to him that he had used moneys of the company for his own purposes, and promised to make it good, and gave a writing to that effect. If so, that writing was the best evidence. It has neither been produced nor legal steps taken to pave the way for the reception of evidence of its contents. It is not shown to have been destroyed, and, if lost, no proper efforts have been made to recover it. Under these circumstances the judge *a quo* very properly refused to receive or consider the evidence of its contents.

The same witness also swears that the deceased was entitled to only $100 per month salary as bookkeeper, and that the credits on the books of larger amounts or at higher rates in his favor should be disallowed, or rather disregarded, and his succession made to account for these sums, also. It appears that $100 per month was the salary due deceased as bookkeeper only. He was subsequently made cashier, also, and it is elsewhere shown by the same witness that the former cashier received $2000 per annum, or, perhaps, $1800. No resolution or action of the directory, nor any contract or understanding with the deceased that he should perform the duties of cashier for less than his predecessor, is shown. It was unreasonable to expect him to perform the additional duties of another office, and one so important, without additional compensation, also. It does not appear that the items in question were overcharges under the circumstances. As to the ability of the deceased to make the loans to the company upon the want of which, and not upon any *knowledge* to the contrary, the witness relies, it appears from his own testimony that the deceased owned a house which had cost him several thousand dollars, and which, as was not uncommon at that time, he may have used as a basis of credit to make the capital so invested active and interest-producing instead of dead or inactive, and that the witness himself bought from him stock to the amount of over $2800, although he says that was raised to liquidate the indebtedness of deceased—to whom or for what purpose is not shown. The entries on the books charging the company with the loan correspond in date and amount with this transaction, and it is at least singular that they should have been made by the deceased with so much boldness, if in fact, as charged, he was a defaulter; or, at all events, that he should have

afforded by his own entries on the books of the company as to this and other matters so ready a means for his own detection. It also appears on the books, and is equally singular according to the theory of the opponent, that in less than a month afterward, in June, 1872, the deceased charged himself with $1200 loaned money returned to him, and at different times with small sums of from twenty dollars to fifty dollars interest on loans paid him, thus multiplying the means of detection and evidence against himself, if there was no foundation for the entries. Another, and perfectly disinterested witness, Van Benthuysen, also avers that he bought three lots from the deceased, and paid him $6000 cash for them. So that, taking into account this sum, the $2850, price of stock, and the amounts derived from current salary due monthly, and if not drawn properly chargeable against the company in favor of the deceased, and without reference to other means or sources from which moneys might have been derived, as shown by this record, the argument that the deceased did not make the loans to the company because he could not has no great weight, especially in view of the evidence of the same witness, Benton, that he himself made advances, but of his own means, in buying up stock for the benefit of the company, which does not seem to have been independent of aid from its own officers at times. There are other and minor items which it is unnecessary to discuss. The deceased seems to have been so implicitly trusted by the president, directors, and company while living that the offices of bookkeeper and cashier were combined in his person. The books, always open to inspection, were kept in a manner far from suspicious, and very unusual for one seeking to defraud. He is dead, and his voice and evidence sealed forever. That of the president, upon whose testimony the opponent relies almost entirely, even if given all the weight which can be claimed for it, fails to make opponent's case certain or satisfactory. The demand is waged against a succession on items originating, if at all, years since, and which do not appear to have been legally demanded during the life of decedent, and while the books kept by the deceased might not have been receivable at his instance or that of his administratrix in his own favor, they were offered as they appear with entries both of debit and credit by the opponent, who is, therefore, bound by them, unless they are satisfactorily contradicted, or shown by other evidence to be false. This has not been sufficiently done in a contest waged under these circumstances, and at this late day, after the death of the deceased, and based solely on parol evidence of the grossest violations of law and common honesty in one whose good character and standing for years while living is shown by the evidence of the opponents themselves. The district judge heard and saw the witnesses; he is intelligent and capable, and thought that the opponent's claim

should be rejected. The record before us does not warrant us in arriving at a different conclusion. Neither are we prepared to say that he erred in ordering stricken out or in refusing to consider the evidence in chief of a witness in the absence and by reason of the failure to produce at the same time the cross-examination of the same witness, or in refusing to receive or consider after the submission of the cause, on the evidence then on file, evidence sought to be filed subsequently—matters raised by two bills of exceptions taken by opponent.

The judgment below rejected the oppositions both of Chubbuck and of the Loan and Pledge Association. It was correct, and is affirmed.

ON APPLICATION FOR REHEARING.

MANNING, C. J. Rule IX of this Court requires that printed statements of the points and authorities, upon which the applicant for rehearing relies, shall be filed in support of his written or printed petition for a rehearing.

This rule has not been complied with, and therefore

The rehearing is refused.

No. 7001.

EDWARD J. GAY & CO. vs. GILBERT A. DAIGRE ET AL.

The privilege acquired by one creditor on certain property gives him, or his transferee, no preference over another creditor who had previously acquired a mortgage on the property, unless the act, or other evidence of the privilege debt, was recorded on the day the debt was contracted.

Recording an account current for advances made by a factor to a planter, running through several months, the day after the date of the closing of the account, is not recording the evidence of the debt on the day on which the contract for making the advances was entered into.

The pledge which the act No. 66, passed by the Legislature in 1874, gives to factors, and others, on certain property of planters, when they have made and recorded certain written contracts, will not operate to the prejudice of creditors holding pre-existing mortgages on the property, unless the contracts were recorded on the day they were entered into.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea*, J.

Barrow & Pope for plaintiffs and appellants.

Saml. P. Greves and *A. S. Herron & Bird* for defendants.

The opinion of the court was delivered by

MARR, J. The executors of John Bird recovered judgment against Gilbert A. Daigre for $5000, with recognition of their mortgage rights and vendor's privilege on Mulberry Grove plantation, situate in the par-

ish of East Baton Rouge; and in another suit they recovered judgment against Daigre for $20,331 85, with recognition of their mortgage rights on the same property.

The note on which the judgment for $5000 was obtained was secured by a mortgage recorded in October, 1869. The judgment for $20,331 85 was for the aggregate sum represented by four notes of different dates; one for $5700, secured by mortgage recorded in March, 1870; two amounting to $11,814 66, secured by mortgage recorded in June, 1870; and one for $2817 19, secured by mortgage recorded in July, 1870.

On these two judgments executions issued on the twenty-second December, 1874, under which the sheriff seized and sold the plantation, with the appurtenances; and the executors purchased the whole for $25,200, which the sheriff applied *pro rata* to the two writs, as shown by his return.

Before the day of sale Edward J. Gay & Co. intervened by way of third opposition, and claimed privilege and preference on a quantity of cane, part of it put up for seed, and part already planted for the crop of 1875, hay, cord wood, and five mules. They claimed a privilege on the mules for $300, the balance of the price, as subrogees of the vendor; and a lien and privilege on the cane, hay, and cord wood, under an act of pledge in conformity to the act number sixty-six, of 1874.

The judgment of the district court, from which Gay & Co. appealed, was in favor of Bird's executors, and rejected the demand and opposition of Gay & Co.

The mules were purchased by Daigre, for the use of the plantation, on the tenth February, 1874; and he acknowledged, in writing, the balance of $300 to be due. The claim was transferred to Gay & Co. by the vendors on the eleventh December; and the whole was recorded in East Baton Rouge on the twenty-second December. As the law was at that time, and continued to be up to the passage of the act number forty-five, of 1877, page fifty-nine, no privilege conferred a preference on the creditor who held it over a creditor who had acquired a mortgage, unless the act or other evidence of the debt was recorded on the day the contract was entered into. R. C. C. article 3274; State *ex rel.* Prager vs. Recorder of Mortgages, 28 A. 534; Succession of Marc, 29 A. 412.

Manifestly, the contract on which the vendor's lien and privilege rested was that between Daigre, the purchaser, and Payne, his vendor; and this lien should have been recorded on the day it was entered into, February 10, 1874. The vendor could have transferred to Gay & Co. no other right than he himself had, at the date of the transfer, December 11, 1874; and the recording on the twenty-second December was wholly without effect, so far as the mortgage creditors were concerned.

The law under which the right of pledge is claimed is entitled an act "to enable planters, farmers, merchants, traders, and others to pledge and pawn cotton, sugar, and other agricultural products to merchants, factors, and others, and to confer a pledge by the transmission of a bill of lading or carrier's receipt by mail or by the carrier." Under this act a contract of pledge and pawn was made between Gay & Co. and Daigre, on the third July, which was recorded on the seventh July, 1874. Gay & Co. also made up their account current, beginning with a balance of $6851 56, on the thirty-first July, brought down to twenty-fourth November, with a balance of $8869 23; and another account, beginning November 24, with this balance, and closing December 21, 1874, with balance, $3382 29; in addition to which they claimed balance of $19,874 59 on mortgage notes held by them. These accounts were recorded on the twenty-second December, 1874; and it is the balance, $3382 29, for which they claim the lien and pledge.

The second and third sections of this act are but enlargements of the privilege of the consignee as established by the R. C. C. article 3247; and it is not necessary to consider them, as there was no shipment or consignment of the property in question.

The first section of the act provides that, in addition to the privilege now conferred by law, any planter, etc., may pledge or pawn his growing crop of cotton, sugar, or other agricultural products for advances in money, goods, and necessary supplies that he may require for the production of the same, by entering into a written agreement to pledge the same, and having the agreement recorded in the office of the recorder of mortgages of the parish where said cotton, etc., is produced, "which recorded contract shall give and confer on the merchant, etc., a right of pledge upon the said crop, the same as if the said crop had been in the possession of the pledgee."

The law which gives a privilege for necessary supplies, etc., furnished to any farm or plantation, "on the crops of the year and the proceeds thereof," is article 3217 of the R. C. C., embodying the act number 195, of 1867. Of course this privilege falls under the dominion of the constitution of 1868, article 123, which requires all privileges to be recorded in order to have effect against third parties, and of the R. C C. article 3274, which required the act granting the privilege or other evidence of the debt to be recorded on the day that the contract was entered into in order to confer a preference over creditors who have acquired a mortgage. Beard vs. Chappell, 23 A. 694; Bank of America vs. Fortier, 27 A. 245; Adams vs. Adams, 27 A. 275. The recording on the twenty-second December could not have been on the day the contract between Gay & Co. and Daigre was entered into; and the recording of an account current for advances running through several months

on the day after the date of the closing of that account is not, in any sense, the recording of the evidence of the debt on the day the contract under which the advances were made was entered into. Prager vs. Recorder of Mortgages, 28 A. 535.

The right of Gay & Co. depends upon the agreement of July 3, 1874, recorded on the seventh July, not on the day the contract was entered into. The counsel for Gay & Co. contend that the contract was a pledge, and although the law requires it to be recorded, it does not prescribe the time at which it shall be recorded; and that it takes effect from the date of the recording. This may be true in general; but it is not true so far as creditors having pre-existing mortgages are concerned; and we think that, whenever the law requires a contract to be recorded, and is silent as to the time within which it must be recorded, its effect is limited and controlled by article 3274.

The lessor need not record the right of pledge by which the rent is secured to him, because the movables subject to his right are in his possession, that is, they are in his house, on his premises. The law does not require the consignee who has made advances on the goods consigned to him, or to whom a general balance is due for advances, to record his claim, because when the shipment is made, and the goods are in the possession of the carrier, the carrier is the agent of the consignee; his possession is the possession of the consignee; and the bill of lading or the carrier's receipt, when it has once passed beyond the control of the shipper, the consignor, by being deposited in the mail, or delivered to the carrier to be transmitted with the goods, vests the legal title, the right of possession and control, in the consignee for the purposes and subject to the terms and conditions of the consignment; and the holder of such a title to movable effects has no occasion to put upon record the evidence of his right and title.

It suffices to say, with respect to the privilege of the lessor and that of the consignee, that the law does not require them to be recorded. The act of 1874 distinguishes between the right of a merchant making advances to a planter under the contract authorized by the first section and that of the consignee to whom the goods have been dispatched. It requires, in express terms, that the agreement between the merchant and the planter shall be recorded, while it imposes no such condition on the consignee.

Pledge is the generic term; that form of pledge by which movables are put into the possession of the creditor as security for a debt is called a pawn; and where the property pledged is immovable the contract is called antichresis. R. C. C. 3133, 3134, 3135.

An essential requisite of the pawn is that the thing must be actually delivered to and must remain in the possession of the creditor, or of a

third person agreed on by the parties. R. C. C. 3162. The act of 1874 authorizes the pledge or pawn of a growing crop, which can not, until it is gathered, be delivered to the creditor. To supply the want of actual delivery, the act requires that the agreement shall be recorded in the office of the recorder of mortgages, in the parish in which the crop is produced. The act does not say when it shall be recorded; and, no doubt, it would be good against creditors acquiring rights and privileges after the recording. But article 3274 declares, in the broadest terms, that no privilege can confer a preference over creditors having acquired a mortgage, unless it be recorded as prescribed by that article. It would require the positive declaration of legislative will to that effect to withdraw the contract authorized by the act of 1874, section one, or any other form of contract creating a privilege which the law requires to be recorded, from the control of article 3274, which is the general law applicable to every species of privilege.

If the right of the lessor and of the consignee need not be recorded, it is not because they are pledgees; but because the law-making power has not seen fit to impose upon them the condition of recording which the act of 1874, section one, requires of the creditor for advances to a farmer or planter.

The counsel for Gay & Co. argue that, by the certificate of the recorder of mortgages, it appears that the mortgage debt of Bird's executors, with interest up to the date of the sale, amounted only to $17,872 28; and, as the price of the adjudication was $25,200, there remains a sum sufficient to pay the debt of Gay & Co., $3382 29, with interest. The certificate was that which was annexed to the sheriff's return; and, as copied in the transcript, it omits the mortgage for $11,814 66, recorded in June, 1870, as stated at the beginning of this opinion. The solemn judgment of the court recognizing this and the other mortgages, all of which appear in the record, with the certificate of the recorder of mortgages on each of them, showing the dates at which they were respectively recorded, can not be affected by the accidental omission in the certificate of the recorder of mortgages, prepared for the sheriff, and which was offered in evidence only incidentally, as part of the sheriff's return. This omission may have been the fault of the recorder, or of the copyist who prepared the transcript; but with the other evidence in the record, showing the precise amount of the mortgage debt and the dates of recording, it is wholly immaterial.

Edward J. Gay & Co. were not entitled to any right or privilege on the mules, or the cane, or the hay, or the cord wood, in preference to the mortgage creditors; and the district judge did not err in rejecting their demand and opposition.

The judgment appealed from is therefore affirmed with costs.

No. 7050.

JULIA A. VENTRESS, EXECUTRIX, vs. ISAAC D. BROWN ET AL.

The objection that a part of the immovables of a succession sold for less than their appraised value, and hence that its sale was null, is not an objection which the notary, before whom a judicial partition of the succession property is pending, could be required to refer to the court, before completing the partition. Such an objection can only be properly urged by way of opposition to the homologation of the partition.

The immovable property of a succession, even though partly owned by minors, may be sold for less than its appraised value, to effect a partition among co-heirs, or co-proprietors.

Where, in a partition suit, the act of the lower judge complained of was done on his own motion, and neither he, nor the parties interested in the partition, are before this court, the appeal will be dismissed.

APPEAL from the Parish Court of Iberville. *Crowell*, J.

Barrow & Pope for plaintiff and appellant.

A. & E. B. Talbot for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the twelfth of December 1876, the probate Court of the parish of Iberville ordered a judicial partition of the property belonging to the successions of James N. and Esther D. Brown, between the parties therein interested. The partition was referred to Adonis Petit—a notary public—who, on the 3d of December 1877, after notice to said parties, was proceeding to complete the same, when Isaac D. Brown, who is entitled to a share in said successions, submitted in writing to the notary his objection to the partition which was then about to be closed, and that objection is that lands situated in the parishes of Iberville and East Baton Rouge and which formed a part of the estates of James N. and Esther D. Brown, were sold for debts and adjudicated at less than their appraised value.

The said Isaac D. Brown urged that—on that account—said sales are null, that the lands thus adjudicated should be re-sold, and the partition suspended until this be done. The notary refused to suspend his proceedings and refer that objection to the Court. He was enjoined and commanded so to do by an order from the parish judge.

Mrs. Julia A. Ventress then interfered, and claimed—in her individual capacity and as dative testamentary executrix—that the notary should disobey the injunction to discontinue the partition, for the reason:

1. That the objection urged was frivolous and had been granted *ex-parte*, at chambers, without affidavit or bond.

2. That—when the order of injunction was served—the partition,

though not signed, was complete, and—at that stage—its homologation alone could have been properly opposed.

The notary closed the *procès verbal* of his proceedings and filed it in the parish Court. The judge, considering that it had been filed in contempt of his injunction, ordered that it be, and it was—accordingly—returned to the notary.

This done, the counsel for Mrs. Ventress attempted to file a motion to homologate the partition, the *procès verbal* of which was—under a previous order of the Court—to be returned to the notary. His application was denied, and Mrs. Ventress excepted to the ruling on this point.

The objection made by the counsel representing Isaac D. Brown, that lands of the herein mentioned successions were sold under their appraised value, is not one of those which he could have required the notary to refer to the court, for the reason that the court could not have passed upon the reference, and maintain or annul the purchasers' titles in a proceeding, the sole object of which was and still is to effect a partition among co-heirs. The notary properly disregarded that objection.

11 L. 497; 4 A. 8.

The notary appointed to make a partition is the ministerial officer of the Court by which the partition was ordered, and his duty is to execute the decree under which he is called upon to act, in accordance with its terms. If he fails to do so, any interested party may protest against his action, and—in such a case—the notary must suspend his operations and refer the matter to the judge, for his decision thereon. As to other errors and irregularities, they should be urged by way of opposition to the homologation of the partition.

R. C. C. 1348-1368; 12 R. R. 417; 13 A. 359; Gilbert, Codes Annotés, p. 346.

The lands which Isaac D. Brown alleges to have been sold for less than their appraised value were s ld under a judgment of the parish court, of the 12th of December 1876, ordering the partition—by licitation—of the successions of James N. and Esther D. Brown; and this court has held again and again that lands, though partly belonging to minors, may be sold for less than their appraised value, to effect a partition among co-heirs and co-proprietors.

12 M. 185; 7 L. 8 L. 179.

From the recitals and the divers clauses of the act of partition, Isaac D. Brown's objection was made at the close of the notary's operation, when the active and passive masses had already been established, and the balances due by and to the heirs ascertained and fixed. The notary had, then, but to sign himself, tender to the interested parties for their approbation or disapprobation, the *procès verbal* of his operations

and return it into Court. This he did, and the application of Julia A. Ventress to have the partition homologated, after the delay and formalities prescribed by law, should have been received and passed upon.

We are informed, by the bill of exception taken by her counsel, that it was the judge who—of his own motion—ordered the *procès verbal* to be returned to the notary and rejected the application made in appellant's name, and—as neither the judge, nor the parties interested in the partition are before us—

It is ordered that this appeal be and it is dismissed at the costs of Julia A. Ventress.

No. 7156.

STATE EX REL. KRAMER, WIDOW, ETC., VS. JUDGE SIXTH DISTRICT COURT ET AL.

In the rule *nisi* granted by this court on an application for a writ of prohibition, the answer of the defendant should be sworn to.

After the bond required by the lower court has been given, and filed, that court has no farther jurisdiction of the case, except to pass upon the solvency and sufficiency of the sureties on the appeal bond. The lower court can not set aside a suspensive appeal, or make it a devolutive one, on the ground that the amount of the bond (fixed by itself in a case where the court is required to fix it) is not the correct amount.

APPLICATION for a writ of prohibition.

John & C. B. Ray and *L. Charvet* for relator.

A. J. Lewis for respondent.

The opinion of the court was delivered by

MARR, J. Bernard Seir, by his will, gave to his wife, Catherine Kramer, the usufruct of his entire succession; and he left a daughter Josephine, wife of Joseph Snow, who was his forced heir. The will was probated; and by judgment of the Second District Court of date May 4, 1876, Mrs. Seir was recognized as the usufructuary, and her daughter Josephine was recognized as sole forced heir of her deceased father: and it was ordered that the usufructuary and the daughter, sole heir, "in their respective capacities, be put in possession of all the property, real, personal, or mixed, left by said deceased."

In October, 1877, Mrs. Josephine Snow, aided and assisted by her husband, brought suit in the Sixth District against her mother, to have the usufruct declared to be extinguished, for various causes. The proceeding is novel.

On March 16, 1878, final judgment was signed, the reasons for which were orally assigned, decreeing the "absolute extinction of the right of usufruct bequeathed to Catherine Kramer, widow, by her deceased husband, Bernard Seir." She moved for a suspensive appeal, on the same

day, in open court, and it was granted, returnable in this court on the first Monday of April, on her giving bond in the sum of $500. The bond was given and filed on the 25th March. On the 16th March, the day on which the judgment was signed and the appeal granted, nine days before the appeal bond was dated and filed, plaintiff's counsel took a rule on the defendant, appellant, to show cause why the appeal should not be dismissed, and execution issue, on the grounds:

1. That the surety in the bond is not good and solvent, nor such as is required by law;

2. That the amount of said bond is insufficient and entirely inadequate to the protection of plaintiff's interest.

One would naturally suppose that the taking of this rule on the first ground would not have preceded the giving of the bond; but the original motion is before us, and it was actually filed on the 16th March, as the copy from the minutes in the transcript shows.

The rule was tried and submitted on the 28th March; and on the 12th April it was made absolute: the appeal, so far as it was made suspensive, was dismissed; and it was ordered that execution issue to enforce the judgment.

Meantime, on the 4th April, Mrs. Kramer's appeal was perfected by the filing of the transcript in this court. Subsequently she applied for a writ of prohibition, forbidding the judge and the plaintiffs, Josephine Snow and her husband, Joseph Snow, to proceed further in the cause. The usual rule *nisi* was granted; and an answer, which begins with a general denial, was filed. This answer purports to be that of Josephine and Joseph Snow. It is signed by their attorney, and also by the judge; but it is not sworn to by any one. We think it should have been sworn to: this has been the practice; and it is in every respect proper.

The party applying for a writ of prohibition makes out such a state of case, by the allegations of his petition, as, *prima facie*, entitles him to the writ, and the object of the rule *nisi* is to enable the judge and the persons against whom the writ is prayed for to be heard, and to show any facts, not stated by the relator, which may tend to destroy the *prima facie* case made by the petition. This rule does not admit of exceptions, nor of the general denial: it simply requires a statement of such facts, appearing of record, or reference to such rules of law as, in the estimation of the respondent, authorize the acts complained of.

The judgment making the rule absolute, and ordering execution, does not inform us whether the judge decided that the sureties were pecuniarily insufficient, or that the amount of the bond was not sufficient. If he held that the sureties were not pecuniarily sufficient, we do not agree with him. There were two sureties, both owners of real estate, one of them a man of large means, either of them amply sufficient. If

he decided that the amount was not sufficient, the error in fixing that amount was his; and the utmost that he could have done, if he had that power, after the bond was signed and filed, would have been to have allowed a rule on appellant to show cause why bond should not be given for a larger amount. But we think, when the bond was once given and filed, the District Court had no further jurisdiction or control of the case, except to inquire into and to pass upon the solvency and sufficiency of the sureties on the appeal bond. If the judge erred in fixing the amount of the bond, his order might have been reviewed by this court; we think it was not competent for him to do so.

The judgment appealed from did not decree the payment of any sum of money; and it did not decree the delivery of any movable or immovable property. It simply decreed the extinction of the right of usufruct.

The answer states that the value of the real property subject to the usufruct was $6300: that the revenues for three years, during which the appeal would probably be pending in this court, would be $2592; and that a bond for $10,188 would be necessary to protect the plaintiffs.

As the judgment is not one falling within the terms either of article 575 or 576 or 577 of the Code of Practice, the judge was bound, in granting the appeal, to fix the amount under the provisions of articles 573, 574. Having done this, and the bond having been given and filed, the judge had no power to dismiss the appeal, nor to make it devolutive instead of suspensive.

If the bond should have been for a larger amount, it would be highly unjust to deprive the appellant of the benefits of a suspensive appeal for no other fault than a strict compliance with the terms and conditions on which the order of appeal had been granted. In this case the judge decided that the bond was not sufficient, on the 12th April, nearly a month after the judgment appealed from was signed; and when the right of suspensive appeal no longer existed. If the objection had been passed upon within the delay fixed for a suspensive appeal, *non constat* that appellant would not have been able to have given such bond as might have accorded with the changed views of the judge. His attention was called to the amount of the bond on the 16th March, the day on which he had fixed the amount; and it was too late for him, after the bond had been given and filed, after the delay for a suspensive appeal had expired, to impose upon the appellant new conditions, or to dismiss the suspensive appeal.

It is therefore ordered, adjudged, and decreed that the rule *nisi* herein granted be made absolute: that the prohibition as prayed for be made peremptory; and that respondents pay the costs of this proceeding.

No. 7155.

SUCCESSION OF WIDOW L. F. FOUCHER, MARQUISE DE CIRCÉ.

When by the will of a foreign testator property is devised to minors, in this State, under the tutorship of their surviving fathers or mothers, it will fall under the administration of the tutors, or tutrices. Any clause in the will requiring judicial appointment of special administrators to take charge of the property, during the minority of the legatees, will be considered as not having been written.

A devise, by which property left to a minor is put in the possession and under the control of a third person until the majority of the minor, involves a *fidei commissum*, which is prohibited by our law.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Henry Denis and *Henry Chiapella* for dative testamentary executor and appellant.

E. Bermudez for Widow G. Burthe, tutrix and appellee.

Victor Olivier for Widow E. Burthe, tutrix and appellee.

R. T. Beauregard for Widow L. Burthe, tutrix and appellee.

The opinion of the court was delivered by

MARR, J. Widow Foucher, Marquise de Circé, died at Paris, leaving a last will, duly probated, by which she instituted as her universal legatees, "conjointly," the children of her four brothers deceased, and in default of children their descendants, in equal portions, in each branch.

"Entendant, ainsi, leur donner tous biens, meubles et immeubles, qui dépendent de ma succession, tant en France, que dans tous autres pays, et notamment en Louisiane."

The clause of the will which occasions this controversy is as follows:

"Voulant sauve-garder, autant qu'il peut dépendre de moi, les intérêts de tous mineurs privés de leur père, qui seraient appelés à recueillir une part de ma succession, je veux qu'il leur soit nommé par justice un administrateur spécial, sans lequel, jusqu'à leur majorité, il ne pourra être procédé à aucun réglement ni partage de ma succession, et qui aura seul droit de toucher et retirer tous objets valeurs et capitaux, comme tous revenus appartenant aux dits mineurs."

Mrs. Widow George Burthe, natural tutrix of her minor children, alleged to be heirs of one eleventh, under this will, took a rule on Arthur Denis, dative executor, to show cause why he should not proceed to a distribution of the large sum of money deposited in bank and susceptible of immediate distribution.

A few days after this rule was taken, the dative testamentary executor, Arthur Denis, took a rule on Widow André Burthe, Widow Emmanuel Burthe, and Widow George Burthe, natural tutrices respectively

of their minor children, to show cause why the court should not proceed to appoint a special administrator to these minors, as required by the will.

The defendants in this rule plead that the clause of the will in question is void, and should be considered as not written:

FIRST.—Because, by the laws of this State, the tutor is alone and exclusively entitled to administer the property belonging to his ward, to receive all moneys or revenues accruing to him, and to represent him in all legal proceedings; and that respondents, as the natural tutrices of their minor children, can not be deprived of the administration of their property by the appointment of any special administrators, who are officers unknown to our laws;

SECOND.—Because the said disposition creates a trust or *fidei commissum*, which is reprobated by the laws of Louisiana.

They pray the court to decree the nullity of the disposition directing the appointment of special administrators, and, furthermore, to decree that respondents are fully entitled and authorized to represent their minor children, in all the proceedings pertaining to the settlement of this estate, as if said clause had not been written by the testatrix.

On the trial it was agreed that the only issues between the parties were: 1. Whether a special administrator can legally be appointed to the minor legatees; 2. In case the court decides that this can not be done, whether the dative executor may, legally, under the provisions of the will, make settlement with and distribution to the universal legatees before the majority of the minor legatees.

The court made absolute the rule of Widow George Burthe, and decreed that the executor proceed, at once, to the distribution of the sum of money in his hands, according to law; and that the rule of the executor to appoint a special administrator to the minor heirs be dismissed.

The copy of the will in the transcript contains no appointment of executor; and from its terms it seems that the testatrix did not contemplate any administration of her succession in Louisiana. The instituted heirs were the children and descendants of her four brothers deceased; and her intention seems to have been that a special administrator should be appointed to the fatherless minors; and that the major heirs and the administrator would settle and make partition of her succession, the portions coming to the minor heirs to be controlled and administered by the administrator.

In France, where this will was written, the law permits the testator to appoint an administrator to minor beneficiaries of the will, only where, by the death of either father or mother, they are under tutelage. So long as father and mother live the father administers the estates of

their minor children; but when, by the death of either, the minors are under tutelage, the testator may appoint an administrator of the property bequeathed by him to the minors; and thus deprive the tutor, whether surviving father or mother, or some other person, of the administration which otherwise would belong to him in virtue of his office. Marcadé, 2, 160, No. 152.

There is but little difference in the provisions of the Code Napoleon and of our Code in respect to minors and their tutorship; and we should be inclined to follow the French jurisprudence and commentators in a case in which our own Code or jurisprudence is silent. Article 250 of the R. C. C. declares that the tutorship of minor children belongs of right to the surviving father or mother.

The mother may refuse to accept the tutorship; but in that event she would retain the superintendence of the children, and the care of their education; and the tutor would be intrusted merely with the administration of their property. R. C. C. 253.

The tutor administers the estate of the minor: he has the care of his person; and represents him in all civil acts. R. C. C. arts. 336–337.

The mother may refuse the tutorship, or she may forfeit it by second marriage, without having obtained the consent of the family meeting that she shall retain it; and the father may be excluded or removed from the tutorship for the causes specified in the Code. But where, for any cause the surviving father or mother is excluded or removed, the law provides for the appointment of a tutor; and it is always the tutor, and no other than the tutor, who administers the estate of the minor, and represents him in all civil acts.

Our law knows nothing of a special administrator for the minor; and the duties of such an administrator would clash with those imposed by law upon the tutor. The testatrix did not name a special administrator; but she required one to be appointed judicially. Her will in this respect conflicts with the plain text of the law of Louisiana. The judges having probate jurisdiction have no power to give the custody of the minor or the administration of his estate to any other than his tutor. It is only the surviving father or mother who can by will or public declaration before a notary appoint a tutor; and if the court should attempt in obedience to the will of the testatrix to appoint an administrator, that administrator would be clothed with all the powers of the tutor with respect to the estates of the minors, during their minority; that is, he would be intrusted with part of the functions of a tutor, while the real tutor would be charged with the remainder of the duties and functions of that office. Perhaps the testatrix was advised that the law of Louisiana, which is like that of France in this respect, would not permit her to appoint a testamentary tutor; and that the estates of

minors must be administered under the control and supervision of the Court of Probates. Be this as it may, our law gives no power or authority to the Probate Court to appoint any other administrator of the estates of minors than the tutor, who becomes an officer of the court, and is subject to the orders and control of the court in his administration. If the father or mother be living and competent, the court can not refuse to recognize and confirm such father or mother as natural tutor or tutrix, because the tutorship devolves upon them of right; and the court has no power to separate the administration of the property, to deprive the tutor of it, and to intrust it to a special administrator, or any other person or officer whomsoever.

In Clague vs. Clague, 13 La., 1, the will required the executors to continue their administration until the majority of the children, heirs of the testator, and to retain the funds of the estate until that period, for their benefit. The widow, natural tutrix, demanded to be put in possession, and called upon the executors to account and pay over to her whatever balance might remain in their hands. This court decided that the disposition requiring the executors to retain the property in their hands until the majority of the heirs was a *fidei commissum*, and was forbidden by the Civil Code, article 1507, R. C. C. 1520. See, also, Hoggatt's case, 10 A. 169.

It is obvious that the testatrix, in this case, when she used the terms "*réglement et partition de ma succession*," had in view only the separation of the portions falling to the major heirs from those of the minors; and that her intention was that the special administrator should retain the custody of the portions of the minors, and administer during their minority. This was a trust; and it does not differ, in any respect, from the disposition in Clague's will, except that the persons charged with the trust in Clague's will were the testamentary executors; while in this will the person so charged is the special administrator. That the testatrix intended that he should retain in his hands and administer the entire portions falling to the minors, is manifest from the whole context, and is placed beyond question by the last clause:

"Les revenus de la part de chaque mineur serviront à son éducation et à ses besoins personnels."

It will be observed that the Code Napoleon, article 896, which corresponds in all other respects with articles 1507 of the C. C., 1520 of the R. C. C., prohibits substitutions only, while our Code prohibits *fidei commissa*, also. If, as this court decided in Clague's case, the charge imposed upon the executors was a *fidei commissum*, the fact that *fidei commissa* are not forbidden by the law of France, when they are not also substitutions, enables us to understand why it is that under the law of France a testator may deprive the tutor of the administration of

property bequeathed to a minor during his minority, while such a disposition would not be tolerated under our law.

We incline to the opinion that the clause in the will of the Marquise de Circé in question falls within the prohibition of article 1520 of the R. C. C.; but, whether this be true or not, the condition that a special administrator shall be appointed for the minor heirs is illegal, and, in that sense, impossible, and it is to be considered as not having been written; that is, as not forming any part of the will. The legal title to all that the testatrix owned passed to and was invested in the universal legatees, and it must be administered in accordance with the law of Louisiana; that is, those portions which fall to the minors must be delivered to the only legal representatives recognized by our law, their mothers, natural tutrices, having the custody of their persons and the care of their education, and charged by law with the administration of their estates.

The judgment appealed from is affirmed with costs.

No. 6947.

SARA T. BOWMAN VS. KAUFMAN, SHERIFF, ET AL.

When the plaintiff in injunction appeals, by motion in open court, from the judgment dissolving the injunction and condemning him and the surety on his bond in damages *in solido*, the surety thereby becomes a party, appellee, and hence is disqualified from becoming the plaintiff's surety on his appeal bond.

An appeal taken separately by one of two defendants who have been condemned *in solido*, will not prevent the other from taking an appeal at a subsequent time, within the legal delay.

A married woman may enjoin the execution of a judgment against her, when the ground of the judgment was a debt of her husband, even though she failed to set up that defense in the suit in which the judgment was obtained.

The failure on the part of a wife to prosecute an appeal she had taken from a judgment against her on account of her husband's debt, will not estop her from subsequently contesting the legality of the judgment.

A married woman, even though separate in property, can not be held liable for a debt contracted by her husband, unless it be affirmatively shown that it inured to her separate benefit.

As between appellees, the judgment of the lower court will not be disturbed.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist*, J.

Sam J. Powell for plaintiff and appellant.

W. W. Leake for defendants and appellees.

ON MOTION TO DISMISS.

MANNING, C. J. The appellees move to dismiss on the grounds, that there is not a legal bond of appeal—that the surety on the injunc-

tion bond is incompetent as a surety on the appeal bond, having been condemned as a party to pay damages—and that the order for one of the appeals is void, because rendered after the jurisdiction of this court had attached.

The plaintiff had obtained an injunction upon a bond with surety, conditioned in the usual form. The injunction was dissolved, and judgment was rendered for fifty dollars as damages against the plaintiff and her surety *in solido*. She moved for a suspensive appeal in open court, and perfected it by giving bond with the same person as surety. In the following month, the surety prayed an appeal by petition, and gave another person as her surety.

In an early case it was held, that the conditions of the two bonds being different, the original one being only for damages consequent on a wrongful suing out of the injunction, and the last, that the surety will pay the judgment to be rendered on the appeal, the same person may well sign both, if otherwise unexceptionable, unless he has been condemned as a party by the judgment appealed from under the act of 1831. Leeds v. Yeatman, 12 La. 383. That act is now incorporated in the Revised Statutes of 1870 as sec. 1754. The defendants insist that the solidary condemnation of the plaintiff and her surety on the injunction bond to pay the damages, as provided by the act of 1831, places this case pointedly within the exception mentioned in that decision.

The plaintiff cites Greiner v. Prendergrast, 2 Rob. 235 as conclusive authority for the contrary doctrine. In that case, upon a dissolution of the injunction, the plaintiff and his surety were condemned *in solido* to pay twenty-seven dollars as damages, with ten per centum interest on the amount of the injoined judgment. The plaintiff prayed a suspensive appeal, and gave bond with the same surety. The same objection was made then as now, and the court held that a party had a right to a suspensive appeal, provided he offered such surety as would indemnify his adversary against all consequences which might result from the appeal. It is true, say the court, that if both the principal and surety, against whom damages had been given on the dissolution of the injunction, had joined in an appeal, they would have been bound to give one solvent surety, although they were both admitted to be sufficiently solvent to remove all idea of danger on that score. The reason would be that the law expressly requires surety on the grant of any appeal.

It will be observed that case is identical with the present one, and the two Justices who were the organs of the Court in the two cases cited were both on the Bench together when each of them was decided. The last must then be considered as overruling the first, if indeed it is not reconcilable with it. The expression, unless the surety has been

condemned as a party, may be understood as another way of stating the reason of the rule why he could not then be taken as a surety, viz that he would then be a principal and must himself furnish a surety.

But since those decisions were made, important and radical alterations have been made in the laws governing appeals. Now, when an appeal has been taken by motion in open court, all parties who are not appellants are declared appellees, and the bond in favor of the clerk is for the benefit of each and every one of the appellees, and may be sued on accordingly.

When the plaintiff took her appeal in open court, and filed her bond, the surety, who had been condemned with her solidarily for damages, became *eo instanti* a party to the appeal, as appellee. When that surety then became again a surety on the appeal bond, he occupied the double and inconsistent positions of an appellee, whose interest was a maintenance of the judgment, and a security to pay the judgment on appeal, in case the appellant did not pay.

Under these changes in the laws governing appeals, and because of them, we hold that in all cases where a party is necessarily appellee if he be not appellant, the surety on an injunction bond is incompetent to be a surety on a bond for an appeal from the judgment dissolving the injunction, and for damages against principal and surety *in solido*. And it was so held by us at the last term. Dumas v. Mary, Opinion Book, 47 p. 265. The appeal of the plaintiff is therefore dismissed.

But that of the surety is good. That appeal was taken by petition, and a separate security given. The filing a bond of appeal by one of the parties condemned in the judgment below lodged only her appeal in this court, and did not prevent the other from taking an appeal at a different time within the permitted delay.

The motion to dismiss the appeal of plaintiff is allowed. The motion to dismiss the appeal of the surety is denied.

On the Merits.

The opinion of the court was delivered by

Manning, C. J. This suit is to have decreed the nullity of a judgment, obtained by J. F. Irvine against the plaintiff, and to restrain its enforcement by *fieri facias*, to accomplish which an injunction was obtained. The plaintiff is married, is separate in property from her husband, and alleges as causes of nullity that the debt, for which the judgment was rendered, was solely a debt of her husband, and that it was rendered without service of citation upon her.

The answer pleads the general issue, and discloses the want of interest of Irvine in the judgment because of its transfer through another

party to Flash, Lewis & Co. its present owners, who intervene and defend.

It is excepted by the intervenors that Mrs. Bowman can not now injoin the collection of a judgment for matters which she could have opposed to the demand in the original suit, a general proposition, the soundness of which is incontestable. It is however subject to some modification, as in the cases where the party sued was under an incapacity to contract. Hence a judgment against a married woman upon two notes, executed by her husband, and by herself as his surety, was held open to assault by means of an injunction, although she had failed to make that defence to the suit upon them, because the judgment, *quoad* the wife, was null, being upon obligations *in fraudem legis*, which she was incapacitated to make. Medart v. Fasnatch, 15 Annual, 651. And that principle has been carried so far that the wife is permitted to sue to annul, and to injoin the enforcement of a judgment which she had confessed. Baines v. Burbridge, *Idem*, 628.

It was also objected that Mrs. Bowman appealed the original judgment, and failed to prosecute her appeal, and therefore she is now estopped from contesting its legality. But if she can contest the legality of a judgment she has solemnly confessed, how much more can she contest one which she disputed, and particularly when the failure to prosecute the appeal was owing to marital influence. Bisland v. Provosty, 14 Annual, 169. She testifies that she signed the appeal bond for the purpose of prosecuting her appeal, and never instructed her attorney to desist.

The proof is very complete that the debt was the husband's. Irvine was a factor in New Orleans, and kept his account for advances and supplies, against the husband, or 'in his name as a courtesy,' as he says, and this account was the basis of the judgment. It does not matter what words or name were written at the heading of the factor's books, so far as fixing liability goes. He could not make her liable by merely keeping the account against her, and she could not avoid liability, if it was kept in the husband's name, if in fact she was legally chargeable.

But it is manifest that Mrs. Bowman was not thought of until it was apparent that a suit was looming in the near future. The account was opened in 1869 against the husband and was continuous to 1874, with such charges as payments of 'your draft,' the draft being the husband's, and statements of account, invoices, etc. were made to him alone. The bookkeeper says;—the whole account was kept and made out in the name of Mr. Bowman, and the items, 'by your draft,' mean the draft of Mr. B. The account was afterwards changed to the name of Mrs. Bowman, after the transactions were closed, with the view of bringing the

suit as he supposed. The change was made just previous to bringing the suit, by order of Mr. Irvine.

Nothing is better settled than that the debt must be shewn affirmatively to have enured to her benefit, when a party is seeking to enforce it against a wife, and she alleges that it is her husband's debt alone, and the fact that she is separated in property from him does not change the nature of the proof required, nor shift the burthen of proof from him who seeks to make her liable upon her who is attempting to escape liability. Erwin v. M'Calop, 5 Annual, 173. Lee v. Cameron, 14 Annual, 709. Even if the wife executes a mortgage under the authorization of the judge, the authority being for a specified sum and an expressed purpose, and the mortgage is for a different sum, and for the purpose expressed but also for an additional and previously unexpressed purpose, any one seeking to enforce the mortgage upon the wife's separate property must prove *aliunde* that the debt, secured by the mortgage, has enured to the wife's separate benefit, even though the debt is evidenced by a negotiable note, and its holder is the party enforcing its payment. Conrad v. Leblanc, 29 Annual, 123.

The proof not only fails to fix liability on Mrs. Bowman, but she establishes by affirmative testimony that the debt was her husband's, and that no part of it enured to her separate benefit, or the benefit of her separate estate. The suit is only one more instance, of which the Reports furnish many, where parties, having goods to sell or money to lend, and seeing a fair chance of profit, deliver their merchandize or send their funds with unsuspecting confidence to a man who has nothing with which to satisfy a judgment, but whose wife is mistress of the household treasury, and delude themselves with the fallacious hope that she will requite their complaisance by taking care that no harm comes to them.

There is not, and there never has been, any doubt about the law governing a married woman's liability. The courts have never wavered in applying it, and if parties will persist in ignoring what has been long settled through repeated adjudications, they must bear with equanimity the losses, the risk of which was incurred through rashness.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiff do now have judgment perpetuating her injunction, and for the costs of both courts.

DeBlanc, J. I concur in the foregoing decree.

On Application for Rehearing.

Spencer, J. As stated in our previous opinions in this case, Sarah T. Bowman enjoined the execution of a judgment against her. There

was judgment against her, dissolving the injunction with damages against her and the surety on her bond *in solido*. Mrs. Bowman appealed by motion in open court. Her surety appealed by petition and citation. On motion we dismissed Mrs. Bowman's appeal, but maintained that of the surety, so that Mrs. Bowman is no longer before us as appellant, since her appeal has been dismissed. She appears only, then, as appellee in the surety's appeal. As between her, therefore, and the other appellees, we can not correct the judgment. See 15 A. 433; C. P. 890; 28 A. 99, 455. Our decree, therefore, so far as it annuls and reverses the judgment of the lower court as to Mrs. Bowman, is erroneous, and must be limited in its effects to the *surety only*.

The rehearing is granted.

ON REHEARING.

We are satisfied, upon re-examination, with our conclusions upon the facts of this case. The debt was, we think, one for which the wife was not liable, and could not bind herself, being that of the husband. The surety has the right by appeal to relief from the effects of an erroneous judgment.

It is therefore ordered, adjudged, and decreed that the judgment heretofore rendered by this court be set aside and annulled; and it is now ordered, adjudged, and decreed that the judgment appealed from, in so far as it affects or condemns Mrs. Mathers, the surety on plaintiff's injunction bond, be annulled, avoided, and reversed, and that she recover of appellees the costs of this appeal.

The said judgment appealed from, so far as the same affects the plaintiff, Mrs. Bowman, is not before us, and is not passed upon.

No. 7114.

STATE EX REL. LOUISIANA BOARD OF TRUSTEES FOR THE BLIND VS. THE JUDGE OF THE SIXTH DISTRICT COURT.

Except in cases of attachment, where the law fixes the fee of a curator *ad hoc*, the court can not, *ex-parte*, assess and order to be paid the fees of such an officer.

A suspensive appeal in a case prevents, pending the appeal, any proceeding, contradictorily taken, for fixing the fees due to a curator *ad hoc*.

APPLICATION for a writ of prohibition.

Merrick, Race & Foster and *Jno. A. Campbell* for relators.

Thos. Hunton and *Richardson & Magruder* for respondent.

The opinion of the court was delivered by

SPENCER, J. The present relator brought suit in the Sixth District

Court praying an injunction against V. J. Dupuy *et al.*, causing curators *ad hoc* to be appointed for several of the defendants therein.

There was final judgment dismissing plaintiff's demand and refusing the injunction. Plaintiff took a suspensive appeal to this court.

After the appeal had been so taken and perfected, the court *a qua* on motion, *ex-parte* and without notice to plaintiff, rendered an order taxing or decreeing the payment of fees to said curators, as follows: To Richardson & Magruder $250; to E. E. Moïse $150, and A. L. Tucker $100. Relator, alleging that said court has no jurisdiction or power to render said *ex-parte* decrees, after appeal, and averring that said decrees will be executed, prays for a prohibition.

The judge *a quo*, in answer to the writ, admits the facts, but denies that he has exceeded his jurisdiction. He contends that relator as plaintiff is primarily liable for all legal costs, and that the appeal does not suspend the right of the officers of court to enforce them. That the allowances to the curators were part of the taxed costs accrued before relator's appeal, and the amount thereof peculiarly within his discretion. That if aggrieved, relator should have moved to rescind or made opposition.

The questions for us to decide are—

First—Whether in suits other than by attachment (when the law fixes a fee of $10 for the curator without proof) the allowances of fees or compensation to curators *ad hoc* can be properly classed as costs that may be taxed *ex-parte* and on motion without notice. It is, we think, clear that the payment of such costs as may be so taxed is not suspended by plaintiff's appeal. He is bound to pay them whenever due, and their payment may be enforced notwithstanding his appeal from the judgment in the cause. The taxing of these costs is a mere matter of calculation, and is not in fact a "further proceeding" in the cause, within the meaning and intendment of article 575 C. P.; 10 R. 150. But we think that outside of the case of attachment, where the law fixes or taxes a fee of ten dollars without proof, the court can not, by *ex-parte* order and without notice, order the payment of specific sums to curators *ad hoc* as fees or compensation.

Unless the law itself fixes the amount of a fee, it can only be fixed contradictorily with the parties in interest. Any other rule would be intolerable, and violative of elementary principles. 13 An. 150.

Second—Holding, therefore, that the fees of curators in cases like the present must be adjudicated and fixed in a proceeding contradictorily taken, the next question is, does the appeal prevent such proceeding being had after it is taken?

We think the answer to this question is found in article 575 of the Code of Practice, which declares that the suspensive appeal "shall *stay*

execution and all further proceedings until a definitive judgment be rendered on the appeal."

"As soon as the appeal is perfected the court of the first instance can take no further steps in the case, except such as may be necessary to transmit the record to the Supreme Court." 10 R. 419.

It is therefore ordered that the writ of prohibition heretofore issued be made peremptory at the costs of respondent.

No. 6926.

THE STATE VS. JOHN WILLIAMS.

When no bill of exceptions is taken to any of the rulings of the lower judge during the trial of an application for a change of venue, his decision on the application can not be reviewed by this court.

The clerk of the Criminal Court is not qualified to act as a jury commissioner, under the Act No. 44, approved March 8, 1877, until he has taken the special oath prescribed by that act. His failure to take that oath before participating in the drawing of a jury, vitiates the drawing.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Marks*, J.

H. N. Ogden, Attorney General, for the State.

James D. Augustin for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant was indicted for murder, found guilty of manslaughter and sentenced to hard labor in the State Penitentiary, for the space of twenty years. He has appealed and alleges that the verdict returned against him, and the sentence based on that verdict, should be set aside and avoided, because:

1. Two applications made by him, one for a change of venue, the other for a continuance of the case, were improperly denied.

2. The jurors by whom he was indicted and tried were not legally drawn, inasmuch as the Clerk of the Court who acted as a member of the jury commission and assisted in the drawing, had not then taken—in that capacity—the oath required by law. This objection was urged on the first day of the term of the court.

3. The record does not show that a grand jury was empanelled, nor who composed it.

Defendant is a white man: he killed—in the parish of St. Charles—one Joseph Johnson, who belonged to the colored class, and the application for a change of venue is founded on the facts that—in said parish—the jury is composed of exclusively individuals of the same class as the

deceased—that the homicide created considerable excitement and commotion in the locality where it occurred, and that several colored men manifested the intention of lynching him and hanging him without judge or jury—that, on account of the prejudice thus existing against him, he could not obtain an impartial trial in either the parish of St. Charles or any other parish of the Fourth Judicial District.

1. The facts that the killing of a human being created a considerable excitement, and that, if tried where the alleged crime was committed, the prisoner would be tried by jurors necessarily taken from the class to which the deceased belonged, are not of themselves sufficient to authorize a change of venue. The excitement which prevails on those grave occasions does not constitute that prejudice which disqualifies an entire community from entering the jury-box, to ascertain and determine whether the law has or has not been violated, whether an accused is or is not guilty of the commission of the crime charged against him.

As to the other branch of this objection, we can only say: that the whites are thoroughly convinced, and that the blacks should realize that justice must be done—not only to all—but by all. They are now—as the whites—called upon to pass upon the rights, wrongs, life and liberty of others—and, in the interest of their own race, they must learn how to impartially try, convict or release a prisoner, whatever may be the color of his skin.

Wharton Crim. Law, 7th ed. vol. 1, No. 469, paragraph 4.

As regards the locality where the trial is to take place, the rule is a constitutional one: the accused must be tried in the parish where it is alleged that the crime has been committed, unless *there* the public mind be clouded by and harbors a prejudice for or against the prisoner.

In this case, the District Judge decided that the apprehended prejudice did not exist, and, as no bill of exception was reserved to any of his rulings during the course of the trial of defendant's application for a change of venue, his decision on this point can neither be reviewed nor reversed.

2. Was the jury regularly drawn? The 3d section of act No. 44 of the Legislature, approved on the 8th of March, 1877, provides—in substance—"that the several District Judges throughout the State, shall select four discreet citizens, who—with the clerk of the district court, shall constitute a jury commission for each parish, etc., and that—*before entering* upon the discharge of their duty, *each* member of the commission shall take an oath faithfully to discharge the duties imposed upon him by this act."

The Clerk who assisted in the drawing of the jury by whom the prisoner was indicted and tried, had not—when he so assisted—taken the oath prescribed by the act of 1877. The presiding Judge held that

he would judicially notice that the Clerk was a sworn officer. That was not sufficient—for the law expressly declares *that he is a member* of the jury commission, and—not that only the four citizens shall be sworn—but that *each* member of that commission shall take an oath, the very terms and form of which are specified in the act. When must *each* of those commissioners take that oath? *Before entering* upon the discharge of their duty as such. This, the Clerk did not do: he did not qualify as a jury commissioner, and that omission did vitiate the drawing of the jury by whom the accused was indicted and tried.

The act of 1877 provides, it is true, that three members of said commission shall be a sufficient number to perform the duties imposed upon it, but it also provides—in terms too clear and too imperative to be disregarded, that no one shall be qualified as a jury commissioner without being sworn in that capacity, and—by an irresistible inference—that, before so qualifying, no one shall participate in the drawing of juries. What three of the commissioners might have done without the presence of the others, the whole commission could not legally do with the participation of the unsworn clerk. His duties are the most responsible of those which devolve upon said commission: he makes, under its supervision, the *procès verbal* of its acts, the list of persons from whom the jurors are to be drawn, keeps a record of the drawing, showing the weeks for which the jurors are to serve, delivers to the sheriff and publishes, in the official journal, a list of their names, and—besides—the jury-box, with the evidence of each separate drawing, is left in his custody. All this he does—not under any power vested in him as clerk, but under the special power conferred on him as a commissioner. The regularity of his acts—in that capacity—or rather the presumption of that regularity flows from, and—under no circumstances—can precede his qualification, which springs and dates from the taking of the special oath prescribed by the act of 1877, an oath different from that administered to clerks, and destined to secure the performance of a newly created duty, imposed upon him in a newly created character, added and attached to his official title and official capacity, as the Clerk of the District Court.

The Legislature might have dispensed an already sworn officer from taking the additional oath prescribed by the act of 1877, but it did the very reverse, and—from the carefully selected and reiterated terms of the act—the Legislature intended to do the very reverse—for, by merely looking at the provisions of the statute, one can see that the Clerk is a member of the jury commission, that *each* member of that commission is commanded to take the prescribed oath—that, before complying with that imperative condition, not one of the commissioners is qualified, not one is authorized to *enter* on the discharge of his duties. The statute

expressly directs that the oath shall be taken *before*, and—in this case—it was taken *after* the imposed duty had been accomplished.

In this instance, the selection of the jurors was not legal, and the inevitable result of that illegal selection was to affect the composition of the grand and petit jury, the validity of the indictment, the verdict and the sentence.

The prisoner has not been in jeopardy, was and stands charged with the crime of murder, and—as no prescription bars the prosecution of that crime, he should not be released on account of the informality which compels us to reverse the judgment pronounced against him.

It is, therefore, ordered, adjudged and decreed that the indictment filed on the 8th of May 1877, in the District Court for the parish of St. Charles, against John Williams, for the alleged murder of Joseph Johnson, is quashed and avoided, and that the verdict, sentence and judgment appealed from be and they are hereby annulled and set aside.

It is further ordered that said John Williams be held in custody until after the adjournment of the first session of the grand jury of the parish of St. Charles, which shall be therein empanelled after this decree is returned to the lower court, to answer to such charge as may be preferred against him for the alleged murder of Joseph Johnson.

The Chief Justice dissents from this opinion and decree.

DISSENTING OPINION.

EGAN, J. The law makes the Clerk *ex-officio* a member of the board of jury commissioners. I think he is subject to no other qualification, and that he was not required to take a new or additional oath, and such I believe to have been the uniform practice in like cases. His membership and right to act as a member of the board of jury commissioners was complete by the appointment and terms of the law itself, and the duty to be performed being *ex-officio*, by reason of his office of clerk he acted as jury commissioner under all the sanctions of his official oath and obligations. I think the view taken by the district judge was correct, and that the provisions of the law in regard to the oath of members refer to those who do not act *ex-officio*. This is the more manifest when it is recollected that, almost from time immemorial, the clerks of courts as such have acted and been required to act in drawing juries. I therefore dissent on this point from the views of the majority of the court and from the decree.

No. 6896.

SUCCESSION OF R. H. BAILY VS. M. A. BECNEL.

The suit brought by an executor against a third person who is the undivided half-owner of certain property, of which the succession owns the other half, for the purpose of effecting a partition of the property, and also for a settlement of accounts with the defendant, does not involve probate matters, and therefore the probate court in which the succession was opened has no jurisdiction of the suit.

APPEAL from the Second District Court, parish of Orleans. *Tissot*, J.

Kennard, Howe & Prentiss for plaintiff and appellant.

Edward Phillips for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 13th of December 1877, George W. Baily—the executor with seizin of the last will of R. H. Baily—filed in the second district Court for the parish of Orleans, in which the testator's succession is opened, a petition in which he alleges:

"That since his appointment as executor, he has been administering this estate and making payments on account of the various legacies, as rapidly as was consistent with the best interest of the succession and of the legatees. That among the assets of this estate is an undivided interest in a certain sugar plantation, and an undivided interest in all the property and all the movables thereon, situated in the parish of St. John the Baptist, in this State, fully described in an inventory thereof, made May 17th, 1872, by Zenin Miller, deputy recorder of said parish, and filed in this Court, May 20th, 1872; which inventory is annexed to and made part of this petition, for a detailed description of said property.

"Your petitioner further shows, that a partition of said property has become necessary, in order that petitioner may realize, for distribution among the legatees, the share of the succession therein, they being unwilling longer to continue in joint ownership with Michel Alcide Becnel, a resident of the parish of St. John the Baptist, who was the owner of the other undivided half of said property, or with any person claiming to be his transferee. That such partition can not be made in kind, as the property can not be conveniently divided, and that a sale at public auction will be necessary in order to effect the partition.

"Your petitioner further shows, that as a necessary incident to said partition it is important to have a full, fair and complete adjustment of accounts connected with said plantation, and between the deceased and his estate and said Becnel, in order to ascertain what portion of the proceeds of said sale shall belong to each owner or *his representatives*.

"Your petitioner further shows, that said accounts were, for the most part, kept by the late commercial firm of G. M. Bayly & Pond, of

this city, and, since their dissolution, by other commercial firms domiciled in this city, and by petitioner, the executor, who has always resided in this parish, and kept the books of the estate here, and that said books cover the space of nearly eight years. * *

"Your petitioner further shows that he discovers, from such examination of the accounts as he has been able to make without the aid of the Court, that said part owner, Becnel, has become so largely indebted to this estate by reason of his failure to pay his share of the purchase money and after-expenses, since incurred with his consent, in running said plantation, that your petitioner believes and avers that, upon a full settlement of the affairs of said plantation, said Becnel or his transferee will have no interest or a very small interest in the proceeds of partition sale aforesaid. * *

"Wherefore petitioner prays for citation of said Alcide Becnel, and of Mrs. A. Provosty, wife of said Michel A. Becnel; that experts may be appointed and sworn to inventory and appraise said property, and to report whether or not it can be divided in kind by commission issued to that effect, according to law; that experts may be appointed and sworn to examine and report on the adjustment of said accounts; and, after due proceedings, that there may be judgment in favor of this estate and against said Becnel, and his transferee, if any, for whatever amount may be found to be due by him to this estate; that if said property can not be divided in kind, the sale thereof be ordered, according to law, to effect a partition, and that the proceeds of said sale of said plantation and movables may be applied by preference to the payment of the interest of this estate in said property, and the amount found to be due this estate by said Becnel, and for like relief against his transferee, if any there be."

The defendants, Becnel and his wife, except to the jurisdiction of the second district Court, on the grounds that they are domiciled in the parish of St. John the Baptist, in which is situated the property referred to in said petition, and that the district court holding sessions in and for said parish has alone jurisdiction of the executor's action.

The Constitution provides that the jurisdiction of the second district court shall be exclusively a probate jurisdiction—and the law "that the second district court shall be strictly a probate court, and shall have exclusive jurisdiction of only successions and probate causes." C. art. 83; Rev. St. Sect. 2011.

Is the suit filed by Baily's executor against Becnel and his wife a probate cause, one which relates to exclusively a succession, and in which alone the legal representatives of that succession are concerned? The executor asks the partition of movable and immovable property situated in the parish of St. John the Baptist, belonging partly to the

estate of R. H. Baily and partly to one of the defendants. He asks—besides—a full, fair and complete adjustment of the accounts of the planting partnership which existed between the deceased and Becnel, and a judgment against the latter for whatever amount may be found to be due by him to the estate of the former.

No branch of that clear demand constitutes a probate matter. The defendants do not hold as heirs, under a title derived from the succession, and their interest is entirely distinct from that claimed by the executor. When ascertained, fixed, severed from that of the defendants, the interest of the succession will pass under the control of the second district court, there to be administered upon and disposed of in accordance with the terms of the will, and there—it may be—to be again partitioned, and then only between those whose rights are predicated on a title derived from the succession, and held in common by them as heirs or legatees. The suit in and by which the representative of a succession seeks to recover, from a stranger, property or money, has none of those features which characterize a probate cause.

To sustain his demand and defeat defendants' exception, plaintiff relies on three articles of the Civil Code which we here transcribe:

"ART. 1135 (1128). If the deceased was in community or partnership with any one who has survived him, the curator of the vacant succession, or of absent heirs, *is bound*, immediately after his appointment, *to sue for a partition*, in order that the part which belonged to the deceased, in the community or partnership property, be ascertained."

"ART. 1137 (1130). Suits for partition *must be instituted before the judge of the place where the succession is opened*, and the *co-proprietors* and partners of the deceased, as well as his heirs, present and represented, *must be cited to appear before the judge in such suits*, though their domicile or ordinary place of residence *be out of the jurisdiction of the judge*."

"ART. 976 (971). All the rules relating to the acceptance, renunciation or partition of successions, the collation of goods and payment of debts, contained in this *title* are applicable to testamentary, as well as intestate successions."

Under the laws enacted after the adoption of the Constitution of 1812, the probate court's jurisdiction was concurrent with that of the district court in suits for a partition, when there was no dispute as to the title of the property to be partitioned—4 M. N. S. 78, 485, 509; 5 M. N. S. 9; 7 M. N. S. 469; 6 L. 423; 9 L. 584—and this court held, in April 1838, "that—then—the authority of the district court, to ordain and regulate a partition of property, owned in common by any other title than hereditary succession, at the suit of a co-proprietor, could hardly be questioned." 12 L. 219.

In 15 L. 33, Judge Martin—as the organ of the court—said: "The art. 924, No. 14 of the Code of Practice, must—in the latter as well as the first part of it, be *confined* to partitions of successions, because successions are the peculiar objects of the Court of Probates, which are courts of special and limited jurisdiction, and which can not be extended by implication to the exclusion of courts of general jurisdiction."

10 L. 90; 15 L. 517; 1 R. R. 226; 11 R. 349.

In the case of Boutté against Boutté, we said in January;

"Here is not a succession to be settled, and property *exclusively its own* to be partitioned among the heirs of that succession.

"If after Charles' death, François, who survived him, had immediately thereafter sued the succession of Charles for a partition of this property, can it be doubted that the court of ordinary jurisdiction would *alone* have had cognizance of the action. How is the case altered when François being also dead, a partition is sought of the property owned by two distinct juridical beings?

"The Second Court had not jurisdiction of the action, just as it is without jurisdiction of an action of partition between two individuals who are majors and own property in common, in their own right. *

* The articles of the Code, and the decisions of this court, cited by appellee, have reference to cases wherein the co-heirs of the same succession are seeking to divide the property which is common to all of them, and which they *derived from a common ancestor*."

30 A. 182, 144.

It will be observed that, though the 1135th article of the Code, cited by plaintiff, ordains that—if the deceased was in community or partnership with any one who has survived him, the curator shall sue for a partition, it does not indicate in what court the suit is to be brought, nor does art. 1137 provide that it shall be brought in the probate court. It merely provides that suits for partition must be instituted before the judge *of the place* where the succession is opened, and—though they reside out of the jurisdiction of that judge, heirs, co-proprietors and partners must appear before him—but in what case? In every case of partition of a succession among co-heirs—C. P. 164—and also when the property to be divided is situated at the place where the succession is opened—otherwise, the action for a partition must be instituted in the parish where the property is situated, and—wherever they may be domiciliated, *there* the interested parties must be cited to appear. The Code so expressly commands. C. C. 1290 (1304); C. P. 165, No. 1.

So long as the succession is not settled and has not ceased to exist as a succession, so long as those therein interested preserve their quality of heirs, all suits which they may bring against each other, and all real

and personal actions, or others, which relate to the unsettled succession, must be brought where it is opened—C. P. 164—: but, when—by its acceptance—the succession disappears and the co-heirs become co-proprietors, the action for a partition among them is governed by articles 1290 (1304) of the Civil Code and 165 of the Code of Practice.

26 A. 611; 25 A. 143.

The present suit is not one to place the heirs in possession of property belonging to exclusively a succession; but one by an executor to divide, with third parties whose title is acknowledged, property belonging partly to those who are sued and partly by the legal representatives of a deceased person. It is a suit between co-proprietors and which should have been brought in the parish of St. John the Baptist, where the property sought to be divided is situated.

Defendants' plea to the jurisdiction was properly maintained.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 6975.

C. S. STEWART vs. F. P. MIX, SHERIFF, ET AL.

Where a wife, authorized and assisted by her husband, purchases property in her own name, and the same is ever afterward given in to the tax collectors by her and her husband as *her* property, and the husband authorizes and assists her to execute a mortgage on the property, as *her* property, to secure a separate debt of hers, the husband is thereby estopped from setting up any title to the property, to the prejudice of a judgment creditor of the wife.

The fact that a justice of this court was of counsel for certain parties in two former suits, is no ground for his recusation in a subsequent suit in which the same parties are litigants, when it appears that the validity of none of the proceedings, and the decision of none of the questions involved in the previous suits, are put at issue in the subsequent suit.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Muse*, Judge *ad hoc*.

Addison & Edwards and *E. F. Russell* for plaintiff and appellee.

M. A. Strickland and *Robert R. Reid* for defendants and appellants.

The opinion of the court was delivered by MARR, J., on the original hearing, and by SPENCER, J., on the rehearing.

MARR, J. In 1854 Mrs. Mary W. Stewart, wife of Charles S. Stewart, authorized and assisted by him, purchased a lot of ground, number six, in the square number seven, in the town of Amite, now Amite City. The conveyance was made to her by notarial act; and, in 1856, it was recorded in the parish in which the property was situated.

Community existed between these parties up to August 2, 1861, when

it was dissolved by judgment. In 1867 Mrs. Stewart bought some property of Brooks, and gave him her note for $3000, on account of the price; and by decree of this court, in November, 1874, she was condemned to pay that debt. 26 A. 714.

Brooks died; and his heirs caused execution to be issued upon that judgment, under which the sheriff seized, and was about to sell the lot number six, when the sale was arrested by injunction, at the suit of the husband, Charles S. Stewart, who alleged that he was the owner of the property, and that it was his homestead; that it does not exceed in value $2000, and that his wife does not own in her own right property to the amount of $1000.

The heirs of Brooks answered by general denial, and they pleaded, specially, that "C. S. Stewart, plaintiff, is estopped from claiming the ownership, and setting up any title to the property described in his petition, having repeatedly and publicly acknowledged the same to be in his wife, M. W. Stewart."

The district judge having recused himself, the case was tried by James H. Muse, Esq., a member of the bar, judge *ad hoc*. The judgment was in favor of plaintiff, perpetuating the injunction; and the defendants appealed.

It was proven that the lot number six was purchased during the existence of the community; that its value does not exceed $2000; that the wife does not own property to the amount of $1000; that there are several children of the family; and that the family residence is on this lot.

We do not think it necessary to decide whether the property situated in a town would be exempt under the homestead law; because, if it belongs to C. S. Stewart, it is not liable to seizure under execution on a judgment against his wife, for her separate debt; and, if it does not belong to him, he can not oppose the sale and claim the benefit of the homestead exemption.

The notarial title in the name of Mrs. Stewart was offered in evidence, and a copy of the judgment in 1861, dissolving the community. Copy of the decree of this court, as reported in 26 A. 714, was also introduced; and the returns for a series of years made by Stewart and his wife to the tax collectors, showing that Stewart returned as his entire real estate certain lots of small value, and that Mrs. Stewart returned the lot number six. Called as a witness, Stewart said the property was assessed in the name of Mrs. Stewart because the title was taken in her name; that the purchase was made during the existence of the community, and that he paid the taxes.

Defendants also offered in evidence a copy of a mortgage, granted by Mrs. Stewart, authorized and assisted by her husband, on this lot

and several others, to secure to William Acy $2000, "cash loaned to her for her separate and individual benefit." This act is dated April 8, 1867; and it was recorded on the twenty-seventh April.

Several bills of exception were taken during the trial to the ruling of the court in admitting the testimony offered by defendants. It is not necessary to notice them in detail. It suffices to say that all the evidence thus offered tended to show title in the wife, and recognition and public acknowledgment of her title by the plaintiff, her husband; and it was properly received.

No part of the proceedings in the suit for dissolution of the community was offered, except the judgment. It decreed that the community be dissolved; that plaintiff have the administration of her separate estate, and of such property as she might thereafter acquire; that there be judgment of nonsuit on her "demand for money, slaves, and land," reserving to her the right to establish her claim to the money and property in a future suit.

As this judgment in no way indicates what money or slaves or land the wife claimed, it is of no value, except to show the simple fact that such a judgment was rendered on the second August, 1861.

Plaintiff relies solely on the legal presumption that all property purchased during the existence of the community belongs to the community; and the judge *ad hoc* based his judgment on that presumption. We have frequently had occasion to say that this, like all other mere presumptions, may be rebutted by proof. It is certainly not sufficient in this case to establish title in the husband.

For nearly a quarter of a century this property has stood upon the public records in the name of the wife; and nearly seventeen years have elapsed since, by solemn judgment, the husband and wife were separated in property. During this long period her title has not been attacked or questioned, so far as the record informs us. If this were a suit by a creditor of the husband to subject the property as his, it would be manifestly unjust to require of her the same strictness of proof now that would have been proper when the acquisition by her was recent, and when she might have proven by witnesses now dead, or beyond her reach, that she made the purchase with her own paraphernal means, administered by herself exclusively.

But that is not the question we are dealing with. The husband, in order to shield the property from the just pursuit of his wife's separate creditors, asks the court to presume that the conveyance to his wife, in 1854, to which he was a party, was a mere sham, a false pretense; that in 1867 he authorized and assisted her in an act of mortgage to secure a loan for her separate, individual benefit, and thus made himself a party to a false assumption of ownership; and that from year to year in the

annual returns of the property for taxation he contributed actively to the repeated, public, false assertion of ownership; thus interposing a barrier to the pursuit of the property by his own creditors.

The reported decisions of this court teem with cases in which, upon the mere legal presumption resulting from the date of the acquisition, property the title to which was in the name of the wife has been subjected to the debts of the community. This is the first case which has fallen under our observation in which the husband has sought to arrest the sale of property standing in the wife's name, at the suit of her creditors, or has asserted title in himself for any purpose on this mere legal presumption. See Meadows vs. Dick, 13 A. 377.

This whole proceeding is bad in law, and equally bad in morals. If the wife is not really the owner of this property, the husband has done all that he could to establish and confirm the ownership in her, and to mislead the public as to the real ownership. If her title is apparent, not real; if it rests upon a basis of false pretenses and assumptions, the husband's hand must not be the first that is raised to strike down the fabric of which he was the chief architect.

Defendants have prayed for the statutory damages, twenty per cent on the amount enjoined; but they did not introduce the writ under which the seizure was made, nor offer any evidence which would enable us to ascertain the amount on which damages should be estimated. They are clearly entitled to damages for the abuse of the process of injunction; and their right to sue for and recover them must be reserved.

The judgment of the district court is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the injunction granted in this case be dissolved; that the demand of plaintiff be rejected, and his suit be dismissed; that the right of defendants to proceed against the plaintiff and his sureties on the injunction bond for damages for the wrongful obtaining of the injunction be reserved; and that the said Charles S. Stewart, plaintiff and appellee, be condemned to pay all the costs of this proceeding in this court and in the district court.

ON REHEARING.

SPENCER, J. It seems that in 1869 suit was instituted by one E. H. Caldwell against Mrs. M. W. Stewart and husband, C. S. Stewart, on a mortgage note of the wife for $3000. In that suit, it is said, Mr. Justice Marr, of this court, was of counsel for Mrs. Stewart and husband. That suit was dismissed, as in case of nonsuit, without trial. Subsequently, it was renewed in the name of M. D. Brooks, for use of Caldwell vs. Mrs. Stewart and husband, but the style of the suit was "Brooks vs. Stew-

art." This last suit resulted in a decree of this court, 26 A. 714, in favor of plaintiff. In this last case, Mr. Justice Marr was not pretended to have been of counsel. The present suit is an injunction by the husband, C. S. Stewart, against the sale of certain property under execution of said judgment in Brooks vs. Mrs. Stewart and husband, on the ground that the property seized belongs to the community, and is not liable to seizure under a judgment against the wife. The property seized is not that upon which the judgment in Brooks vs. Stewart recognized the mortgage. The present suit in no way involves the validity of the judgment of Brooks vs. Mrs. Stewart; nor the title or status of the property mortgaged in that case. But the counsel of C. S. Stewart, in his application for rehearing, for the first time suggests that Mr. Justice Marr, who delivered the opinion herein, should have recused himself; and insisted upon this as one of the grounds for rehearing. We do not think that the facts stated necessitate or even authorize a recusation. The sole question involved in this suit is whether a certain piece of property, in no way connected with the previous litigation, is the property of the community between C. S. Stewart and wife; and whether it is liable to seizure for the wife's debt. Justice Marr was never "employed or consulted" in reference to any of these matters, as an attorney. We do not see how the fact, if true, that he appeared as an attorney for Mrs. Stewart and husband in defense of the first suit, which was dismissed, or even in the renewed suit, in which Brooks obtained the judgment, could furnish cause of recusation in this suit, unless the validity of some of the proceedings in said previous suits or some of the questions then involved were brought again in question in this suit. We have seen that such is not the case; that the only thing connecting the present suit with the previous ones is that the judgment sought to be executed and enjoined was rendered in said former suit; but the validity, legality, and effect of that judgment, or of any of the proceedings leading to it, are in no wise contested in this case. Justice Marr, however, though unconscious of having ever been of counsel at all, induced us to grant a rehearing.

We have reconsidered with great care the facts of this case, and the very elaborate and able argument of plaintiff's counsel; but we are confirmed in the correctness of the decree heretofore rendered. The fundamental error of plaintiff's argument is in supposing that Stewart, the husband, has the same rights as *his creditors* would have if attacking the sale. The question as to Stewart is one of estoppel. No principle of law is better settled than this, that one will not be heard in his own interest to controvert or deny the truth of a state of facts which he has openly and publicly led others to believe, and upon the faith of which they have acted.

This property may indeed be community property, but C. S. Stewart has, by his acts and conduct, debarred himself from asserting it to the prejudice of third persons. Thus, I may be the undoubted and absolute owner of a piece of property, yet if by my acts and conduct I hold another out to the world as owner, I will not be heard to assert my claim to the prejudice of those who may have been misled by me. We see no reason to doubt the correctness of the opinion and decree heretofore rendered.

It is therefore ordered, adjudged, and decreed that our former judgment and decree remain unchanged.

Mr. Justice MARR takes no part in this decision.

No. 6632.

D. LANDRY VS. FRANÇOIS VICTOR.

Where a mortgage debtor who has taken a suspensive appeal from an order of seizure and sale is cast on appeal, the mortgage creditor, who has subsequently obtained a judgment against the debtor for the balance due after deducting the proceeds of the mortgaged property, has a right of action, for the amount of the judgment, against the surety on the appeal bond of the mortgage debtor, from the moment the return of *nulla bona* has been made on the execution issued under the judgment.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J.

Robert J. Ker and *A. L. Tucker* for plaintiff and appellee.

Louque & Fernandez for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. The grounds urged for the dismissal of this appeal, we consider as untenable; but, the conclusion to which we have come, dispenses us from the necessity of discussing those grounds.

D. Landry, as holder of a claim secured by mortgage, applied for and obtained an order commanding the seizure and sale of the property subject to that mortgage. His debtor, François Victor, the owner of said property appealed from the order of seizure and sale, and Lacroix became his surety on his appeal bond.

That bond is for $3000: its condition is "that François Victor shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the sale of his estate real and personal—if he be cast in the appeal: otherwise that said Lacroix shall be liable in his place."

François Victor was cast in the appeal, and the decree appealed

from and affirmed by this Court was not satisfied by him, nor satisfied by the sale of his property. Has Landry an action on the bond signed by Lacroix, as the security of Victor? Does that bond contain an obligation which may be enforced against any one? The counsel representing appellant, the transferree of one of the legal representatives of said Lacroix, contend that his estate is not bound, because:

1. As the judgment was but an executory proceeding, and the mortgaged property has been sold, the condition of the bond has been fulfilled and the surety discharged.

2. As no writ could have been issued on the executory process and returned *nulla bona*, no recourse can be had against the surety.

3. There was no decision rendered on the validity of plaintiff's claim, and the appeal did not deprive him of any right.

4. Suretyship can not exceed what may be due by the debtor, nor contracted under more onerous conditions.

This defense is certainly ingenious, but rests on technicalities.

The order of seizure and sale was issued on an act importing a confession of judgment; from the decree commanding the execution of that confessed judgment, defendant was allowed a suspensive appeal—the appeal was not successfully prosecuted—the writ of seizure and sale executed, and the mortgage claim partly satisfied by the sale of the mortgaged property; for the balance, plaintiff obtained a judgment against Victor, the principal on the appeal bond; from that judgment an execution was issued, and the sheriff's return is that he found no property of defendant upon which to levy. From the date of that return plaintiff's right of action on the bond, has accrued.

The law does not make the distinction contended for by appellant's counsel, between the suspensive appeal taken from an order of seizure and sale and any other suspensive appeals, as regards the liability of the surety on the bond. It provides "that in all cases of appeal to the Supreme Court, or other tribunals in this State, if the judgment appealed from be affirmed, the plaintiff may—on the return of the execution that no property has been found, obtain a decree against the surety on the bond for the amount of the judgment, etc."

Rev. St. of 1870, Sect 37.

C. P. 575-579.

27 A. p. 706-707.

Were we to rule otherwise, to legislate a distinction which is not in the law, which is repugnant to the letter and spirit of the law, which would defeat its object and destroy its value, no creditor would dare—thereafter—proceed by the executory process. That process, now one of the highest guaranties of the creditors, would have to be carefully avoided as an obstacle, an impediment, a danger: instead of hastening,

it would invariably retard the recovery of the debt—as, in every case, the execution of a decree based on a confession of judgment, would be suspended by an appeal and obstructed by a nameless bond, by the counterfeit of an obligation, by a worthless document which would bind neither the principal nor the surety, neither for the debt nor for the costs.

The real complaint of defendant is that—instead of only one, two judgments have been rendered, two executions issued against the principal on the bond. The condition of the bond is not that if executions issue and any thing be seized and sold, the surety shall be released; it is, when the appellant is cast, that—unless he satisfies the judgment—his surety shall be liable. Not one of the two judgments, not one of the two executions has been satisfied, and the surety is bound for the balance due by Victor to Landry. If not, such a bond has but one effect: to suspend an impending execution: it is good against the creditor alone—never against the principal or his surety.

The district Judge has, by a correct decree, enforced a plain, a legal obligation.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby affirmed with costs.

Marr, J. I do not concur in the opinion and decree pronounced in this case; and reserve the right to assign the grounds of my dissent hereafter.

On Rehearing.

DeBlanc, J. François Victor appealed from an order of seizure and sale, and—to do so—furnished bond in the sum of three thousand dollars, with one Lacroix as his security.

That appeal and that bond suspended the execution of a decree or order—by whatever name it may be called—based on Victor's own confession of what the law styles "a judgment."

Does the bond—in such a case—evidence a legal obligation, one which can be enforced according to its express terms, and against either the principal or security by whom it was subscribed, or is it merely the semblance of an obligation, which can be used—without apprehension or risk—to delay the execution of a confessed judgment?

Our opinion has not changed; we have held and we hold that one who—as security—assists in suspending, by a groundless appeal, the execution of an order of seizure and sale, is liable—to the extent of his obligation—for whatever amount of the confessed and affirmed judgment is not paid by or recovered from the principal on the appeal bond.

It is, therefore, ordered that our former decree remain undisturbed.

DISSENTING OPINION.

MARR, J. Landry proceeded, *via executiva*, on two notes of Victor, secured by mortgage, aggregating in principal and interest about $2000; and the order of the judge was indorsed on the petition in the usual form: "Let executory process issue, as herein prayed for, and according to law." Victor appealed from this order, and gave bond in the sum of $3000, with François Lacroix as his surety, conditioned for the satisfaction of such judgment as might be rendered against him on the appeal. This court rejected certain items of cost and expense claimed in the petition of Landry; and affirmed the order appealed from, the appellee paying the costs of appeal. Opinion Book 44, p. 54.

The sheriff proceeded with the writ of seizure and sale. The mortgaged property was sold for $1350; the costs, including attorney's fees, amounted to $208 28; the taxes, due for several years, aggregated $662 67; and there remained only $479 05 to be applied to the mortgage debt. Landry then brought suit on the two notes against Victor, *via ordinaria*, to recover the balance, $1704 95, with interest and costs; and judgment was rendered accordingly; on which execution was issued, and returned, "no property found." He then took a rule on Lacroix, the surety on the appeal bond in the executory proceedings, to show cause why execution should not issue against him. The rule was made absolute; and Lacroix took this appeal from the judgment condemning him to pay the balance, $1704 95, with interest and costs.

The proceeding by seizure and sale is *ex-parte*, and anomalous. The creditor exhibits to the judge, in term or in vacation, authentic evidence of the debt, and of the mortgage by which it is secured; and prays that the mortgaged property be seized and sold, and the proceeds applied to the payment of the mortgage debt. On this, the judge grants the order, the usual form of which is: "Let executory process issue as prayed for, and according to law." No previous notice is given to the mortgagor; no citation is issued; nor is any opportunity afforded to him to object to the granting of this order. The first notice he gets is by service of a copy of the order, and a demand of payment; and his property will be advertised and sold, unless he appeals within ten days, or obtains an injunction on opposition, or by separate suit.

No personal judgment is asked for or rendered, and none can be rendered against the mortgagor. The proceeding is purely *in rem*, against the property mortgaged; and no other property can be seized or sold under the order and writ. With the sale of the mortgaged property the proceeding is at an end, *functus officio*, and the return of the sheriff is the official proof that the mandate of the court, the order of seizure and sale, the judgment, if that word be preferred, has been

obeyed and fully executed. If the proceeds do not suffice to pay the mortgage debt, no further proceeding can be taken in that suit; and the creditor is compelled to bring a new suit, a suit *in personam*, against the debtor, the mortgagor, in the ordinary form, to recover the balance, just as he would proceed on any other ordinary unsecured debt.

It was doubted at one time whether the order of seizure and sale was such a judgment as entitled the mortgagor to appeal. The right of appeal was recognized in Day vs. Fristoe, 7 Mart. 239, and in Tilghman vs. Dias, 12 Mart. 691, and it was conceded in subsequent cases without serious question. Gurley vs. Croquet, 3 N. S. 498; McDonough vs. Fort, 14 La. 350. The nature and extent of this order were elaborately discussed in Harrod vs. Voorhies, in 16 La. 254; and the right of appeal conceded; and this was followed in Bank vs. McKee, 2 A. 461; Mathé vs. McCrystal, 11 A. 4; and Riley vs. Christie, 13 A. 256.

In Harrod vs. Voorhies the question was whether the order of seizure and sale was a judgment in the sense that it prevented the running of prescription on the note on which it was founded. It was admitted as settled doctrine, and it is not to be questioned, that an appeal lies from this order: and the court went on to say that when an authentic instrument importing confession of judgment is presented to the judge, with a petition praying for executory process, he must examine and decide whether it unites all the requisites of the law necessary to authorize this summary proceeding. "So far it is a judgment, and an appeal must lie from it, as from all other orders of court that might work irreparable injury. * * * * But such a decree is not a judgment in the true and legal sense of the term, and possesses none of its features. It issues without citation to the adverse party; it decides on no issues made up between the parties; nor does it adjudicate to the party obtaining it any right in addition to those secured by his notarial contract. If such an order was a real judgment, it would be out of the power of the judge granting it to set it aside; after rendering this decree he would be divested of all jurisdiction, and it could be reversed only by means of an appeal, or a separate action of nullity: Whereas, it is every day's practice for the judge issuing such orders to set them aside on a rule to show cause or on opposition; and in most cases the proceedings are turned into an ordinary suit, in which final judgment is afterward rendered. Such a decree, then, can be viewed only as giving the aid of the officers of justice to execute an obligation which by law produces the effects of a judgment in relation to the particular property mortgaged." P. 256, 257; see, also, Chamblis vs. Atchison, 2 A. 490, 491.

And, again, p. 257: "Plaintiff's note and mortgage have not merged in the decree made on them, as they would have done in a contradictory

judgment rendered by a competent court. If they were liable to prescription, surely the decree of the district judge granting executory process on them could not shield them from its operation."

The proposition that this order is not a judgment in the true and legal sense of the term, and possesses none of its features, was repeated in the same language in Riley vs. Christie, 13 An. 256, where it was decided that it is not a "judgment" in the sense of the Constitution, for which reasons must be specially adduced in the order itself. The doctrine that this order does not prevent the running of prescription was not questioned, so far as I am advised, until 1853, when in Rhea vs. Taylor, 8 An. 24, it was decided that service on the mortgagor of notice of seizure interrupts prescription.

This decision seems to rest upon the mere assumption that Harrod vs. Voorhies had been overruled in this respect by Stanborough vs. McCall, 4 An. 324, and Fortier vs. Zimple, 6 An. 54. In Stanborough vs. McCall, the proceeding *via executiva* was suspended by injunction; and in Fortier vs. Zimple it was arrested by the opposition of the mortgagor: and, in both cases, the litigation was protracted by the action of the mortgagors. These circumstances distinguish these two cases; and in any case so long as the hands of the mortgagee are tied, and the enforcement of his rights suspended and delayed by an injunction suit or an opposition, prescription can not run, upon the well-known maxim, *contra non valentem*. The court did not, in either of these cases, question the correctness of the decision in Harrod vs. Voorhies; and the decision in Rhea vs. Taylor is mere assertion, not supported by any principle stated by the court, nor by any previous decision. Citation interrupts prescription, because the law has expressly so provided; but the notice of seizure served on a mortgagor is not a citation; it has none of the features of a citation, and none of its effects; and no law declares that it interrupts prescription.

In Rhea vs. Taylor the defendant, in answer to the suit *in personam*, to recover the balance not satisfied by the sale of the mortgaged property, specially admitted the execution of the notes, and pleaded an open account in compensation "of any amount that may be found due," etc. After the suit had been pending some five years, he pleaded prescription. The plea in compensation was the assertion, the judicial admission, of mutual co-existing indebtedness; and it was not necessary to place the decision overruling the plea of prescription on any other ground than that the first plea was an acknowledgment of indebtedness.

In Walker vs. Lee, 20 An. 192, the proceeding *via executiva* was arrested by injunction. Subsequently, suit was brought *in personam;* and defendant pleaded prescription. The court considered the question settled by Stanborough vs. McCall, Fortier vs. Zimple, and Rhea vs. Taylor; and the plea was overruled.

In Roupe vs. Carradine, 20 An. 244, the proceeding *via executiva* was not enjoined; but the writ was returned by order of plaintiff's attorney. The court lost sight of the fact that this was an abandonment of that proceeding; and, on the assumption that Walker vs. Lee, and the cases there cited, had settled the question, overruled the plea of prescription. Properly understood, Harrod vs. Voorhies is not shaken by Stanborough vs. McCall, Fortier vs. Zimple, and Walker vs. Lee, in all of which plaintiffs were stopped and delayed in the enforcement of their rights by the acts of the defendants; and the maxim *contra non valentem* was perfectly applicable: and in Rhea vs. Taylor and Roupe vs. Carradine the court evidently failed to observe the distinguishing characteristics of the earlier cases relied upon, that in all of them the proceeding *via executiva* was suspended by opposition and by injunction.

By act of 1846, p. 166, so much of articles 746, 747 of the Code of Practice as authorized executory process on judgments obtained in other States and in foreign countries was repealed. In several cases orders had been granted making executory judgments rendered in other States which the parties were endeavoring to enforce when the act of 1846 was passed. This court held that the repeal of the law put an end to the proceeding *via executiva;* and that the judgment creditors must sue upon their judgments *via ordinaria.* There could not have been a more authoritative recognition and enforcement of the doctrine laid down in Harrod vs. Voorhies and Riley vs. Christie, that the order of seizure and sale is not a judgment in the true and legal sense of the term; and that it is merely giving the aid of the officers of justice to enforce a judgment obtained elsewhere, or a contract to which the law attributes the effect of a judgment with respect only to the property specially mortgaged. If the order making a judgment executory had been itself a judgment, it would have created a vested right in the plaintiff; it would have been his property from the moment it was granted; and by the Constitution of the United States and the constitution of Louisiana it could not have been annulled by any subsequent action of the Legislature. It was only because this order was merely a mode of proceeding, and was neither a judgment nor a contract, that it was subject to legislative control and repeal. C. P. art. 548; Scott vs. Duke, 3 An. 253; Kilgore vs. Bank, 3 An. 693; Bank vs. Markham, 3 An. 699.

It will be observed that, while the Codes attribute to the contract upon which executory process is granted the effect of a confession of judgment, in so far as the mortgaged property is concerned, the order of seizure and sale is not called a judgment. In the Civil Code, 1808 p. 460, art. 40, 1825, art. 3361, it is called "an *order* for the immediate seizure" of the thing mortgaged. In the Code of Practice it is called "an *order*": arts. 66, 735, 736, 738, 742. The use of the word *judgment* seems to have

been studiously avoided in art. 738, where "the debtor against whom this *order of seizure and sale* has been rendered," is authorized to have the sale suspended by injunction; and in article 742, where, on proof of the grounds alleged in the opposition, the judge is required to *revoke* the *order* of seizure and sale." It is usual to speak of a judgment as having been rendered; and the invariable use in the Codes of the word *order* shows that the compilers designed that this fiat of the judge should be an *order* merely, and not a *judgment* in the sense of the law. Article 540 of the C. P. plainly declares that *orders* of court, "such as mandates of arrest and of seizure," are not termed judgments, though they have the same effect; that is, they must be obeyed and enforced, unless they are set aside or revoked. A judge has no power to revoke a judgment. Once rendered, it is the property of the party in whose favor it has been given; and the judge can not alter it, except on new trial, or to change the phraseology, or to correct some error of calculation, or some clerical error. C. P. arts. 547, 548. In an action of nullity he may decree it to be void, and may enjoin it perpetually; or he may rescind it at the suit of a minor or absent defendant. C. P. arts. 556, 614, 615. The order of seizure and sale, therefore, is not a judgment in the legal acceptation of the word, since the law so declares in art. 540 of the C. P., and the judge who granted it is required to revoke it on proper proof; art. 742; and because the Codes call it an order, and never speak of it as a judgment.

There are important distinctions between the order of seizure and sale, granted on an act *importing* confession of judgment, and the order making executory the judgment of a different tribunal. In the one case the order and writ require the sale of the mortgaged property alone; in the other a common writ of *fieri facias* issues, and may be levied on movables and immovables, rights and credits of the debtor. In the one the sale may be suspended by injunction, on opposition without security; while in the other the judgment debtor can not obtain an injunction without bond and security, as in other injunction suits. C. P. art. 750.

When the word "judgment" is used in the Code of Practice, it means the decision of the judge in a contradictory proceeding; and it does not include in that term orders of seizure or of arrest, or other mandates which courts may grant. Judgments require the party condemned to do some thing or to pay some thing: the order of seizure and sale does not require the mortgagor to do any thing or to pay any thing, not even costs; it is granted on the *ex-parte* application of the mortgagee, without an opportunity having been afforded to the mortgagor to be heard; and he knows nothing of the proceeding until he is informed, by subsequent notice, that an order has been granted, under which his property is about to be seized and sold: and he must seek relief, either

by opposition, in the nature of an answer to the demand, or by separate suit and injunction. Judgments are rendered after the parties have been heard, or have had the opportunity to be heard; the mortgagor is heard only after the order condemning his property to be sold has been granted; and then he can only proceed by injunction or by appeal!

This proceeding, *via executiva*, was in use under the dominion of the Spanish law; and it prevailed in France to enforce contracts, ACTES or TITRES, "emportant exécution parée." Merlin, vo. *Exécution Parée*, tells us that this term was applied to the execution "qui peut se faire en vertu de l'acte tel qu'il est, *sans avoir besoin d'autre formalité ni d'autre titre*, le mot *parée* n'est, comme l'en voit, que la traduction de l'expression Latine, *parata;* et le sens en est que tel acte est prêt à recevoir son exécution."

In the Code of 1808, p. 460, art. 40, and of 1825, art. 3361, the phraseology of the French law is adopted; and the words of the French text are "*emporte exécution parée*," which, in the English version are, "amounts to a confession of judgment." There is no word in the French text which can be translated either *judgment* or *confession;* and there are no three words in the English language which can express the meaning of the three French words, "emporte exécution parée." The reason of this is obvious. No English speaking people have any analogous proceeding, nor does the English system attach sufficient importance to any contract whatever, to permit execution to issue upon it under which the property, which is the subject of the contract, may be seized and sold, without a previous contradictory judgment or decree. Of course, no people would have or require words to express a thing of which they have no knowledge.

The compilers of the Code of Practice adopted the same phraseology in describing acts upon which the order of seizure and sale may be granted. Article sixty-three declares that the creditor who has against his debtor "*un titre emportant exécution parée*," shall be entitled to have the hypothecated property seized immediately and sold. The English translation is "*a title importing a confession of judgment.*" In article sixty-six the phrase is varied in the French: "*porte exécution parée*," which is also translated "*imports a confession of judgment;*" and in article ninety-eight the expression in the original text is, "*un titre emportant exécution parée*," which is translated in the English text, "*an act or title importing confession of judgment.*"

Article 732 uses the words "*acte emportant l'exécution parée*," which is translated "*an act importing a confession of judgment.*" Conscious of the fact that there was no English equivalent for these French words, the compilers have expressed their meaning paraphrastically, in article 733: "An act is said to import a confession of judgment in matters of privi-

lege and mortgage, when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage."

Every promissory note is a declaration and acknowledgment of a debt; and the fact that the maker adds to this acknowledgment a formal contract by which he grants a mortgage or a privilege to secure the debt no more makes that contract a confession of judgment in any just sense of the words than would a similar acknowledgment in a contract which grants no mortgage or privilege. To give additional facility to the enforcement of mortgages and privileges, the law-maker has seen fit to allow the mortgage creditor to seize and sell the mortgaged property, without the delay of obtaining a contradictory judgment; but it has not chosen to elevate the contract to the dignity of a judgment, or to give it the effect of a judgment, except in so far as execution of the contract, by the sale of the mortgaged property, is concerned. Where there is a confession of judgment, the creditor may obtain, upon exhibiting it, a real judgment, which may be enforced by the seizure and sale, not merely of the property specially mortgaged to secure it, but of any other property of the debtor subject to execution.

The paucity of the English language does not admit of a translation of the original French of our Codes, "emporte exécution parée;" and the compilers have sufficiently shown what they meant by the mistranslation "*imports a confession of judgment*," by limiting it to contracts clothed with certain prescribed formalities, and restricting its effects to the property specially designated and affected.

There are other considerations not less conclusive. Death puts an end to the capacity to stand in judgment; and that which belonged to a man up to the moment of his death passes, *eo instanti*, into the ownership and dominion of another. But the death of the mortgagor is no obstacle to the granting of the order, and to the seizure and sale of the mortgaged property. No judgment can be rendered against the executor or administrator of a succession, except for the purpose of liquidating a debt which he does not acknowledge; and that judgment is always guarded with the qualification that it be paid in due course of administration; and it can not be enforced by execution. But, although the mortgagor be dead, and the mortgaged property be inventoried as belonging to the succession, and the succession be in regular course of administration, the mortgagee may go into a court of ordinary jurisdiction, and obtain the order of seizure and sale, and have the mortgaged property sold by the sheriff, in accordance with the terms and conditions of the notarial contract of mortgage. It necessarily follows, therefore, that the order of seizure and sale is not a judgment; it is an *ex-*

parte order; and it is executed by the sale of the mortgaged property, whether the mortgagor be living or be dead.

Having thus ascertained the nature, extent, and effect of the order of seizure and sale, and the restricted sense in which alone it can be treated as a judgment, it remains to inquire what are the obligations assumed by the surety in the bond given for an appeal from that order.

The condition of the bond is that prescribed by the Code of Practice, art. 579, that the appellant shall prosecute his appeal, and "shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise, that the surety shall be liable in his place."

The Code of Practice, article 575, requires that the bond for a suspensive appeal shall be for a sum exceeding by one half the amount of the judgment appealed from, when it is for a specific sum. If the judgment be not for a specific sum, but for the delivery of some movable of a perishable nature, the bond must be for an amount exceeding by one half the estimated value of such movable. Art. 576. If the judgment decree the delivery of real estate not of a perishable character, the bond must be for a sum exceeding by one half the estimative value of the revenue to be derived from the property pending the suit; and for such additional sum as the judge may determine as security for any injury or deterioration which may be caused to the property by the appellant while it remains in his possession. Art. 577.

If the actual owner of real estate sue one wrongfully in possession, and obtain judgment decreeing him to be the owner, and to be entitled to immediate possession, no judge would think of requiring the defendant to give bond for the value of the property, much less for a sum exceeding that value by one half, in order to appeal suspensively. In all such cases the bond must be fixed in accordance with the requirements of article 577. Is it possible to suggest any good reason for requiring the mortgagor, appealing from an order of seizure and sale, to give bond for a larger amount than would be required of him if he were defendant in a petitory action, appealing from a judgment decreeing the ownership and right of possession of that same property to be in the plaintiff? The mortgage does not give the mortgagee any title of ownership, nor right of possession, nor does the order of seizure and sale. The mortgage creates a lien, a right to be paid out of the proceeds of the sale of the mortgaged property; and the order simply requires the property to be sold, and the contract right of the mortgagee to be enforced. Why should the mortgagee, proceeding in the most expeditious manner known to the law, having the right to a summary trial, as well in the district court as in the appellate court, in the event of

opposition by the mortgagor, be secured by a bond for a larger amount than the real owner could require, who is delayed, and who must await the slow movement of regular proceedings in order to obtain possession and enjoyment of his property, wrongfully withheld by the appellant?

It is immaterial what the amount of the bond may be, except in so far as the enjoyment of the right of appeal may be improperly obstructed by requiring an unreasonable bond, and that the liability of the surety can not exceed the amount fixed. The precise obligation is to satisfy such judgment as may be rendered by the appellate court against the appellant, on the appeal. As was well said in Wilson vs. Churchman, 6 A. 469: "We know of no instance in which sureties on an appeal bond have been held liable, except on the judgment of the court of the appeal;" and by the very terms of the appeal bond, as prescribed by the Code of Practice, art. 579, the satisfaction of the judgment rendered by the appellate court discharges the obligation of the surety.

Wilson vs. Churchman is an instructive case. Plaintiffs had sold a lot of flour to Churchman, which was put on board a ship, consigned to parties in Philadelphia. After the bill of lading had been sent by mail to the consignees, plaintiffs sued for the price and sequestered the flour on the ship, under their lien as vendors. Gilchrist, as master and part owner of the ship, bonded the flour, and the ship transported and delivered it as consigned. Gilchrist intervened by way of third opposition, alleging his obligation to deliver the flour, in accordance with the bill of lading, and his right to the custody and possession of it for that purpose. The judgment of the district court, on rule, maintained the sequestration; and, on the merits, the opposition of Gilchrist was dismissed. He appealed; and this court reversed the judgment on the rule, and set aside the sequestration, and affirmed the judgment dismissing the opposition. The case was remanded "for the sole purpose of ascertaining the value of the flour sequestered at the date of the bonding by Gilchrist, and of rendering judgment against him for that value, subject to credit for such payments as may have been made by Churchman." 4 A. 456.

Judgment was rendered in the district court against Gilchrist for $3500; and, on a return of "no property found," the sureties on the appeal bond on the first appeal were condemned to pay the amount; and they appealed. This court held that they were not liable. After the language first quoted above, the court said:

"The Code of Practice, article 575, evidently looks to the responsibility attaching in a definitive judgment on the appeal, and seems to us to exclude the idea of the surety binding himself to abide by the action of any court other than that of the court to which the appeal is taken. The same sense, we think, prevails in article 579." 6 A. 469.

Greiner brought suit against Prendergast to annul a judgment obtained against him by Prendergast, and he enjoined the execution of that judgment. The injunction was dissolved with $27 damages, ten per cent interest on the judgment, and costs. Greiner took a suspensive appeal; and gave bond with Durell as his surety, conditioned as the bond is in this case. The judgment appealed from was affirmed; and on rule, Durell, the surety, was condemned to pay $500, the amount of the appeal bond, "to be discharged on payment of $271, with interest and costs, the amount of the original judgment in favor of Prendergast, against Greiner, together with the $27 damages, and the ten per cent interest decreed on the dissolution of the injunction." On the appeal taken from this judgment, this court decided that Durell had bound himself for the payment of the $27, ten per cent interest, and costs of the action of nullity, "*and nothing more.* To hold him to the payment of the original judgment would be to hold him beyond the terms of his bond, *which can not be done.*" 3 An. 389.

Lewis, a slave, brought suit for his freedom against Cartwright, who claimed to be his owner; and he appealed suspensively from the judgment decreeing him to be a slave, and the property of Cartwright. The condition of the bond was identical with that in this case; and the judgment appealed from was affirmed. The slave was at large from 1841 until 1846, when he was arrested and delivered to Cartwright, from whom he afterward escaped. Suit was brought by Cartwright on the appeal bond against the sureties, to recover for the loss of the services of the slave from 1841 to 1846. This court said the obligation of the sureties was that the judgment which might be rendered on the appeal should be satisfied, *and nothing more.*

"Satisfaction of the judgment involved two things: 1. That the slave should surrender himself to his master as his slave. 2. That the costs of the suit should be paid. The judgment merely ascertained a question of property; it did not determine what damages the owner had incidentally incurred by the litigation carried on against him by his slave. * * * * * The sureties in such an appeal, upon a bond expressed as the present bond, would be considered as satisfying their bond by delivering the slave and paying the costs." The judgment discharging the sureties was affirmed. 3 A. 685.

In the State vs. Judge of the Third District, 18 La. 444, the mortgagor arrested the sale, on opposition, under articles 739, 740 of the Code of Practice, without giving security. The injunction was dissolved, but the court ordered it to be reinstated on the mortgagor giving bond in the sum of $13,500. He demanded a suspensive appeal, which was granted on condition of his giving bond in the sum of $13,500; and he applied for a mandamus to compel the judge to grant him the appeal on

his giving bond to cover the costs. The case was one of first impression; and the court held that, although the mortgagor may be entitled to an injunction without giving bond, he can not take a suspensive appeal from the judgment dissolving that injunction without giving security as required by article 575 of the Code of Practice.

This decision is not reconcilable with the reasoning and decree in the subsequent case of the State vs. Judge of the First District, 19 La. 169, 171. Where an injunction is dissolved, without damages, a bond for costs only suffices for a suspensive appeal; Malain vs. Judge of Third Judicial District Court, 29 An. 794; and it logically follows that this rule is applicable as well to injunctions obtained without as to those granted with bond and security. The principle is that the judgment appealed from does not condemn the plaintiff to do any thing or to pay any thing; and he is, therefore, entitled to appeal on giving bond to cover the costs. This court well said in Parham vs. Cobb, 9 An. 426: "The term *suspensive appeal*, as used in the Code of Practice, has no meaning, except as applied to a judgment rendered against the defendant in a suit." Of course this is to be understood to apply to the party condemned; and the defendant in the judgment may be the plaintiff in injunction, or in a reconventional demand, etc. The false application of this term has misled the judicial tribunals of this State on more occasions than one, and notably in 18 La. 444. See the rule as stated in Blanchin vs. Fashion, 10 An. 345, and Untereiner vs. Miller, 29 An. 436, in accordance with Parham vs. Cobb, 9 An. 426.

In State vs. Judge of the Seventh District Court, 22 An. 35, it is said that a judgment *in rem* may be for a sum as specific as a personal judgment. "To suspend the execution of a judgment for a specific amount, whether it be an order of seizure and sale, or an ordinary judgment, the appeal bond must conform to article 575 of the Code of Practice;" and Tournillon vs. Ratliff, 20 An. 179, is relied upon as the authority for this assertion. But in that case the court decided nothing more than that a bond exceeding by one half the mortgage debt actually due sufficed to suspend the execution of the order of seizure and sale, although the whole mortgage debt was for a larger amount; and that the amount not due could not be taken into consideration. "Its payment was suspended by the terms agreed upon, without any bond." P. 180.

The case in 22 An. 35, therefore, is without support. If it be conceded that a judgment *in rem* may be for a sum as specific as a personal judgment, it certainly is not true that an order of seizure and sale, "Let executory process issue as prayed for, and according to law," is a judgment for any sum whatever. Who could know in advance what the mortgaged property would sell for?

In Wood vs. Fulton, 2 Harris & Gill (Md.), 75, which was an action

on an appeal bond against the surety, on a decree foreclosing a mortgage, the court held that the decree appealed from was *in rem*, and that the measure of damages was the actual injury suffered by the appellee from the delay.

In the present case the obligation of the surety is dependent on two conditions; 1. That, on the appeal, the appellate court should render a judgment against the appellant. 2. That the appellant should fail to satisfy that judgment.

The appellate court could only review the matters passed upon by the district court. The district court merely ordered the mortgaged property to be seized and sold. The appellate court could only inquire whether sufficient authentic evidence had been presented to the district court to authorize that order. It might have found the evidence insufficient, and reversed the order; or it might have found part of the demand of the mortgagee not established by authentic evidence, and have affirmed the order deducting the amount not so established; or it might simply have affirmed the order appealed from. The court might have rendered a judgment against appellant for the costs, and, also, for damages for a frivolous appeal; and this would have been a judgment against the appellant for which the surety would have been bound by the terms of the bond. The court actually rendered no judgment against the appellant in this case, and it could not have rendered any judgment against him for the mortgage debt, because the proceeding in the district court was not against him, but was *in rem*, against his property. The appeal was not frivolous, but was so well founded that the appellate court reduced the demand of the mortgagee, the appellee, and condemned him to pay the costs of the appeal.

If the appellee was subjected to delay, it was by his own fault, because he demanded more than was legally due to him; and the mortgagor was entitled to seek relief, as he did, by appeal. The delay was not great; the appeal was taken in February, and the decree of the appellate court was rendered in December, 1874; and the mortgaged property was sold in January, 1875. Nearly half the price of the adjudication was consumed by the taxes, which had accumulated from 1870, and which primed the mortgage debt. The presumption is that the property sold for its full value; and it is not alleged in the rule, nor was it proven, that it would have brought more at any time between the date of the order, third February, 1874, and the date of the sale, thirtieth January, 1875.

As the obligation of the surety is to pay and satisfy such judgment as may be rendered against the appellant by the appellate court, on the appeal, he can not be held liable for damages for the delay caused to the mortgagee by the appeal; and it would be manifestly unjust in this case

to make him liable for any consequence of the delay, because it was by the fault of the mortgagee in demanding what he had no right to recover, that the appellant was compelled to seek the relief which he obtained by the appeal.

No case is cited, nor do we know of any, in which proceedings were taken to hold the surety liable on a bond given on appeal from the order of seizure and sale, prior to 1875. In Whan vs. Irwin, 27 An. 706, the mortgaged property had been sold, and a balance of the mortgage debt remained unpaid. A rule was taken on the surety in the appeal bond; and our predecessors decided without dissent that as there was no personal judgment against the appellant, the mortgagor, no execution could issue against him, and the surety could not be held liable. A rehearing was granted; and the court, by a bare majority, three to two, decided that, after exhausting the mortgaged property, the mortgagor might proceed at once against the surety in the appeal bond. In support of this the cases in 20 An. 179, and 22 An. 35, are cited, both of which relate exclusively to the amount of the bond to be given on an appeal by the mortgagor from the order of seizure and sale; and neither of them refers in any manner to the extent of the liability of the surety.

Whan vs. Irwin ignores the jurisprudence of half a century, and the express terms of the Code of Practice, that this *ex-parte* order of court is not a judgment, in the true and legal sense of the term; and it can not be accepted as a correct statement of the law. In the subsequent case of Gaines vs. White, 28 An. 532, there was a personal judgment for a large sum with recognition of the mortgagee's rights; and that judgment was appealed from.

Neither the mortgagor nor his surety guaranteed the sufficiency of the mortgaged property to pay the mortgage debt, as the Supreme Court of Maryland well said in 2 Harris & Gill, 75. The specific obligation was to satisfy such judgment as might be rendered against the appellant on the appeal. No judgment was rendered against him. The order of seizure and sale, to the extent that it can be called a judgment, is a judgment purely *in rem;* and the decree of the Supreme Court simply affirmed that order. If it can be said that the appellant and the surety bound themselves that that order or judgment should be satisfied, it was satisfied by the sale of the mortgaged property. When the mortgaged property had been sold, the order of seizure and sale was satisfied; and the proceeding in that suit was at an end. To say that the surety bound himself that the entire mortgage debt should be paid, is to make a contract for him to which he never consented. The order of seizure and sale did not condemn the mortgagor to pay any sum, much less to pay the mortgage debt. It merely ordered the mortgaged property to be sold, whatever it might yield; and the affirmance of that

order did not condemn the mortgagor to pay any thing. The proof of this is that no proceeding could be taken on the suit *via executiva* to recover of the mortgagor the balance remaining unpaid after the sale of the mortgaged property.

It is elementary that the obligation of the surety can not be extended beyond that of the principal. Gilbert vs. Meriam, 2 An. 162; R. C. C. 3087. The surety in this case was not bound except by the appeal bond; and there is nothing in that bond which binds the principal to pay the mortgage debt. By what process of reasoning can it be shown that the surety, binding himself specifically that a judgment to be rendered shall be satisfied, is liable for another and a wholly different judgment, rendered in another and a wholly different suit? On the affirmance by the appellate court of the order of seizure and sale, neither before nor after the mortgaged property has been sold and exhausted can any writ issue against the mortgagor on that order. How can his surety be held under the more onerous condition that, on sale, judgment and execution may be obtained against him to which the principal is not liable?

In Cartwright's case, 3 An., the satisfaction of the judgment appealed from was the delivery of the property to the owner; that is, the performance of the decree. In this case, the satisfaction of the order of seizure and sale was the sale of the mortgaged property. In Wilson vs. Churchman, the liability of the defendant was fixed by the judgment appealed from; and the cause was remanded only to ascertain the precise amount of that liability. But when that liability was ascertained the judgment was not that rendered by the appellate court on the appeal; and the sureties were not bound, because they were liable only for such judgment as might be rendered by the appellate court on the appeal, not for a judgment to be rendered in subsequent proceedings in another court. In this case it can not be pretended that the surety on the appeal bond was liable for the entire mortgage debt. It was necessary first to sell the mortgaged property; and a new suit was then brought to enforce the personal liability for the balance.

The proceeding *via executiva* related solely to the liability of the mortgaged property, and in no way affected the personal liability of the mortgagor. The surety undertook to satisfy such judgment as might be rendered against the mortgagor in that suit, which could have been only for costs and damages; and he did not in any manner undertake to be liable for another judgment, in another suit against the mortgagor.

It is manifest that the idea of the liability of the surety in such a case, for the balance not satisfied by the sale of the mortgaged property, grew out of the demonstrated error in 18 La. in fixing the amount of an appeal bond on the dissolution of an injunction; and this was followed by the demonstrated error in 22 An. in calling an order of seizure and

sale a judgment for a specific sum, and requiring an appeal bond in such case to be in accordance with art. 575 of the Code of Practice. It seems to me contrary to right and justice that a surety in such a bond should be held as guarantor of the sufficiency of the mortgaged property; and that the mortgagee, after he has obtained the full benefit of the security which he accepted in the contract of mortgage, should be allowed to recover of the surety in the appeal bond, as if he had been guarantor of the sufficiency of the property, and surety, originally, for the debt secured by the mortgage.

There is proof on the record tending to show that plaintiff paid part of the city taxes at fifty cents on the dollar, which are deducted in full from the price of the adjudication. If the surety could be held liable, he ought to have the benefit of this discount; and the case should be remanded to ascertain the amount.

The proceeding by attachment differs from that by executory process in many particulars; and the Code of Practice, art. 732, declares that they are subject to different rules, and must not be confounded. In a suit by attachment the proceeding is, in form, *in personam*. An action is brought to recover a debt, a specific, fixed amount; and the property of the debtor is attached for the purpose of bringing him into court; and to secure the payment of the judgment that may be rendered. If the debtor is absent and is not cited, a curator *ad hoc* or advocate is appointed to represent him, and is cited in his stead. A judgment is rendered against the defendant, with lien and privilege on the property attached. That judgment is for a specific sum; and if the curator or the defendant should appeal suspensively, the bond would be fixed in accordance with art. 575 of the C. P.; and the surety would know and understand that he was bound for the debt if it was not made out of the debtor or his property, in the event of the affirmance of the judgment by the appellate court. The form of the proceeding is *in personam;* but where the defendant is not cited, and does not make personal appearance, the proceeding is *in rem*, in the sense that it concludes the defendant only with respect to the property attached; and no other property of the debtor could be seized and sold under that judgment.

It will be time enough when the case arises to inquire what would be the liability of the surety in an appeal bond in an attachment suit where the defendant has not been cited and has not appeared personally and the value of the property attached is less than the amount of the judgment. Reference has been made to this proceeding now and this digression made only because it has been suggested that the proceeding by attachment and by seizure and sale are subject to the same rules. The Code of Practice declares that they are not; and, it may be

added, there is not much probability that a curator *ad hoc* would be able to give the bond for a suspensive appeal in an attachment suit without the consent and assistance of the defendant, and such action on his part as would bind him personally by such judgment as might be rendered on the appeal by the appellate court, by which his surety would also be bound.

It may be that the proceeding by seizure and sale interrupts prescription; but the argument and decision to the contrary in Harrod vs. Voorhies has never been met or answered. It may be that where the mortgagor, having obtained an injunction on opposition, can appeal from the judgment dissolving that injunction only by giving bond for an amount exceeding by one half the mortgage debt, as decided in 18 La. 444; though this would be in violation of the general rule that plaintiff in injunction, and the party who is not condemned to do any thing, or to pay any thing, may appeal on giving bond for the costs only; and it may be, as asserted in 22 An. 35, that to appeal suspensively from an order of seizure and sale, the mortgagor must give bond for one half over the amount of the mortgage debt, contrary to all the analogies of the law in kindred cases. It would not thence follow that the surety in such a bond was liable for the mortgage debt, or for the amount of a judgment rendered in another suit, for the remainder not paid by the sale of the mortgaged property. His obligation is specific to pay and satisfy such judgment as may be rendered "against the appellant," on the appeal; and it can not be extended beyond the express terms of the bond. A judgment for the remainder, a judgment in another suit, is not the judgment appealed from, nor is it the judgment rendered against the appellant by the appellate court on the appeal. Until such a judgment has been rendered and has not been satisfied the surety is not in default: his conditional obligation has not become absolute, and he is not liable.

Whan vs. Irvin is the only case of which I have any knowledge in which the surety in an appeal bond has been held for a judgment rendered by another court than that of the appeal; and in another and wholly different proceeding. In my judgment that decision and the one now rendered in this case impose upon the surety an obligation to which he has never assented. The contract of suretyship is *strictissima juris:* Whenever resort is had to the surety, he may well ask: "Is it so nominated in the bond?" And if it is not, he may truly say: "*Non in hæc fœdera veni.*" Instead of construing the obligation of the surety strictly, Whan vs. Irvin construed it liberally against the surety, and in favor of the obligee. In Whan vs. Irvin, a contract was made for the surety and enforced against him, instead of the contract which he actually assented to and made.

Wilson vs. Churchman, 6 An., was a well considered case, by a court

which we all remember with pride as one of the ablest that has ever graced the Bench. That decision commends itself to my judgment and approval, and I am not prepared to overrule it.

Dissenting, as it is my misfortune to do in this case, from all my brethren, due respect for them and myself has compelled me to state at large, as I have done, the reason by which I am controlled.

No. 7013.

MRS. A. R. RICHARDSON VS. MOSES MANN.

Where the pledgee of a mortgage note, in whose hands it has been placed to secure a debt due him by the pledgor, sells the property mortgaged to secure the note for a sum less than the amount of the note, and immediately resells it for a larger sum than that of the note, he becomes liable to the pledgor, not for the price at which the property was resold, but merely for the amount of the note.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist*, J.

Kennard, Howe & Prentiss and *W. W. Leake* for plaintiff and appellee.

Wickliffe & Fisher for defendant and appellant.

The opinion of the court was delivered on the original hearing by MARR, J., and on the rehearing by SPENCER, J.

MARR, J. Mrs. Richardson pledged to Mann, Fischer & Co., as collateral, two notes secured by mortgage on the "Island Plantation." On the 4th February, 1875, it was agreed between her and Moses Mann, of Mann, Fischer & Co., then in liquidation, that Mann should "proceed in a summary manner, by the 25th January, 1876, to collect the notes held as collateral, or, if he should not do so, he obligates himself to pay to Mrs. Richardson the difference between the sum total of her indebtedness to Mann, Fischer & Co. and to Mann individually and the notes held as collateral, it being optional with Mann to proceed to the summary collection before the 25th January, 1876, should he so desire."

On the 24th January, 1876, Mann, Fischer & Co. obtained an order of seizure and sale on the mortgage notes; but their attorney apprehended that the evidence on which that order was granted was not sufficient, because he had offered a copy of a copy of the mortgage; and, as soon as he procured from New Orleans a properly authenticated copy of the original, he submitted that, with the other authentic evidence, and the judge ran his pen through the figure "24," in the order, and wrote in the line above "thirty-first."

The sale-day in the parish of West Feliciana was the first Saturday of each month. The first Saturday in February was the fifth day of the

month; and, of course, there was not time to advertise for that day: the first Saturday in March was the fourth day of that month, which was a legal holiday, a *dies non*, by express statute: so that the sale could not have been made on that day. Act of 1874, p. 64. The sale was made on the first Saturday, which was the first day of April.

This suit was brought on the 24th of February, 1876, to recover of Mann the amount of the two mortgage notes, $5000, with eight per cent interest from January 25, 1874, less sundry credits set forth in the petition, on the ground that Mann had "failed to proceed to the summary collection of said mortgage notes on or before the 25th January, 1876, according to said contract, and refuses to pay petitioner the balance of her notes as he agreed and obligated himself to do, though amicably requested, and having been put in default."

The answer sets out the facts, the obtaining of the order of seizure and sale on the 24th January, that no legal sale could have been made prior to the first Saturday in April, when it was made: that plaintiff suffered no damage or injury from the fact that the suit was instituted on the 31st instead of the 25th January; that defendant's counsel had doubt as to the sufficiency of the evidence on which the order of 24th January was granted, and for that reason sent to New Orleans for additional evidence, on which the date of the order was changed to 31st January; that the sale could not have taken place earlier than the 1st April on an order obtained at any time in January; and that he has carried out strictly the spirit and intent of the contract.

In November an amended petition was filed in which it was charged that on the 1st April the property was adjudicated to Moses Mann and others for $8200; that at the sale Mann, Fischer and others, and Vincent D. Walsh were bidding for the property, when Mann persuaded and influenced Walsh not to bid, and as soon as the property was adjudicated to Mann and others they sold it, before leaving the place, under their agreement, to Walsh for $10,000.

That the illegal acts of Mann and others prevented fair competition and sale as contemplated by law, through which Mann expected to defraud petitioner of one half the difference between his purchase, $8200, and the sale to Walsh for $10,000, amounting to $900 05.

The prayer is for judgment for the entire amount, as set forth in the original petition.

Defendant answered by denial of each and every allegation in the amended petition contained. The judgment was in favor of plaintiff's transferees, McGehee, Snowden & Violet, for $5000, with interest, subject to sundry credits, as prayed for in the original petition; and defendant appealed. Plaintiff, in answer, prays for damages for a frivolous appeal.

We agree with the district judge that Mann complied with his contract to proceed in a summary manner by the 25th January, 1876. He had the option to proceed or not before that time; he obligated himself to proceed by that time. He actually commenced the proceeding, by obtaining the judge's order on the 24th January. If he had prosecuted the sale under that order, with all possible dispatch, it could not have been made before the first Saturday in April.

It appears from the testimony of Walsh that August Fischer, representing Mann, Fischer & Co., and Willis W. Forrester, who held one of the mortgage notes, concurrent with those pledged by Mrs. Richardson to Mann, Fischer & Co., were bidding on the property against Walsh. Walsh had made one or more bids, and had bid more than he intended when he left home. He asked the sheriff to suspend until he could have a talk with Fischer. Does not remember whether or not Mann was present at this conversation. He did not bid again on the property. Did not bid on the machinery, which was sold separately. After the sale, and before leaving the place, "I was induced, by the advice of Gov. Wickliffe, to buy the property. The inducements that persuaded me to purchase was the deferred payments, enabling me to meet them with the crops raised on the place. I purchased the property at $10,000, one half cash, and balance in one and two years."

On cross-examination he says he considers $10,000 for the place, including the machinery, on the terms, half cash, balance in one and two years, a more reasonable price than his highest cash bid, which was between $6500 and $7000, for the place alone, without the machinery.

"Neither Moses Mann, nor August Fischer, nor Willis Forrester, nor Max Fischer, nor any other person persuaded or induced witness to cease bidding on the place. Witness ceased bidding because he thought that Mr. August Fischer would give more for the property than witness would. Witness came to that conclusion from the conversation he had with Mr. Fischer. * * * * * * * * * * *

"Had no understanding with Mann, Max and August Fischer and Forrester in regard to bidding on the Island plantation, except that he told August Fischer that he would not bid any more than he had already bid; that he had already bid more than he expected, when he found out that the machinery would be sold separately."

The testimony fails to show any illegal act, any thing that was in any respect improper on the part of Walsh, or the other parties bidding on the property. It is evident that he was influenced mainly by the advice of Gov. Wickliffe and Louis Sterling, old friends of his, as he states, to make the purchase; and he considered the terms at which he purchased better than his highest bid.

The district judge makes no reference in his reasons for judgment

to the alleged illegal acts of Mann, with intent to defraud Mrs. Richardson; nor do we think it necessary to say more than that it is without support in the testimony adduced. The decision in favor of plaintiff is upon the sole ground that, in the transaction with Walsh, "Mann was acting as the agent of Mrs. Richardson, and she is entitled to the benefit of said sale at $10,000."

The legal title to the two notes pledged to Mann, Fischer & Co. was in them. They had the option to allow Mrs. Richardson their face value and interest, or to proceed on them by the 25th January, 1876. They elected to proceed, and they commenced the proceeding on the 24th of January. They were no more the agents of Mrs. Richardson, in provoking the sale of the mortgaged property, than they were of Willis Forrester, who held one of the series of notes secured by the same mortgage. Their object was to collect the debt due them by Mrs. Richardson; and their only obligation to her was to collect and give her the benefit of her share and portion of the proceeds of the sale. If the amount thus realized on the two notes should exceed the amount of her indebtedness, for which they were pledged, she would be entitled to the excess. They did not buy the property as agents for Mrs. Richardson, nor did they sell it to Walsh as her agents. They purchased in their own right, as the highest bidders; and their obligation was to account for the proceeds. Their bid was $8200. The costs and taxes to be deducted were $935 70, leaving for distribution $7264 30. Out of this the sheriff retained, by order of court, $500, to answer the demands of Rudman and Wagner, who claimed privileges on the machinery and implements, leaving for actual distribution to the two mortgage creditors $6764 30.

The amount of Mrs. Richardson's two notes was - -	$5866 67
And the amount due Forrester was - - - - - - - -	2933 33
Total mortgage debt - - - - - - - - - -	$8800 00

If the $500 retained by the sheriff should come into this distribution, Mrs. Richardson's portion would be just double that of Forrester, $4842 87. Or, if the $500 be deducted, her share would be $4509 54.

The amount due by Mrs. Richardson to Mann, Fischer & Co. up to the date of the sale was $4844 29. If her share of the proceeds be fixed at $4842 87, the balance against her would be $1 42. If it be fixed at $4509 54, she would owe Mann, Fischer & Co. $334 75. In either case, Mrs. Richardson has no just claim or cause of action against defendant; and she had none at the time the suit was brought.

The judgment of the district court is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the demand of plaintiff be rejected, and her suit be dismissed with costs in this court and in the district court.

ON REHEARING.

SPENCER, J. The questions presented and to be determined by us on this rehearing we will consider *seriatim.*

First—Is the pledgee of a note the agent and mandatary of the owner, and in case he buys property mortgaged to secure the note for a less sum than the amount of the note, and immediately resells it for a greater sum than the note, what is the measure of his responsibility to the owner? Is he bound to account only for the price at which he purchases; or at the price at which he sells; or is he liable only for the amount of the note?

Although for the purposes of collection the pledgee is considered to have the legal title of the note pledged, still he is not really the owner of it. Art. 3166 C. C. declares that the debtor "remains proprietor of the pledge, which is in the hands of the creditor only as a deposit to secure his privilege on it." This is made manifest also by the undoubted rule that when there is no fault or negligence in the pledgee the loss of the pledge, or deterioration of its value, by insolvency, etc., must be borne by the pledgor. 1 An. 344.

The obligations of a pledgee are in substance very similar to those of mandataries and agents. In 17 Barbour, 492, the Supreme Court of New York say that "a creditor holds collateral securities as the agent and trustee of his debtor." In Moses vs. Murgatroyd, 1 John. Ch. 119, Chancellor Kent said: "These collateral securities are in the nature of trusts, created for the better protection of the debt." In 1 An. 344, our own court assimilate the responsibilities of pledgees of notes to those of agents, and a similar doctrine is held in "King vs. Harman," 6 La. 607.

We think, therefore, that Mann, in the enforcement and collection of the mortgage notes placed in his hands as collaterals, was the agent or trustee of Mrs. Richardson, and is not permitted to speculate, to her prejudice, upon the thing pledged.

Mr. Story on "Agency," sec. 207, says: "Indeed, this doctrine is so firmly established upon principles of public policy that no agent will be permitted to take * * any profits *incidentally obtained* in the execution of his duty, even if it be sanctioned by usage. Such a usage has been severely stigmatized as a usage of fraud and plunder."

Perry on Trusts, § 427, says: "Trustees hold a position of trust and confidence. The legal title of the trust property is in them, and generally its whole management and control is in their hands. At the same time the beneficiaries of the trust may be *women* or children, or persons incompetent to protect their own interests. For these reasons, to protect the weak and helpless on the one hand, and to prevent trustees

from using their position and influence for their own gain, and to prevent them from hazarding the trust property upon what they may think to be profitable speculations on the other, they are not allowed to make any profit from their office. They can not use the trust property, nor their relations to it, for their own personal advantage. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule as between trustee and *cestui que trust.* * * * * *

"A trustee, executor, or assignee can not buy up a debt or incumbrance to which the trust estate is liable for less than is actually due thereon and make a profit to himself: but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestui que trust* shall have *all the advantages of such purchase.* * * *

"So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside or to *claim all the benefits and profits of the sale for himself.* * * * * * * * *

"By this rule, trustees may be liable to great losses, while they can receive no profit; and the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust fund upon the chances of trade and speculation. If a trustee charge a bonus in his account for his skill and services in conducting the business of the trust, it will be set aside. * * * * * *

"All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation. * * * * * * * *

"Agents, guardians, directors of corporations, officers of municipal corporations, and *all other persons clothed with a fiduciary character*, are subject to this rule."

In his work on Bailments Mr. Story says, § 343:

"Another duty of the pawnee at the common law is to render a due account of all the income, profits, and advantages derived by him from the pledge in all cases where such an account is within the scope of the bailment. If, for instance, the pawn is a slave, the profits of his labor are to be accounted for. If the pawn consists of cows, horses, or other cattle, the profits of their labor are also to be accounted for, if within the contemplation of the parties. The Roman and foreign law seem, in all cases of this sort, to imply an obligation to account, from the very nature of such a pledge. In rendering an account of the profits, the pawnee is at liberty to charge all the necessary costs and expenses to which he has been put, and to deduct them from the income or profits.

If he has sold the pledge he is bound to account for the proceeds, and to pay over to the pawner the surplus beyond his debt or other demand, and the necessary expenses and charges. Pothier thinks that the duty of the pawnee goes further; and that he is bound to account for all the profits and income which he might have received from the pledge but for his own negligence."

See, also, Gibson vs. Hunter, 14 La. 124.

But in the case before us the total mortgage debt bearing on the property amounted to only $8800, of which $5866 67 was held by Mrs. Richardson, and $2933 33 by Willis Forrester. The property was bought in by four persons jointly, and, so far as appears, equally, to wit: Moses Mann, Max Fischer, August Fischer, and Willis Forrester; and these four made a joint deed without assignation of parts to Walsh for ten thousand dollars, one half cash, and the balance at one and two years with eight per cent interest from date, and attorney's fees, and secured by mortgage and vendor's lien. We think this equivalent to a cash sale at $10,000. But we see no reason why we should allow Mrs. Richardson more than the amount of her notes. We do not think the agent's responsibility should go beyond that. If he realizes the full amount of the notes, there is no speculation at her expense or to her loss. We think that under the circumstances of this case, when the property was bought in for $8200 and on same day and at same place resold for ten thousand dollars cash, or its equivalent, the agent should not be permitted to profit by the resale, except to the extent that there is excess over the amount due the pledger. But we can not require the agent to pay more than he realized. As we have seen, Mann was only one of four purchasers, and realized therefore by the resale only one fourth of $1800 as profit—say $450. This suit is against Mann *only*, and we can not hold him responsible for the profits made by his copurchasers, who are no parties to this suit, and, for aught that appears, in nowise the agents or trustees of Mrs. Richardson, or in any wise accountable to her for any profits realized by them. She declares upon her contract *with Mann only*, of date February 4, 1875. It is that which she seeks to enforce in her original petition; while in the amended petition she simply alleges a conspiracy to prevent bidding at the sale, and consequent injury. She does not ask any where specifically the relief sought on this rehearing; but as the evidence showing the relations between herself and Mann is before us without objection, and there is a prayer for a judgment of $1500 and "for general relief," we think we can allow her a judgment for the amount realized by Mann as profits on resale. As we have seen, Mann realized a profit of $450. Giving Mrs. Richardson the benefit of the $500 retained by the sheriff, she would still owe defendant $1 42 after crediting her with her *pro rata* of the $8200, less costs.

Her *pro rata* was, after deducting costs, - - - - -	$4842 87
Her debt to defendant was - - - - - - - - - -	4844 29
Leaving balance due by her - - - - - - - -	$ 1 42
Which being deducted from - - - - - - - - - -	450 00
Leaves due by Mann - - - - - - - - - - -	$ 448 58

But should the $500 retained by the sheriff on oppositions or any part thereof be decreed to go to the claimants (opponents), then her *pro rata*, to wit, two thirds of these $500, or of such part thereof as may be decreed to said opponents, must be deducted from the above sum of $448 58.

It is therefore ordered and decreed that our former decree be set aside, and it is now ordered that plaintiff, Mrs. Richardson, (for use of McGehee, Snowden & Violet, subrogees,) do recover of Moses Mann the sum of $448 58, with legal interest from April 3, 1876, till paid, subject to a credit of same date for two thirds of such sum as shall be awarded out of the $500 retained as aforesaid to said opponents.

It is further ordered that this cause be remanded, for the purpose solely of ascertaining the amount of said credit, and that this judgment be not executed so far as it would be affected by said credit until the same is ascertained.

It is further ordered that plaintiff and appellee pay costs of this appeal, and defendant those of the court below.

No. 6530.

AUGUSTUS F. HICKMAN VS. GUSTAVE J. FRERET ET AL.

In order to make a valid appraisement of the undivided interest of an heir in a succession which has been seized under a *fi. fa.*, it is proper to appraise, not each separate effect of the succession, and then estimate the value of his share of such effect, but to appraise his interest as a single, undivided thing, and estimate its value, after deducting the debts and charges of the succession.

APPEAL from the Fourth District Court, parish of Orleans. *Campbell*, J.

Julien A. Seghers for plaintiff and appellant.

McEnery, Ellis & Ellis for defendants and appellee.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by SPENCER, J.

EGAN, J. The only facts material to the issues in this proceeding are the following: The plaintiff, a judgment creditor of the defendants, sued out a writ of *fieri facias* under which the sheriff seized and adver-

tised for sale—to use the language of his return and of the notice of seizure and advertisement, all of which are accordant—"All the right, title, and interest of Gustave Joseph Freret and William Peter Freret as heirs at law of the succession of their late father, James P. Freret; *their said interest in said succession consisting of one undivided twenty-sixth part* to each of them in and to the property hereinafter described, to wit:" then follows the specific description in detail of three certain portions of ground in the city of New Orleans, numbered from one to three; fourth, a certain mortgage note; and, fifth, sundry bills receivable. The property was separately appraised; No. 1 at $1500; No. 2 at $1800; No. 3 at $8000; No. 4 at $250, and No. 5 at $25 cash, making the appraisement of the undivided interest of the defendants in the whole property thus seized, appraised, and advertised for sale amount to the sum of $3175. At the sale the entire interest of both defendants, as thus described, was bid in by J. H. Lagroue, for the sum of $2125, a few dollars more than two thirds of the appraisement. Lagroue not having complied with the terms of sale, and the sheriff not having completed the adjudication by making title, the present rule was taken by the plaintiff to compel them to do so. The mode of seizure adopted was, to say the least of it, very unusual. Although the sheriff professed to seize all the right, title, and interest of the heirs in the succession, he describes that interest in all the proceedings, as we have seen, to be one undivided twenty-sixth part to each of them, in and to specific property; and thereupon the sheriff proceeded to have each piece of property, and the interest of the defendant heirs in each piece of property, separately appraised, just as though they held it in indivision by any other right or title, and not merely as succession rights subject to the settlement of the succession. It is not true to say of an heir that he is interested as such in any proportion in *any or all of the property of the succession.* If he be heir, he is interested in proportion to the number of heirs in the succession as an entirety, subject to its settlement and the payment of its debts. It is that interest, and that only, which as an incorporeal right is allowed to be seized and sold under article 647 of the Code of Practice. See Noble vs. Nettles, 3 R. 152; Mayo vs. Stroud, 12 R. 105; Diamond vs. Courtney, 12 Annual, 251. In the present case the appraisement which regulated the sale was not that of the right of the heirs, but of specific interests in specific property, appraised for the purposes of the sheriff's sale separately, and as though the interest of these heirs were as well ascertained and as definitely fixed, with regard to each piece of property appraised, as if it were held by them as joint owners with other co-proprietors. While it is as necessary, then, to appraise for the purposes of forced sale the incorporeal thing, the right or interest of an heir in a succession, and while for that purpose it is proper to

take into account the property of which the succession consists, it is not that property or any specific or proportionate interest in it which is subject to seizure and to sale, and consequently to appraisement with that view; but it is simply the right or interest of the heir in the entirety, the succession, and subject to its settlement and the payment of its debts and charges, which should be appraised, as it alone can be seized or sold. This was not done in the present case, and without it the sale was not lawful, and can not be enforced; practically, the purchaser was made by this appraisement to pay for what he did not get, and might never get. That it was not the right of the heir which was appraised, is manifest, as in order to do that it was necessary to take into account not merely the value of the succession property, but also the amount of the debts and charges to which it was subject.

The court below discharged the rule at the cost of the plaintiff.

The judgment is correct, and is affirmed.

ON REHEARING.

SPENCER, J. The right of an heir in a succession is an incorporeal thing. It is an entity, a unit. It does not consist in specific interests in specific things; for when determined and ascertained by the liquidation and settlement of the succession, such things may form or constitute no part of what the right embraces. It is not true to say that the heir owns any particular part of any particular property composing the succession. You can not seize or sell his interest in any specific thing belonging to the succession, and, therefore, you can not appraise specific and particular things in order to a sale of his hereditary right. His right of succession is in some sort indivisible. No one can seize a fraction of it. It is a single right and not an aggregation of many rights. It must be seized, appraised, and sold as a unit. For the purpose of approximating its value, the appraisers would of necessity take into consideration the value of the active mass of the succession, and, also, the passives, or debts and obligations thereof. They would thus ascertain the probable net value of the succession *in globo*, and fix the value of the heir's *succession right* by taking the aliquot part represented by him as heir.

As stated in our former opinion, the appraisement in this case seems to have been made by separately valuing the heir's interest in each of several pieces of property said to compose the succession. It is true that the appraisers then put the value of the "total undivided interest" of the defendant heirs at a round sum of $3175. Perhaps it is *the mode* of reaching the conclusion as to value which is irregular, rather than *the conclusion itself*, since there is a *round sum* declared by the appraisers to be the value of the heir's right under seizure.

But if the seizure and appraisement be regular, under the mortgage

certificate there could be no adjudication at the price said to have been bid by Lagroue, $2125. The recorder of mortgages certifies as existing *on the property seized* the following mortgages "in *the names* of Gustave J. Freret and William P. Freret," to wit: "The mortgage in favor of Theo. Lercom, act of O. de Armas, notary, dated October 26, 1870, to secure the sum of $6000, interests and costs, etc., recorded October 28, 1870." Then another mortgage before Cuvillier, notary, in favor of Chas. Lafitte, for $8500, recorded May 4, 1872. There are, also, other antecedent mortgages and privileges certified to exist. These mortgages are certified as having been granted *not by the ancestor*, as suggested by plaintiff's counsel, *but by the heirs, G. J. and W. P. Freret.*

Plaintiff's suit, in which he attached the property in question, was not commenced till November, 1875, and his judgment and judicial mortgage were only registered November 29, 1875.

It appears, therefore, that there were operating and uncanceled upon this property *two antecedent special mortgages granted by the seized debtors*, and amounting to $14,500 principal. No adjudication could be made on a bid less than the amount of these prior special mortgages. C. P.

It is therefore ordered that our former decree remain undisturbed,

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CONCURRING OPINION.

EGAN, J. I adhere to the views expressed in the original opinion in this case. I do not regard the manner of seizure and of appraisement adopted in this case as merely irregular. In my opinion, they were both illegal, for the reasons stated in the original opinion, and under the facts therein stated, which are copied from the record. I concur in so much of the opinion now read as holds the sale in question bad, for the additional reason stated, that, even assuming the validity of the seizure, the price bid was less than the special mortgages resting upon the property. In preparing the first draft of the original opinion I had taken that view, also. After consultation it was omitted as unnecessary. I still adhere to that view of the case. The sheriff states that he seized and offered for sale the entire interest of the heirs in the succession, *which interest* he states is one undivided twenty-sixth interest to each of them (not in the succession) but in each of the following pieces of property—describing them as stated in the original opinion. This, it is admitted, was not true—an admission which is conclusive of the question that the heirs had not and could not have any such interest in the particular property which the sheriff professed to seize, appraise, and sell.

I concur in the decree affirming our former decree.

Nos. 6957 and 7052.

SUCCESSION OF J. C. PATRICK. OPPOSITION OF CARROLL, EXECUTRIX.

The law of this State authorizing the revival of judgments was not intended to provide any different mode of *interrupting* prescription of judgments from those applicable to other forms of debt, but was only intended to prevent the prescription of judgment debts, and continue them in force for ten years from the date of the judgment of revival. The prescription of a debt evidenced by a judgment, can be interrupted in the same modes as the prescription of debts evidenced in any other way, except, that the acknowledgment of the judgment debt by the debtor must be *in writing*.

The written acknowledgment, or judicial admission of a judgment debt of a succession, made by the executor before the debt is prescribed, will interrupt prescription.

The special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests by preference over the expenses and charges of the administration, only when there are other funds of the succession out of which such expenses may be paid.

APPEAL from the Parish Court of West Baton Rouge. *Hyams*, J.

Barrow & Pope for appellee.

Thos. J. Semmes, Favrot & Lamon, and *Chas. Carroll* for opponent and appellant.

The opinion of the court was delivered by

EGAN, J. This case comes before us on two appeals; one taken by the opponent, and the other by the executor of the succession. The principal question grows out of the filing in this court of a plea of prescription of ten years against the judgment evidencing the claim of opponent. The judgment was rendered on the fourth of *January*, 1868, *and has never been revived under the statute.* The plea of prescription was filed on the sixteenth of *February*, 1878, more than ten years after the rendition of judgment.

Two questions confront us at once under this state of facts. First: Do the general rules laid down in the Civil Code for the *interruption of* prescription of debts apply to judgments as well as to other forms of obligation?

Second: If they are thus applicable, has prescription been interrupted in the present case, and, if so, how? Prior to the act of 1853 our law provided no period for the prescription of judgments; debts thus evidenced and decreed to exist in the most solemn form were so highly favored and considered of so high dignity and truth that they were imprescriptible. Then, for the first time, it was provided that "all judgments *for money*, whether rendered within or without the State, shall be prescribed by *the lapse of ten years from the rendition* of such judgments;" thus fixing their prescription at the longest time

known to our law for the prescription of personal actions. It was, however, at the same time provided that *any party interested* (not merely the judgment creditor) might have the same (judgment) *revived at any time before it is prescribed* by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived: and that "*any judgment revived* as above provided *shall continue in full force for ten years from the date of the order of court* reviving the same, and *any judgment may be revived as often* as the party or parties interested may desire." These provisions are re-enacted in terms in the Revised Civil Code, article 3547, under the general head of: "Of the prescription which operates a release from debt;" and under the particular head (which also embraces certain other particular actions and personal actions in general not otherwise provided for): "Of the prescription of ten years." This statute, passed originally in 1853, continued in the revision of 1855, 1856, and again in the present Revised Civil Code of 1870, is now, as we have seen, incorporated with and placed by the legislator upon the same general footing as other prescriptions operating a release from debt, and under the general head of "Prescription," in the Code. As an original question, then, it would hardly have occurred to any one to distinguish the prescription of judgments from the prescription of debts otherwise evidenced, except as the time of acquiring prescription when specially provided, and except, also, as to the higher privilege accorded to judgment creditors of *preventing prescription* altogether by the action of revival. We may here remark of this peculiar statutory action that it is not to be confounded with the *interruption* of prescription, which when the statute is complied with is not *interrupted* in the sense and meaning of the law, but is considered as *having never been*, as being altogether *prevented* by the action for revival. This is manifest not only from the fact that this prevention of prescription is provided for by the proviso of the very act which creates it under other conditions, but because by the terms of the law itself, unlike the interruption of prescription, the time during which the judgment shall continue in force is counted not from the date of service of citation, but "from the date of the order of court reviving the judgment." It is, however, argued that because the law provides a means for the *revival* of judgments, and for thus continuing them in force, this action of revival is the only means of avoiding the effect of the lapse of time fixed in the law for their prescription! In other words, that debts thus ascertained and decreed to be due in the most solemn form known to the law, to which the highest dignity is attached, and containing one, the existence and exigibility of which is closed by the rendition of the judgment, which

theretofore stood as a perpetual public evidence in favor of the creditor and against the debtor, were placed and intended to be placed by the passage of the statute providing for the first time for their prescription "*in duriori casu*" than any and all other debts, of however little dignity, and however evidenced! Is such a legislative intention to be lightly assumed? We say "*in duriori casu*," because while the avoidance or interruption of prescription *by suit against the debtor* is always open to the creditor *whose debt is not merged in judgment*, he is also entitled to the benefit of all the means otherwise provided in the law for the avoidance or interruption of prescription, while if the argument now urged be well founded the judgment creditor alone is not permitted to profit by an acknowledgment of his debtor voluntarily given, or by any of the other means of interruption known to the law and applicable to other creditors and debts without distinction. We should be very slow to arrive at such a conclusion unless it is clear that such was the legislative intention. What, then, it may be asked, was the object of the Legislature in providing in the same act for the revival of judgments by citation to the debtor and another solemn adjudication by the same court of the continued existence and exigibility of the judgment debt? This, we think, is easily answered. But for the proviso of the act the judgment creditor who had once resorted to citation to his debtor and thus exhausted his legal remedy in the courts; who having once sued and attained all the ends and objects of suit would not again have been permitted to summon his debtor before a court of justice on account of the debt would have been left entirely at the mercy of his debtor who might not choose to give any voluntary acknowledgment of the debt and who not being liable to citation by his creditor, as in case of ordinary debts or creditors, had nothing to do but sit still during the ten years and his judgment creditor would have thus been completely in his power notwithstanding the high dignity and formal judicial ascertainment of his debt. Hence it was that the same statute which made judgments prescriptible in ten years at the same time gave the creditor or other parties interested the statutory action for *the revival and continuing in force of the judgment*—without reference to any act of the *debtor*. Had the statute not given him a direct action in some form, he would have had none. The Legislature, which in those days was composed in part of lawyers of eminent ability, it may be well assumed saw this, and while applying prescription to judgments at the same time and by the same act provided this peculiar action of revival, which this court has repeatedly held to be so exceptional in its character that the grounds or evidence upon which the judgment is based can not be inquired into, and that the only issues pertinent are: Is there in fact a valid subsisting judgment, rendered by a competent court, and is it still exigible, or has

it been extinguished by payment or in some other lawful mode? It is then both in the scope of inquiry and in its effects wholly unlike the ordinary action upon debts and claims not in judgment, and neither by its terms nor any fair construction was intended to provide any different mode of *interrupting* prescription of judgments from those applicable to other forms of debt, but, as we have said, was intended altogether to prevent the prescription of debts evidenced in the solemn form of judgments and to "*continue them in force*" in the language of the statute, not for ten years from the date of citation, which as to ordinary debts interrupts prescription, but for "ten years *from the date of the order of court* reviving the same." It is questionable even whether any thing more than a mere *order* of revival is necessary under the statute, and whether it is necessary to await the delays of and clothe that order in the form of a judgment at all!

If, then, the proceeding under the statute was intended to revivify and "continue in force" *ab origine* the judgment, and with no other scope or object, how can it be said to be at all events the only and exclusive means of "interrupting" the prescription of the debt evidenced by the judgment, a subject and matter for which the law at the time of the passage of the act under discussion made other and distinct provision? See O. C. C. arts. 3482–3486 inclusive, and arts. 3514–3520 inclusive; but especially arts. 3486 and 3516 and 3517, which among the causes of interruption of prescription provide that "prescription ceases to run *whenever the debtor or possessor makes acknowledgment of the right of the person whose title they prescribed*" or "*of the debt.*" If, however, there was ever reasonable cause for doubt on this subject of the legislative intent, it was removed by the act of April 18, 1858, entitled an act to require *written proof* in certain cases (acts of 1858, p. 148), the first section of which provides "that *hereafter parol* evidence shall not be received to prove any acknowledgment or promise to pay *any judgment, sentence, or decree of any court* of competent jurisdiction *either in* or out of the State for the purpose or in order to take such judgment, sentence, or decree out of prescription or to recover (revive) the same after prescription has run or been completed," and does not even stop there, but continues affirmatively "that *in all such cases* the acknowledgment and promise to pay *shall be proven by written evidence signed by the debtor himself or by his specially authorized agent or attorney in fact.*" Could there be any clearer legislative interpretation of the effect of the act of 1853 than is here given, or any clearer evidence that *prior to* the act of 1858 there was nothing to prevent the reception of parol evidence of the acknowledgment or promise to pay a judgment debt as well as one in any other form? And what would be the meaning or purpose of the Legislature in prohibiting the reception of *parol* evidence for such purpose in

future, if evidence in any form could not be received at all? What, too, becomes of the positive affirmative provision of the act that such acknowledgment or promise to pay *any judgment*, sentence, or *decree* of any court of competent jurisdiction *shall be proved by written evidence* signed by the debtor or his authorized agent? It is manifest that the act of 1853 providing for the prescription and revival of judgments was not then considered or intended to exclude *any competent evidence* of the acknowledgment of a debt in the form of a judgment more than if in any other form. Had there, however, been at any time reasonable question on this subject, we think it was finally settled and removed beyond controversy when both the provisions of the act of 1858 and those of 1853 were incorporated in and made part of the Revised Civil Code of 1870; see articles 2278 and 3547 of the existing Code. The latter article, relating to the prescription and revival of judgments, comes under the general head of "Prescription," under that section which treats of "the prescription which operates a release from debt;" and under the immediate head "of the prescription of ten years," which follows in its order the provisions of the Code on the subject "of the prescriptions of one, three, and five years," and immediately precedes that of thirty years, while it is itself preceded by the provisions of the Code on the subject "of the causes which interrupt prescription," "of the causes which suspend the course of prescription," and is followed with only the intervention of a single article by the section of the Code under the same general head of prescription which treats "of the rules relative to the prescription operating a discharge from debts," wherein it is provided (art. 3551) that "*The prescription releasing debts is interrupted by all* such cases (causes) as interrupt the prescription by which property is acquired, and which have been explained in the first section of this chapter." And it is also interrupted by the causes explained in the following articles, the first of which, art. 3552, reads: "A citation served upon one debtor *in solido, or his acknowledgment of the debt*, interrupts the prescription with regard to all the others, and even their heirs." And the next, art. 3553, that "a citation served on the principal debtor, *or his acknowledgment*, interrupts the prescription on the part of the surety;" while, under the preceding head referred to, among the causes which interrupt prescription are enumerated not only citation before a court of justice, but it is also provided (art. 3520) that "prescription ceases likewise to run whenever *the debtor* or possessor makes acknowledgment of the right of the person whose title they prescribed." All of the provisions quoted are general, and neither by the terms of the law, nor, we think, by any just rule of interpretation, can they be applied or confined to any particular period of prescription, or to any particular class of claims or evidences of debt to the exclusion of others. There

is nothing in their collocation or language to warrant so narrow a view, and by every fair and well established rule of interpretation, being upon a general subject under general heads, and being, also, general in their terms, they must have general application to all debts, however evidenced. The language used in regard to the prescription of judgments is no more peremptory than that in regard to other actions or debts prescriptible by ten years, or by any shorter or longer period. In regard to all alike, where there is no prevention, interruption, or suspension of prescription, it is an equally "peremptory and perpetual bar to recovery," where the creditor has been silent for the "requisite time, without urging his claim." C. C. 3459. We think, then, that, subject only to the exclusion of *parol evidence*, by what is not inaptly termed our statute of frauds, the prescription of judgments may be interrupted like other debts, or debts evidenced in other form, and that there is nothing to exclude the acknowledgment, promise of the debtor to pay debts of such high dignity, and the existence and amount of which has been ascertained and decreed in the most solemn form known to the law, any more than acknowledgments of other debts of less dignity, rank, and certainty. It may not be amiss to remark, also, that where the proceeding by "*scire facias*," which is somewhat similar to our statutory action of revival, prevails, that process is not the only means known to the law for the interruption or prevention of prescription.

Having answered the first inquiry with which we set out affirmatively, it only remains now to answer the second (i. e.): Has prescription been interrupted in the present case, and, if so, how?

On the fifth of March, 1875, the executor of Patrick filed a provisional account and tableau, from which the Soniat judgment, claimed and held by Mrs. Carroll, executrix, was altogether omitted. On the twenty-first of April, 1875, she filed an opposition asking that she be placed on the tableau as a judgment creditor, with the proper rank and privilege. There was judgment in the parish court on the sixteenth of October, 1876; and on appeal in the Supreme Court, April 16, 1877, the opposition was sustained after a vigorous contest, and the existence and ownership of the judgment in question was decreed in favor of the same opponent, contradictorily with the executor of Patrick, who was ordered to file a new and amended tableau, and to place upon it said judgment. Accordingly an amended account and tableau was filed by the executor on the thirtieth of July, 1877, and the judgment of the opponent was recognized and placed upon it; at the same time, however, the executor of Dr. Patrick alleged the rendition in favor of the succession of a judgment versus Mrs. Ellen G. Patrick, with which he claimed to compensate to its amount that of the opponent, Mrs. Carroll; and also alleged that since the decree of this court, before recited, he

had instituted suit in the third district court of New Orleans, to revoke and set aside the transfer to Mrs. Carroll of the Soniat judgment, which he claimed rightfully to belong to Mrs. Patrick, the judgment debtor of the succession, and asked that further proceedings in the matter of account and tableau be stayed till the determination of the revocatory action in the third district court before mentioned. A copy of this proceeding in the third court was filed in the present case on the thirtieth of July, 1877, and appears in this record. Mrs. Carroll again opposed, and there was judgment on her opposition in the parish court, in accordance with the former decree of this court, and recognizing her rank and privilege as well as the amount of her judgment, which was ordered to be paid accordingly. It is from this judgment that the present appeal is taken, both by the executor and by Mrs. Carroll, the opponent, who complains of error in the judgment, which, while sustaining her opposition so far as to recognize her as a judgment creditor to the full amount of the Soniat judgment, and refusing the claim to compensate it with the judgment versus Mrs. Patrick, still preferred to her certain expenses and charges of the succession, altogether amounting to a little more than $1100. In regard to this, we may as well now say that we are not prepared to say the parish judge erred as to the general rank of the items going to make up the sum; that the amounts are small, and such as, from their nature would seem to be legitimate and proper expenses and charges of the succession.

Recurring again to the other branch of the case: An examination of the pleadings both on the original opposition and that now under consideration discloses the fullest and clearest possible recognition by the executor of the existence, amount, and character of the Soniat judgment, which carried with it a vendor's privilege for lands sold to deceased, and found in the succession; and all within less than ten years from the rendition of that judgment, as we have seen by the dates already given. In the answer to the first opposition the existence, amount, and character of the judgment were not disputed, but, on the contrary, directly admitted. It was only the transfer to Mrs. Carroll which was attacked as simulated, fraudulent, and illegal, and the right claimed by the executor to compensate it with the same demand, not then in judgment against Mrs. Ellen G. Patrick. It was on these issues that our former decree, of April, 1877, was rendered against the executor, and in favor of the opponent, as heretofore stated. The amended account and tableau, filed subsequent to that decree, in July last, and the petition of the executor of Patrick accompanying, sets forth the Soniat judgment with the utmost minuteness of detail, and after recognizing and placing it upon the account makes up a statement of interest both on that and on the judgment against Mrs. Patrick, and strikes a balance after deducting it from

the Soniat judgment in favor of the latter of $4411 62. The account thus stated is asked to be approved and homologated. It is difficult to conceive of a fuller or clearer acknowledgment and judicial admission in the most solemn form, within the period of prescription of the full amount of the judgment claimed by the opponent. But this is not all. Nothing could be more specific and direct in the way of acknowledgment of this judgment than the petition and suit in the third district court of New Orleans to revoke and set aside the transfer of it from Mrs. Patrick to Mrs. Carroll, the opponent against whom the prescription is here pleaded, and who has, year after year, and in various shapes and forms, been judicially "urging her claim," to use the language of the law. C. C. 3459. She has been any thing but silent, while unfortunately for his plea the executor of Patrick, in his vigorous efforts to defeat her, has been equally far from being silent, and, as we have seen, has in every pleading filed by him in every judicial proceeding down to the present, since the original provisional account, not only admitted, but himself directly alleged the existence and amount of the judgment set up by the opponent, and, according to his own allegations and proof in this proceeding, is even now waging vigorous contest to restore the title to this very judgment to the debtor of the succession which he represents, that he may thereby collect his debt by compensating the two judgments pro and con. The existence, exigibility, or amount of the Soniat judgment were, indeed, never denied by the executor or any one else until the plea of prescription of ten years was filed in this court in February of the present year. It is quite evident that counsel has relied in support of the plea entirely upon the idea that no other evidence except the order or judgment of revival provided by the statute could avoid the effect of the plea. We have, however, seen otherwise in discussing our first proposition; and we have now sufficiently reviewed the facts of this case to make it manifest that not only by the most solemn judicial allegations and admissions of the executor—who represents both the succession and the creditors—but, also, by the decree of this court on the former opposition between the same parties, all within less than ten years from its rendition on the fourth of January, 1868, the judgment and debt of the opponent, Mrs. S. E. Carroll, now wife of Noble, has been taken out of prescription, which has thus both by judicial proceeding to demand and enforce the debt, and by the most solemn admissions and assertions by the executor of its existence, been interrupted. There are some minor objections raised by counsel to the manner of proceeding to the trial of the opposition; all evidently intended for delay, which we do not consider it necessary to notice, as it was the duty of the executor of Patrick after our former decree to obey it according to its terms, and not again, in the face of that decree, to

claim the right to compensate the judgment of opponent with that against Mrs. Patrick. We think he has no one to thank but himself for any subsequent complications or litigation in the present case, and that the parish judge did not err in disregarding this renewed attempt to assert rights already decreed adversely to his pretensions on the former appeal, or in giving to the opponent that trial of the opposition to which she was entitled under the law, as the case then stood. The same plea of prescription of ten years has been filed in this court against the judgments of Rebecca Rowe, No. 1766, and William Bogel, No. 1953, both of the docket of the fifth district court of West Baton Rouge. The former of these appears to have been rendered on the twenty-first of July, 1866, and the latter on the eighteenth of April, 1867, and would on their face appear to be prescribed. As, however, the executor of Patrick seems from this record not to have contested these judgments, but, on the contrary, to have, so far as appears, voluntarily placed them and the costs of court in them on his account and tableau, the homologation of which he prayed for, and, as no creditor or other party in interest appears before us to confess them, we think justice requires that these judgment creditors should not be taken unawares by the plea filed in this court for the first time, when they had good reason to believe their judgments not only not contested, but admitted. We will not, therefore, conclude them by our judgment. We have not dwelt upon a motion to dismiss the appeal of the executor of Patrick, No. 7052, but will now say that we think the grounds for dismissal untenable, and that the executor had a right to appeal. The motion to dismiss is, therefore, overruled. The lands upon which Mrs. Carroll, executrix, claimed the vendor's privilege were sold, in the succession, but an opposition was filed by her attorneys for her claiming her privilege on the proceeds. By means of this, and of her opposition heretofore filed, and that now before us, her privilege was preserved, and she is entitled to be paid her judgment out of the proceeds by privilege and preference over all other creditors; and if there be other sufficient funds in the succession to pay the expenses and charges thereof, by preference and privilege over them, also. She asks that the judgment of the parish court be modified and amended as to so decree. This, we think, she is entitled to. The appeals of Mrs. Carroll, executrix, and of Butler, executor of Patrick, numbered respectively on the docket of this court 6957 and 7052, were both in the same case and from the same judgment. They were argued and submitted together, and this opinion applies to and covers the whole case on both appeals, the only difference being as to the matter of costs.

It is therefore ordered and decreed that the pleas of prescription against the Soniat judgment of Mrs. Sarah E. Carroll, executrix of Joseph Carroll, deceased, be and they are overruled, and the judgment below be

so amended as to her as to require that the debts and charges allowed in preference to hers be paid out of the funds of the succession of Patrick derived from other sources, so far as sufficient for that purpose, before any contribution thereto is called for or made from the funds or price of the land upon which she is decreed to have the special privilege of vendor for the payment of her judgment, and that, in other respects, as to her and her said judgment and debt, the judgment of the court below is affirmed, the succession to pay costs of both courts on her appeal, 6957. It is further ordered and decreed that so much of this case as relates to and is affected by the plea of prescription filed in this court to the judgments of Rebecca Rowe and of William Bogel be remanded to the court below for the trial of that question only, and as between the holders of said judgment and the succession the costs of appeal number 7052 by the executor of Patrick await the judgment on the question of prescription, and as to all others that said costs be paid by the succession of Patrick.

DISSENTING OPINION.

MANNING, C. J. I think the plea of prescription should be sustained. In my opinion, it was not intended by the legislature, in passing the act of 1853, to permit any other method of preventing the prescription of judgments, save that of a citation for its revival. In framing that law, the General Assembly must be presumed to have taken into consideration all the possible modes of acquiring prescription of obligations, and of interrupting or suspending it. The law about to be framed was an innovation of a most serious kind, and the consequences of such an enactment must have been foreseen. Notwithstanding those possible consequences, which did not require any special sagacity to discern, it was enacted that judgments should be prescribed by the lapse of ten years, provided however that the party who wishes to keep them alive might have them revived by pursuing a specified course. The Soniat judgment, which opponent now owns, has never been revived, nor has citation to revive been served upon the representative of the defendant in the judgment. Ten years have passed since its rendition, and I think the plea fatal to its continued existence. Suc. Hardy, 25 Annual, 489. Smith v. Palfrey, 28 Annual, 615.

Even if its acknowledgment by an administrator, or the placing it on a tableau of debts, were sufficient to interrupt prescription, (and I do not think it is of a *judgment)* in this case, so far from there being any acknowledgment that the Soniat judgment was a valid claim against the succession, it was constantly disputed—it was not recognized as one of the liabilities of the succession, and it was not until a decree of this

court was made, directing that the executor of Patrick should place it on his tableau, that any recognition of it was ever made. When that decree was made, the judgment was not prescribed—ten years had not elapsed—and it was therefore properly made, but in the interim, the full term has passed, and the plaintiff or her assignee has neglected to issue any citation for revival, and the judgment has, as I think, become extinct.

The difficulty lies in the construction of the act of 1858, which is said in the Opinion of the court to be a legislative interpretation of the act of 1853. There is so much force in this position that at first glance it seems conclusive. Nevertheless I do not adopt it.

The first section of that Act, the object of which was to require written proof in certain cases, prohibits parol evidence being received to prove any acknowledgment to pay any judgment for the purpose of taking it out of prescription, or to recover it after prescription has been completed, but requires such acknowledgment to be in writing. It may be very pertinently asked, if nothing but a citation to revive can prevent the acquisition of prescription, why prohibit a parol promise from producing that effect, and why enact that the promise must be in writing?

I do not think the act of 1858 can be held to be, or that it ever was supposed to operate, a repeal of that of 1853, and the latter had expressly enacted that the judgment should be prescribed in ten years, providing however that this might be prevented by a citation to revive. It was supererogatory for the legislature to say in 1858 that a parol promise to pay a judgment should not interrupt or prevent prescription, but that the promise must be in writing, because at that time it was positive law that neither the one nor the other could produce that effect so as to revive the judgment. The act of 1853 had rigorously declared that the lapse of ten years would inevitably destroy a judgment unless the party owning it should before the completion of that period cite the judgment debtor to revive it. It was superfluous afterwards to say, a parol promise to pay should not enable one to recover it, for neither parol nor written promise could effect its revival. It should be observed that the act of 1858 does not enact in positive terms that a written promise shall interrupt prescription, and thereby repeal *pro tanto* the act of 1853, but that hereafter parol evidence shall not be received to prove any acknowledgment of a judgment, but the same must be in writing. The prohibition was unnecessary, because after you had received in evidence both the parol and the written promise, and the proof of acknowledgment was complete, you were as far as ever from keeping the judgment alive, inasmuch as the law of 1853 had stricken it with an incurable paralysis, if its holder had neglected to have issued a citation for its revival.

There are peculiarities of diction in both the texts of the law of 1858 which strengthen my construction of it, if they affect it at all. The word 'recover' in the first section has *recourrer* in the corresponding text, so that we are not left free to conjecture that 'revive' was intended to be used, as we certainly should if '*revivre*' was in the corresponding French text.

The law of 1858 then is, that you must have a written promise to pay a judgment in order to take it out of prescription, or to *recover* it after prescription has been completed. The law of 1853 had already enacted that prescription was completed in ten years unless you had commenced proceedings to *revive*. The harmonious construction of the two laws is, that a citation to *revive*, timely served, keeps the judgment continuously alive, while a written promise or acknowledgment will enable you to *recover* the judgment, *after* prescription has been completed—will enable you to revitalize it.

But in that case, you must bring your suit on the extinct judgment, and shew your right to *recover* by proving the written promise or acknowledgment. Nothing of that kind has been done here—nothing has been done at all, except to contest the accounts or tableaux of the administrator of the deceased judgment debtor.

There is still another fatal objection to the construction of the majority of the court. The act of 1858 is now sec. 2818 of the Revised Statutes of 1870. The act of 1853 is now art. 3547 of the Revised Civil Code. Where these conflict, the Code must prevail. The act of 1853 must then prevail over that of 1858, and the enactment which imperatively requires a citation to revive as the only method of keeping alive a judgment, or of preventing prescription, is the paramount law. How then is it possible for this Soniat judgment to escape an extinction, twice pronounced by the legislative will as sure to befall all judgments that have not been revived, or the judgment debtor cited for revival within ten years?